IN THE MATTER of an Adjudication pursuant to the Construction Contracts (Security of Payments) Act **("the Act")**

No: 02.15.01

BETWEEN:

Applicant

and

Respondent

DETERMINATION

1. Pursuant to the Act and in respect of the Applicant's adjudication application dated 11 June 2015, I make the following determination:

    1.1 the Respondent is liable to pay the Applicant [the amount claimed], plus GST;

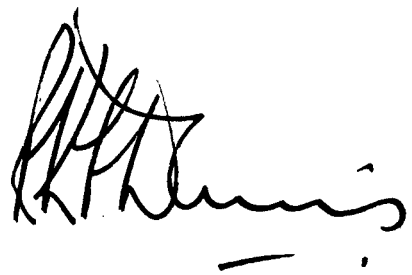
    1.2 the Respondent is also liable to pay the Applicant interest on [the amount claimed] from 14 May 2015 to the date of this determination at the rate of 1.025% per annum;

    1.3 the Respondent must pay the total sum due, principal, GST and interest, by close of business on Tuesday, 21 July 2015.

2. The reasons for my determination are annexed as **Schedule 1**.

3. The information prescribed by regulation 8, pursuant to the Act, is contained in **Schedule 2** to this determination.

DATED: 7 July 2015



RKF Davis
Adjudicator

Perth, WA

SCHEDULE 1
REASONS FOR DETERMINATION

1. On 11 June 2015, the Applicant served this application for adjudication on the Institute of Arbitrators and Mediators Australia, as prescribed appointor under the Act. On the same day, it also served a copy of the application on the respondent, as required by the Act. By letter dated 12 June 2015, IAMA appointed me to adjudicate the alleged payment dispute and so advised the parties.

2. On 15 June 2015, I wrote to the parties, principally to establish contact but also to make a number of points with respect to the conduct of the adjudication, particularly the need for the Respondent to deliver to me and the Applicant its response, within the time prescribed. In the event, the Respondent delivered the response within time.

3. The application comprised two lever arch files, containing:

   - the application;
   - the Applicant's submissions with annexures;
   - copies of authorities, the Act and regulations: and
   - statutory declarations from [DMB] and [CB].

4. The response comprised one lever arch file and a smaller, two ring, file containing:

   - the response, with submissions annexed;
   - annexures referred to in the submissions;
   - statutory declarations from [GP] and [JJW], with annexures.

5. I sought further submissions from both parties pursuant to section 34(2)(a) of the Act on one occasion. The Applicant was represented by DLA Piper Australia and the Respondent by Clyde & Co.

6. In drafting these reasons, I am assuming the reader has access to the Act and the material agreements between the parties. I do not propose to restate large

portions of those documents though I will, of course, paraphrase sections and clauses where appropriate.

Jurisdiction

7. The parties do not dispute my jurisdiction to adjudicate this payment dispute. In particular, the Respondent accepts the Applicant's submissions to the following effect:

   7.1 the Act applies to the payment dispute: the Installation Subcontract is a construction contract entered into after the commencement of section 9(1) of the Act;

   7.2 the Applicant's Progress Claim 28 is a payment claim, as defined in section 4 of the Act;

   7.3 there is a payment dispute between the Applicant and the Respondent in accordance with section 8 of the Act in that the full amount claimed by the Applicant in the payment claim was not paid in full when it fell due;

   7.4 the Installation Subcontract between the Applicant and the Respondent is a construction contract, as defined in section 5 of the Act, in that the material works were construction work;

   7.5 the application was made within the time prescribed by section 28(1) of the Act;

   7.6 another application for adjudication in respect of the payment dispute has not already been made and the payment dispute is not the subject of an order, judgment or other finding by an arbitrator or other person or court or other body dealing with a matter arising under the Installation Subcontract.

   I so find.

Background

8. [Redacted] By an agreement dated 10 February 2012, the Respondent was engaged by [the principal], [redacted].

9. Subsequently, the Respondent engaged the Applicant to perform [work details redacted]. The Applicant produced a proposal, dated 28 March 2012, from which the parties negotiated the terms on which the work was to be carried out. On 30 March 2012, the Respondent delivered to the Applicant a Letter of Award which recited, at paragraph 3, that all the terms and conditions of a Subcontract Agreement between the parties had been agreed and that the execution of the agreement "shall be in accordance with such terms and conditions". In the meantime, the parties were to be bound by an interim subcontract agreement, executed and also dated 30 March 2012. Clause 7.1 and Attachment D of that agreement specified the compensation and payment to the Applicant. The work to be performed by the Applicant was divided into six items for the installation component and a seventh for [redacted]. Payment was stipulated to be a stated lump sum amount for each item, with lump sum totals for the installation and [material] procurement components.

10. In the event, for [redacted] reasons the contemplated single agreement was split into two subcontract documents, executed by the parties on 20 July 2012. [redacted] (the **Supply Subcontract**) [redacted] (the **Installation Subcontract**) [redacted]. This payment dispute arises under the Installation Subcontract but aspects of the Supply Subcontract also impinge.

11. For some time prior to this application, the parties have been in dispute over payments due under both subcontracts. There have been a number of prior adjudications and I have subsequently been nominated to adjudicate another. Given the prolix, convoluted, confused and confusing drafting of both subcontracts, it is difficult to see how this could have been avoided. This payment dispute, for example, requires for its resolution construction of the most basic, fundamental, obligations of the parties under the subcontracts that one would reasonably expect, in a project of this size and complexity, to be expressed in totally unequivocal and unmistakeable terms.

12. On 30 March 2015, the Applicant submitted to the Respondent Progress Certificate 28, claiming payment of [amount redacted] for work performed under the Installation Subcontract. The Respondent approved the claim and, on 2 April 2015, issued the certificate to the Applicant, duly counter-signed. Later on 2 April 2015, the Applicant submitted the approved certificate with a

tax invoice in the sum of [amount redacted]. In the normal course of events, payment was due under the Installation Subcontract by 14 May 2015 but, before that day arrived, the Respondent made it clear it claimed to be entitled to set off against the sum due amounts sufficient to fully extinguish the Respondent's liability. The Respondent did not pay the Applicant on the certificate and has not done so to date.

The Issues

13. The Applicant now seeks a determination that it is entitled to payment of [amount redacted], plus GST. The Respondent does not dispute the Applicant's entitlement to payment of that sum but seeks to set off against its liability sums it claims to be due from the Applicant, on three discrete grounds.

    13.1 The terms of the head contract between the Respondent and [the principal] (the **head contract**) are incorporated into the Installation Subcontract as Attachment B, as part of the back-to-back structure of the overall project arrangement. Article 22 of the head contract sets up a system of variations to the scope of work, and payment where appropriate. What are normally called variation orders are defined as Change Orders. On 17 April 2015, long after the subject work had been performed, the Respondent purported to issue a Change Order to vary the scope of work by reducing the [the applicants works] in preparation for [further works]. The Change Order purported to reduce the Subcontract Price by [amount redacted].

    13.2 Second, the Respondent alleges the Applicant, in breach of the Supply Subcontract, sold a quantity of [materials] but not [installed], as planned. The Respondent submits the [material] was paid for and owned by the Respondent and claims the value of the surplus [material] at the unit rate provided in the Supply Subcontract, for a total of [contract amount redacted]. It asserts a contractual right to the setoff under the Installation Subcontract pursuant to Article 34.5 of the head contract. Alternatively, under this head, the Respondent claims, at least, to be entitled to set off the sum the Applicant received from the sale of the [material], namely [amount redacted].

13.3 Third, the Respondent claims liquidated damages against the Applicant for its alleged failure to meet two key milestones:

13.3.1 mobilisation of the [redacted] – [amount redacted]: and

13.3.2 completion [works] and ready for [other works] - [amount redacted].

The Applicant disputes the Respondent's entitlement to all of those claims and in this application seeks a determination that the Respondent is liable to pay to it the sum approved in Progress Certificate 28, without any deductions. Resolution of the first two claims to setoff depends to some extent on whether or not the two subcontracts are to be construed as lump sum contracts. I will consider each of the Respondent's claims to setoff, in turn.

The Respondent's Negative Change Order 026: Reduction in [redacted] Volume [of work]

14. The issue here is simply whether there was a change in the scope of work that justified the Respondent's negative change order. I have noted and accept the sworn evidence of [GP] in relation to this issue. It appears that following production of a stability report for [work details redacted], by letter dated 31 December 2013, the Applicant proposed a revised [work details redacted]; that is, [details redacted] that differed from those shown on the drawings. [Details of variation redacted] see [GP], paragraph 11. The Respondent evidently accepted the recommendation and, on 14 January 2014, passed it on to [the principal] as a request for a Technical Deviation. On 23 January 2014, [the principal] responded by stating, inter alia:

> "[The principal] considers (the Respondent's) proposal as a query and not a deviation as [the principal's] specifications and [redacted] design drawings require a minimum [work details redacted] are indicative only, dependent on the actual [redacted] material. The [work details redacted] is at the Respondent's discretion and does not require prior approval by [the principal]."

15. Since [the principal's] response is clearly contractually correct, one would expect that to have been the end of the matter for both [the principal] and the Respondent, but both have since ignored that interpretation of the contract documents. On 4 March 2015, some 14 months after the matter had been

raised and disposed of, [the principal] wrote to the Respondent to advise that it would be seeking to recover from the Respondent additional costs it had incurred as a result, inter alia, of deviations to specifications, including[details redacted]. On 17 April 2015, the Respondent issued its Change Order 26, purporting to deduct [amount redacted] from the Contract Price on account of the reduced [work] volume. The Respondent denies that by so doing it was acting contrary to section 12 of the Act, but I seriously doubt that denial. Fortunately, I do not need to decide the question.

16. The dispute is easily resolved by reference to the subcontract drawings, produced in evidence by the Respondent. At paragraph 4/3.1 of the response, the Respondent states that the Installation Subcontract scope of work and the subcontract price were based on the original [works] designed by [the principal]. That design is annexed to the response at Annexure 6 and clearly shows 3 separate [work details redacted], all of which are subject to note 3. Note 3 reads as follows:

> "3. [note 3 redacted]

There is no specified [work detail redacted] – those shown were indicative only. The [detail redacted] was to be established when [redacted] conditions were known. As it transpired, the Applicant did take all appropriate steps to accommodate the [retails redacted].

17. While the drawing note is sufficient to decide the issue, for the sake of completeness, I note further:

17.1 Nowhere in the subcontract documents is the [relevant work detail redacted] set out. The Applicant's obligation was to [work detail redacted] in accordance with the subcontract drawings, for which it was to be paid the applicable lump sum component of the overall lump sum Contract Price. The fact that the [volume of materials] may be easily calculated does not alter that fact. It is not correct to say, as the Respondent does in paragraph 4/3.10 of its response, that the amount of material [redacted] was [redacted] less than the amount contemplated in the Price List or the initial Subcontract Price. No quantity was contemplated for those purposes.

17.2 By Article 22 of the head contract, the Respondent was entitled at any time to direct a change in the scope of work. Change Order 26 does not do this. First, it does not direct the Applicant to do anything in relation to the scope of work. The design of the work had been established and was implemented. The change order does not purport to change anything. The Respondent is not directing the Applicant to do any of the things set out in head contract article 22.1.1. Second, Change Order 26 is not directed to the scope of work: it does no more than dictate a reduction in the Subcontract Price, for an extraneous reason. The Applicant carried out, apparently precisely, the scope of work required of it. The fact that the [way the work was carried out], in accordance with the scope parameters, differed somewhat from the [that] contemplated when the work was costed, is not to the point. There is no provision in the Installation Subcontract that permits the Respondent to reduce the Subcontract Price in these circumstances. I do not understand the point the Respondent is making in paragraph 4/4.11(2) of the response.

17.3 The reference to a unit rate for [works] in the Installation Subcontract Price List does not affect this conclusion. The same document states clearly that [the work] is to be remunerated for a lump sum of [installation contract lump sum redacted]. I note also, [the inclusion of a unit rate] based on the "theoretical" volume as per design drawing. Inclusion of a unit rate for [the work] is entirely consistent with a lump sum price for that work. If a genuine variation to the scope of work was required, that involved additional [work], then the work could be valued against the agreed rate. Provision of the unit rate had no bearing on the original scope of work.

17.4 I do not accept the Respondent's statement in paragraph 4/4.2 of its response. The assertion that the Respondent had no "visibility" of the significance of the alleged change in the scope of work until after Progress Claim 28 was submitted and certified, is not believable. I consider it more likely the Respondent was stirred into action by [the principal]'s letter of 4 March 2015.

17.5 It is also not correct for the Respondent to say, as it does in paragraph 4/4.5, that if Change Order 26 is not given effect to it will be paying the Applicant for work it did not complete. It may be that [the principal] is refusing and will continue to refuse to pay the Respondent the amount the Respondent is seeking to recover from the Applicant but that is of no contractual concern to the Applicant. The Applicant has carried out the work it was required to do and is entitled to be paid the agreed price. Paragraph 4/4.6 of the response appears, on its face, to contain implications for section 12 of the Act.

17.6 In paragraph 4/4.7 of the response, the Respondent is reversing the applicable onus. It is for the Respondent to support, by reference to the Installation Subcontract, the contractual basis for Charge Order 26. It is unable to do so.

17.7 As to paragraph 4/6 of the response, it is not at all inconsistent for the Applicant to seek a Change Order where it considers there has been a change in the scope of work. Its proper entitlement would depend on whether it is correct in its claim that there had been a change to the scope of work it contracted to perform. The Respondent has not established any such change in the extent of the [work] required, as claimed in Change Order 26.

18. For these reasons, I am satisfied Change Order 26 is ineffective. The Respondent is not entitled to deduct from the Applicant's entitlement under Progress Certificate 28, [redacted] any sum, in compliance with Change Order 26.

[Materials] Belonging to the Respondent Allegedly Sold by the Applicant

19. Under this head, the Respondent seeks to set off against the Applicant's entitlement [set off sum redacted] for alleged overpayment for [material] delivered pursuant to the Supply Subcontract. It appears from the evidence, and I accept, that the Applicant has delivered [material] sufficient for the purpose intended and has been paid by the Respondent for that [material] [redacted]. The total sum paid to date is less than [the lump sum contract price]. The Respondent raised the proposed deduction in its letter of 13 May

2015, referred to by the Applicant at paragraph 4.3.3 of its submissions. I would consequently have expected submissions from the Applicant on the issue, in anticipation of the response, but there are none. The omission probably arose from confusion between the several adjudications between the parties under both the Supply Subcontract and Installation Subcontract that have, to some extent, been running concurrently. The Applicant did have an opportunity to remedy this apparent oversight to some extent when I sought clarification of the parties' positions on the material subcontract provisions but I am relying for the facts of this dispute mainly on the Respondent's submissions and the statutory declaration of [JW]. Since I have, nonetheless, found the Respondent has failed to prove an entitlement to the deduction, I have not considered it necessary to seek additional submissions.

20. Resolution of this dispute depends on whether the Supply Subcontract is to be construed as a lump sum agreement or whether it provides for the Applicant to be paid for its performance on some other basis. If the Supply Subcontract is a lump sum agreement then, if the Applicant performs the work specified, it is entitled to be paid by the Respondent the agreed lump sum of $[redacted] in full, in accordance with whatever payment schedule was agreed. Only if the scope of work to be performed is varied will that requirement vary. I have considered whether the Respondent is entitled to deduct from monies allegedly owed by the Applicant under one subcontract (not the construction contract under consideration in this adjudication) from monies owed by the Respondent to the Applicant under the material subcontract. The Respondent would say that the sum it seeks from the Applicant comes under article 34.5.1 of the head contract as "any sum due to (the Respondent)", but the normal rules would require there to be some degree of proximity between the two liabilities. Since in this case there is a very close relationship, if the Respondent is otherwise entitled to the setoff, the lack of congruity in the subcontracts would not be fatal.

21. Once again, the Supply Subcontract is silent as to the quantity of [material] that is to be delivered. As the Applicant notes at paragraph 8 of its supplementary submissions, various [quantities of material] have been recorded or referred to in the course of the Applicant performing the subcontract but none of them have any contractual basis. I accept the Applicant's submission that the scope

of work to be performed is set out in articles 4.3.4.1 and 4.3.4.2 of Attachment C to the Supply Subcontract. That description is meagre indeed, but all there is. It is, however, sufficient to establish the Applicant's scope and indicative of the parties' intent regarding payment. If the facts and my finding on the purported reduced [work] requirement deduction under the Installation Subcontract had been different, it may have been possible for the Respondent to argue that the change in the volume of [material] required amounted to a variation in the scope of work for the Supply Subcontract as well, but that possible argument is not available.

22. Payment for carrying out the work is set out in the Supply Subcontract at Article 7 of the subcontract agreement itself. Item 1 of the table in Article 7 states the price of $[lump sum price redacted] but for the expected value refers the reader to the Price List "and/or other incidental costs". The term "expected value" is confusing but, in view of the Price List elaboration, I take that to mean that the final price will only be known when any incidental costs are known. The Price List is unequivocal: for [material] procurement and transportation [redacted] the price is $[the lump sum]. The unit of measurement is shown as LS, for lump sum. A unit rate of $[redacted] "of theoretical value" is stipulated below the price but that reference sits quite comfortably with the lump sum price. If the scope of work were to be increased or decreased by Change Order, then the amount added or subtracted was to be valued at that rate. There has been no change to the scope of work under the Supply Subcontract disclosed in the evidence in this adjudication. Item (III), under the heading Pricing Notes, describes the work included in the lump sum price, namely "the procurement, transportation and storage of material at [the site]".

23. The Applicant has referred me to numerous further references in the subcontract documents to the fact that the price is a lump sum. I accept that those references convey the intent for which the Applicant contends and add strength to its submission as to the nature of the subcontract. The letter of award is also consistent with this construction: see paragraph 9 above. I am left in no doubt that the Supply Subcontract recorded an agreement between the Respondent and the Applicant by which the Applicant was to carry out the basic task set out in Attachment C, for the lump sum of [lump sum redacted].

The Applicant's remuneration could only be varied if the scope of work changed, which it did not do.

24. The Respondent has raised a number of submissions to the contrary of that finding, on which I comment as follows.

24.1 Attachment D does not convey an intent by the parties that the Applicant should be paid on a unit rate. The attachment is headed Compensation and contains details of liquidated damages and, under the heading Payment Milestone, details of a payment schedule. The basis on which the Applicant is to be paid progressively for delivery of the [materials] to the [site] in Darwin is not related to the quantity delivered. There is no suggestion that the Applicant is to be entitled to any payment because it has delivered a particular quantity of [materials]. After some payments following the achievement of milestones, item 3.3 states that "*(T)he balance Subcontract Price of [material] Procurement shall be invoiced when the quantity [at the site] in Darwin exceeds the value of 30% payment* and further pro-rata payment shall be invoiced after January 2014 onwards". The words in italics (mine) are clear enough and consistent with a lump sum agreement. The balance Subcontract Price becomes payable when the [materials delivered], valued by reference to the unit rate in the Price List, reaches 30% of [the lump sum]. The remaining words can only mean that any payment required in addition to the agreed price must be paid on a pro rata basis after January 2014. Contrary to the Respondent's submission, the payment schedule in Attachment D reinforces the lump sum nature of the Subcontract Price.

24.2 References to Contractor Items and Articles 49.2 and 14.3 of the head contract are beside the point. If the Applicant has delivered sufficient [material] of the required [quality] to the [site] in Darwin to satisfy its needs for compliance with the Installation Subcontract, then the Applicant is entitled to be paid $[the lump sum]. Notions of excess, surplus, property passing and references to the amount paid progressively, are irrelevant. If, as apparently occurred, the Applicant delivered more [material] than it needed, that is of no concern to the Respondent. It is a disposal problem for the Applicant to resolve, and it

did. The [material] was not, as the Respondent contends, bought and paid for by the Respondent. The Respondent was, or at least should have been, paying the lump sum price in instalments as set out in Attachment D, quite independently of the quantity of [material] bought and delivered.

24.3 As to the Respondent's supplementary submissions:

24.3.1 Sub-paragraph 1.12 is correct. That is evidently the basis on which the Subcontract Price was calculated. That does not make it a rates based agreement.

22.3.2 Sub-paragraph 1.14 is difficult to understand. No such express provision is necessary to support the proposition. The proposition is inherent in the nature of a lump sum price. No quantity of [material] was specified. The basis on which the parties arrived at the lump sum price is not material to that quality.

24.3.3 For the reasons I have expressed, I do not accept sub-paragraph 1.15.

24.3.4 Sub-paragraph 2.1 is factually incorrect.

24.3.5 The Applicant's proposal, referred to in sub-paragraph 2.2, refers to "the total expected quantity of [material]". The estimate was no doubt the basis on which the lump sum was calculated, but it was no more than an estimate contained in a proposal. The agreed contractual terms are to be found in the Supply Subcontract.

24.3.6 I accept the accuracy of sub-paragraph 3.2, but there has been no change in the scope of work. I am unable to see any provision in the Supply Subcontract that supports the Respondent's contention in sub-paragraph 3.3.

24.3.7 I have considered, above, the point raised in sub-paragraph 3.4.

25. For these reasons, I conclude that the Respondent is not entitled to deduct any amount from the sum due to the Applicant under Progress Certificate 28 for allegedly excess amounts of [material] delivered to the Darwin [site] and/or sold by the Applicant to a third party. To the contrary, under the Supply Subcontract the Applicant is entitled to total remuneration of [the lump sum]. To the extent the Respondent has paid less than this amount to date, it is liable, in due course, to make up the difference.

Liquidated Damages

26. Finally, the Respondent seeks to set off against its liability to the Applicant [set off amount redacted] as liquidated damages for alleged failure on the part of the Applicant to meet two key milestones under the Installation Subcontract. The sum is made up of two amounts, one for each milestone. The Respondent appears to have first raised this claim against the Applicant by letter dated 10 April 2015 and has repeated it in subsequent correspondence. The Applicant has, just as repeatedly, denied any liability. Factually, there seems to be no dispute that the Applicant was substantially late in meeting the first milestone and late by 8 days in meeting the second.

27. On liquidated damages (**LDs**), the subcontract agreement is, as on many issues, confusing. Article 7.1 states that the compensation to be paid to the Applicant under the agreement for the execution of the works shall be as stated in Attachment D. Attachment D, while headed Compensation, deals with liquidated damages and payment milestones. Article 8 of the agreement also refers the reader to Attachment D, this time correctly, for elaboration of the Applicant's liability for LDs. There appears to be little or no dispute that Attachment D lays down the parties' obligations with respect to LDs.

28. I note that Attachment D is included in the same terms in the Supply Subcontract. Obviously, it would be extraordinary if the Respondent could levy LDs twice for the same alleged delay to complete, once under each subcontract. While I do not need to determine the issue for the purposes of this adjudication, there would be an argument available to the Applicant that the possibility of the Respondent even seeking to claim LDs under both subcontracts for the same delays constitutes a penalty under both subcontracts. Article 36.3 of the head contract would be ineffective to counter

such an argument. Whether or not the liquidated damages provisions constitute a penalty must be objectively determined: it is not for the parties themselves to decide the question by agreement, subjectively. While it is evident that the second milestone, the [redacted] Milestone (**Milestone 2**) falls under the Installation Subcontract, it is not clear to me which of the two subcontracts the first, the [redacted] Mobilisation Milestone (**Milestone 1**), falls. Attachment D straddles both subcontracts as originally intended, before the work was divided into the two agreements.

29. Attachment D first sets out the basis on which LDs are to be charged against the Applicant with respect to each of three key milestones. I am only concerned with the first two: the Respondent is not presently attempting to charge the Applicant LDs for delay in completing the [redacted] works. Under the heading Notes, it relevantly sets out three qualifications to the Applicant's liability. The preamble to those qualifications reads:

> "In respect of Liquidated Damages and notwithstanding anything stated to the contrary herein, the following principles shall prevail at all times, i.e. …"

The Applicant addresses the central issue for construction of these provisions in paragraph 4.24 of its submissions. The Applicant submits they reveal an intention by the parties, first, that LDs on Milestone 1 will be waived if the Applicant met Milestone 2 and, second, that LDs on Milestone 2 will be waived if the delay did not have an impact on the Respondent's [equipment]. [equipment] is defined in the head contract to mean the [redacted] portion of construction equipment. So much is clearly correct from the terms of Attachment D, but the Applicant goes further: it submits the parties intended a waiver of Milestone 2 to also include a waiver on Milestone 1. As the Applicant puts it, "there would be a cascading effect whereby any delays in meeting earlier milestone(s) would be forgiven (and liquidated damages waived) if later connected milestone(s) … were met *or if any delays in meeting the later milestone(s) did not impact upon the Respondent's [equipment]*." (my italics). The Respondent has not, in its response, attempted to refute this submission. It has submitted that the Applicant has failed to meet both milestones and that it is not entitled to a waiver with respect to either milestone. Because the Applicant failed to meet Milestone 2, the Respondent argues, it is not entitled

to a waiver on Milestone 1 under Note 1(a). It has not attempted, on a fall-back basis, to answer the Applicant's submission that it is entitled to a waiver on Milestone 1 when it has failed to meet Milestone 2 but LDs on Milestone 2 have been waived.

30. For reasons I will elaborate, I find that the Respondent is obliged to waive LDs on Milestone 2. Since the Applicant does not proffer any defence to liability for LDs with respect to Milestone 1 other than the "cascading effect" argument, its liability for Milestone 1 depends on the success of that argument. The preamble to the Notes in Attachment D I have noted is of some significance: it makes clear that the waivers, referred to as "principles", shall prevail at all times. The overall scheme also makes it clear that the important milestone in terms of progress on the project to that point, is Milestone 2. In other words, practical completion of the Supply Subcontract will be achieved when the Applicant meets Milestone 2. The Notes to Attachment D convey that failure to achieve Milestone 1 is of relatively little importance compared to meeting Milestone 2 – all will be forgiven so long as the Applicant meets Milestone 2, either literally or constructively. While I do not believe the question is free from doubt, I have concluded that the Applicant's construction of Attachment D, as advanced in paragraph 4.24.1 of its submissions, is correct. It would be illogical and anomalous if the Applicant could be late in meeting Milestone 2 (by very little, as it turned out) but not liable for LDs because it is entitled to a waiver, and still be liable for LDs on Milestone 1. Such a result would be contrary to the apparent intention of Note 1(a) and the scheme of the Notes as a whole.

31. As for Milestone 2, I accept the Applicant's evidence that the reason the earlier date was extended to 19 June 2014 was the additional bedding layer works directed by the Respondent on 9 April 2014. I accept further that the Applicant experienced delays within the extended period as a result of [three reasons redacted]. The Applicant notified the Respondent of these delays by letters dated, inter alia, 27 May and 30 May 2014. Those delays do not appear to have been properly taken into account by the Respondent but my finding on the waiver issue does not depend on that failure. Despite the Respondent's protestations to the contrary, it was not ready to proceed with the [works] on 19 June 2014 and was not ready until 28 June 2014.

32. The Applicant handed over the works on 27 June 2014 and has, since the Respondent first advised of its intention to charge LDs, maintained vigorously that the Respondent was not ready to proceed with the [works] at that time. It produces as evidence in support of that proposition a thread of emails commencing with an inquiry, dated 28 June 2014, from [GJ] of [the Consultants] to [FG] of [the principal] in which [GJ] states:

> "Despite repeated requests there remain a number of documents not issued to us at Revision 0 or above. It is difficult to understand how the Respondent can be ready when critical documents such as the following are not issued for use: …"

[FG] passed on the inquiry to [GP] at the Respondent in the following terms:

> "There is a number of *critical documents for* [work description redacted] that are not issued at rev 0 or above. Please issue urgently for [the Consultants] to review". (my italics)

I note the Applicant is not the subject of this query. Later on 28 June, [GP] replied to [FG] as follows:

> "Will revise them to have the paper in order but their status ACC is sufficient to start operations; it is not necessary to be at Rev 0".

[NA], whom I take to be from the Respondent, then emailed [JW] at the Respondent, explaining the status of two documents, as follows:

> "Undertaken a brief check with [ED] on these documents, the following to share:
>
> - F281-AV-PRC-0078 Rev.E [work description redacted]
> - Sent as rev F on 18-Jun-14 to SMP, [the principal] response received 23-Jun-14 via SMP transmittal, [the Principal] provisionally accepted, however *subject to final [Consultant's] approval prior to the Applicant re-issue as rev 0.* ([Consultants'] comments till date not received from SMP)
> - F281-AV-PRC-0079 Rev.C [work description redacted]
> - Sent as rev C on 23-Jun-14 to SMP for final approval, we have not received any comments/approval from SMP.
>
> Both documents are ACC, we can issue both as rev 0 this morning if you want, we'll make a note on the submission to highlight this." (my italics)

[JW] then emailed [FG] at [the principal], still on 28 June 2014, as follows:

> "I have had a meeting with [the Consultant] and [the principal] and all documents approved and only outstanding items to be completed are for the [redacted] to close out.
>
> …
>
> [the Consultant] agree[s] nothing else required to commence [the respondent's works]."

33. In a letter to the Applicant dated 12 March 2015, the Respondent attempts to explain this correspondence in the following terms:

> "… (the Applicant) is right in saying that a meeting was called with [the Consultant], though neglects to mention that it was for the purpose to clarify and close out items within the Applicant's own documents as below."

The Respondent's defence to the Applicant's contention that the Respondent was not ready to proceed with the [the Respondent's works] on 28 June 2015 is that the obstacle was the fault of the Applicant.

34. With respect to the email correspondence on 28 June 2014 summarised above, I find two facts. First, the Applicant was clearly not involved in the efforts to obtain approval for the documents identified by [GJ]. There was no suggestion by the Respondent, or any other party at the time, that the Applicant had failed to do anything it should have done. Nor is there any other correspondence before me, up to and including 28 June 2014, to suggest anything of the sort. Second, it is clear that until [the Consultant] gave the go ahead, the Respondent could not proceed with the [particular works]: it had not until then completed the documentation it needed to complete before proceeding. Even then, there were details for the vessel itself to complete, as described by [JW]. On those two findings, I conclude that the Respondent was not ready to proceed with the pipe pull until it did so, on 29 June 2014. That being the case, the Respondent cannot accurately assert that the Applicant's delay in handing over the works for the pipe pull until 27 June 2014 delayed commencement of the pipe pull or, as expressed in Note 1(b) of Attachment D, that the delay impacted the Respondent's [equipment]. The Respondent is obliged to waive the imposition of LDs on the Applicant for Milestone 2, with its flow on consequences for Milestone 1.

335. I have noted the Applicant's submissions on further reasons I should find the Respondent was not ready to commence the [Respondent's work], set out in paragraph 4.24.1(d) of the application. I do not need to make findings on those submissions but simply record that none of them are persuasive.

36. The Respondent is not entitled under the Installation Subcontract to deduct from the Applicant's claim under Progress Certificate 28, [amount redacted], or any sum, for LDs with respect to Milestones 1 and 2.

Conclusion

37. The Applicant is entitled to payment in full on Progress Certificate 28 and I will so determine.

Interest, Costs and Time to Pay

38. The Applicant claims interest on the amount for which the Respondent is found liable and has referred me to section 35(1) of the Act. The Applicant submits that section 35(1) permits an adjudicator the choice of awarding interest on an overdue payment either in accordance with the terms of the Subcontract or, alternatively, at the rate prescribed in the regulations, in this case much the higher rate. I do not read the section in that way. In my view, in these circumstances it bestows a discretion on the adjudicator to award interest but only in accordance with the terms of the Subcontract. The Applicant has calculated that rate at 1.025% per annum, compounded at six monthly intervals and the Respondent does not submit otherwise. I will make a determination that the Respondent pay interest on the sum payable at the rate of 1.025% per annum from 14 May 2015 to the date of the determination.

39. For the reasons advanced by the Applicant, I have considered determining that the Respondent should pay part of the Applicant's costs in relation to this adjudication on the grounds that its submissions in response were frivolous and/or vexatious. While I have found the Respondent's view of the nature of the subcontracts to be misconceived, I am not prepared to go so far as to characterise them in that way. Effectively, the Act entitles a respondent to an adjudication application to defend the claim without a costs penalty, so long as the defence is serious and genuine. I have no reason to doubt that is the case here. Each party must bear its own costs of the adjudication, including my fee.

40. I consider two weeks to be an adequate and reasonable time for the Respondent to pay the Applicant the total sum for which it is liable.

Postscript

41. Immediately prior to delivering this determination I was advised by counsel for the Applicant that a determination on an earlier adjudication, before Mr Scott Ellis, had been delivered. Since the determination allowed one of the deductions sought by the Respondent that was in the same terms as sought again in this adjudication, the Applicant wished me to request a copy of Mr Ellis's determination and seek from the parties submissions on his findings. In the light of my findings, I declined to make the request.