Determination 26.14.05

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

BETWEEN:

Applicant

and

Respondent

REASONS FOR DECISION

1. On 16 May 2014 the Applicant served two Applications dated 15 May 2014 on Master Builders Association Northern Territory ("MBANT") as prescribed Appointer under the Act. One application related to a payment dispute on the Barunga building site ("Barunga") and the other to a payment dispute on the Eva Valley building site ("Eva Valley").

2. The Respondent was also served a copy of each Application on 16 May 2014. By letter from MBANT dated 16 May 2014 I was appointed adjudicator to determine both payment disputes between the parties. I received the letter on 16 May 2014 and the application documents on 19 May 2014.

3. On 27 May 2014 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

4. On 30 May 2014 I received a Response to each Application.

5. On 10 June 2014, having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar and sought additional time in which to make my decision under section 34(3)(a). On that date the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 4 July 2014 for the Barunga Application and up to and including 7 July 2014 for the Eva Valley Application. There were no objections from the parties.

6. On 10 June 2014 I also received further submissions from the Applicant in relation to matters raised by the Respondent in both the Barunga Response and the Eva Valley Response. There was some contention between the parties as to what comprises the Contract. I did not seek those submissions, however the Applicant requested that I accept its further submissions in relation to both Applications under section 34(2) of the Act. To ensure procedural fairness and the rules of natural justice were upheld and that I had made available all the evidence of the matter, as reasoned by Barr J in *Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd & Anor* [2014] NTSC 20 at [42], I sought submissions from the Respondent under section 34(2)(a) of the Act. I limited the scope of those submissions to matters raised by the Applicant and requested that the Respondent's submissions be returned by 26 June 2014.

7. On 26 June 2014 I received the Respondent's submissions and later that day received substituted submissions with some minor cosmetic corrections. There were no further submissions in the matter and it was clear from the Applicant's submissions that each payment dispute was to be adjudicated *"…with respect to the relevant construction contract for each project."*

8. This determination is only in relation to the Eva Valley Application.

Introduction

9. This adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to build a duplex dwelling, two houses in all, on Lot 2 at the Eva Valley Community, South of Darwin in the Northern Territory ("Contract"). The Contract forms part of the National Partnership Agreement on Remote Indigenous Housing undertaken by the Northern Territory Government.

10. The Applicant says it is entitled to be paid its variation claims in the Contract in the sum of $115,935.20 (including GST) for the additional costs it has incurred in the Contract. The Applicant's claim comprises the following components:

    (a) Windows and Screens – Superintendent's direction to replace the installed louvre windows on the duplex house with Breezway proprietary brand products and the additional cost of Crimsafe screens over the cost of Amplimesh screens - $10,971.80 (including GST) for the windows and $7,136.00 (including GST) for the screens at a total of $18,107.80 (including GST);

    (b) Verandahs – an additional cost for 2 x verandahs at $44,975.70 each not allowed for in the Contract - a total of $89,951.40 (including GST); and

    (c) Engineering Consultant's costs – additional costs associated with consulting engineering advice for the non-compliance reports - a total of $7,876.00 (including GST).

11. The Applicant also seeks interest payable on its claim under the Conditions of Contract (“GC”) 2.18 at the 90 day bank bill rate published on 1 June each year at a current rate of 2.82% per annum.

12. The Applicant also seeks the costs of the Adjudication being:

    (a) the Adjudicator’s costs; and

    (b) the Applicant’s costs,

    to be paid in full by the Respondent.

Procedural Background

<u>The Application</u>

13. The Application is dated 15 May 2014 and comprises three volumes enclosing a general submission tabulated 1 through to 45, a construction contract submission tabulated 1 through to 14 and period contract submission tabulated 1 through to 4. The attachments include:

    (a) a copy of the construction contract;

    (b) a copy of the period contract;

    (c) a copy of the payment claim;

    (d) a rejection of the payment claim; and

    (e) supporting evidence, including tender documents, engineering report documents, statutory declarations, emails, photographs and general correspondence between the parties.

14. The Applicant's Payment Claim was initially submitted to the Respondent on 20 January 2014 for the sum of $671,679.20 (including GST). The Respondent assessed the payment claim on 28 January 2014 and rejected part of the claim stating:

    "The Principal is well within its rights to withhold payment for non-conforming works."

    and

    "The Principal will arrange payment once formal advice is lodged and conformation of the rectification of the works has been verified, and any other matters which may limit payment claims are resolved".

15. The Application, dated 15 May 2014, was served on 16 May 2014 and includes details of claim of the amount rejected by the Respondent. The Respondent paid $555,744.00 including GST of the Payment Claim dated 20 January 2014 and rejected the sum of $115,935.20 (including GST), being the amount of the payment claim in the Application.

16. The Application claims interest at 2.82% per annum on any overdue payments in the Contract.

17. The Application claims costs of the adjudication, under section 36(2) of the Act, as the fees of the Adjudicator and the Applicant's costs of bringing the Application, to be paid in full by the Respondent.

The Response

18. The Response is dated 30 May 2014 and comprises two volumes; a general submission tabulated 1 to 3 and a statutory declaration, MD, with 10 attachments. The attachments include:

    (a) a copy of the Panel Contract;

    (b) tender response schedules;

    (c) minutes of meetings;

    (d) payment claim responses; and

    (e) supporting evidence including, emails, drawings and general correspondence between the parties.

19. The Response does not seek costs or interest and there are no counterclaims.

20. The Response was served on 30 May 2014.

Adjudicator's Jurisdiction and the Act

21. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.

22. Section 4 of the Act – **Site in the Territory** – the site is at a remote community South of Darwin in the Northern Territory. The site map provided at Folder 2, Tab 8 of the Application and Tab MD4E of the Response identifies the building site in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.

23. Section 5 of the Act - **Construction Contrac**t - the Contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract. However, the parties cannot agree on precisely what documents and terms form the Eva Valley Contract.

24. The Applicant says that the Panel Contract is a stand-alone contract that pre-qualified a panel of contractors for a period of 12 months to bid on the Eva Valley and other works and that the actual GC's of the Eva Valley Contract is the *"…Period Contract for Works and Services (Effective Date: 10 January 2011 Version No. 4.1.34)…"* ("PCWS").

25. The Respondent says *"The parties entered into a panel contract......which incorporates the terms and conditions of the construction contract…"*, that is, the PCWS plus conditions of tendering, preliminary clauses and special conditions from the "Panel Contract", and that those are the terms of the Eva Valley Contract. This much is clear from the Application, the Response and further submissions from the parties.

26. The initial contention between the parties in relation to the terms of the Eva Valley Contract is whether or not there has been a failure by the Applicant, when preparing the Application, to:

    "…….state the details of or have attached to it:

    (i) the construction contract involved or relevant extracts of it; and

    (ii) any payment claim that has given rise to the payment dispute….".

27. A careful reading of the PCWS terms establishes at GC 2.2 the "Formation of Contract" provisions and sets out in order of precedence the documents which will form the Contract. The parties presumably

read the contract document and the Applicant has included the PCWS terms in its submissions which terms clearly state what comprises the Eva Valley Contract. Additionally, the parties consistently refer to the Panel Contract in their submissions which, in my view, states the details of the construction contract for the purposes of the Act.

28. While not having the entire Contract to hand may not be convenient for the Adjudicator, I found it unnecessary to call for a copy of the Request for Tender of the Panel Contract which, *inter alia*, included a copy of the Special Conditions of Tendering and Contract ("SC") of the Panel Contract, as these were included in the Response at Tab MD3.

29. In reaching a landing on this point, I turned to the 'Request for Service' for the Eva Valley works. While the heading on that document states it is a Request for Service, it is in fact a quotation of the works in the form of a simplified tender document, a Request for Tender ("RFT"). A careful reading of the document informs the respective tenderers in the section titled *"HOW TO RESPOND TO THIS QUOTATION"* and goes on to state:

> *"Complete the QUOTATION FORM and SCHEDULES provided. This will become your Quotation which may be lodged in any of the following ways….".*

30. The next section titled "CONDITIONS OF CONTRACT" clearly establishes this to be a tender as it states:

> *"The Conditions of Tendering and Contract applicable to this RFT are…."*

and then refers to the PCWS and the Panel Contract as follows:

"…Period Contract – Works and Services (PCWS) V4.1.34 (January 2011) ***as per Panel Contract T12-1514****"* [my emphasis added].

It is clear from this that the Panel Contract incorporates the terms of the PCWS for the purposes of the Eva Valley Contract.

31. However, the whole of the terms of the Eva Valley Contract are not settled at this point. The Eva Valley works tender also incorporates into the Eva Valley Contract additional Preliminary Clauses and Contract Particulars setting out the Time for Completion, Site Access requirements, the Defects and Liability period and Time for Commencement of the Eva Valley Contract, as well as other site and community specific requirements.

32. I am of the view that the terms of the Eva Valley Contract are the Panel Contract incorporating the PCWS terms and the terms of the Eva Valley RFT.

33. I am also satisfied that the Eva Valley Contract is a construction contract for the purposes of section 5 of the Act.

34. Section 6 of the Act – **Construction Work** – the work is to build two new houses constructed as a duplex house at the Eva Valley Community, South of Darwin, and sections 6(1)(c) and 6(1)(e) of the Act specifically provides for this type of civil work. I am satisfied that the work is construction work for the purposes of the Act.

35. Section 4 of the Act - **Payment Claim** – means a claim made under a construction contract:

    (a) by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations; or

> *(b) by the principal to the contractor for payment of an amount in relation to the performance or non-performance by the contractor of its obligations under the contract.*

36. The Applicant's claim, dated 16 January 2014, has been lodged as a Payment Claim on 20 January 2014 and has attached to it 10 Tax Invoices dated 24 December 2013. While the Application refers to the contents of the Payment Claim for Eva Valley, there are no copies of tax Invoices 520 and 521 in the Payment Claim at Tab 3 of the Application. In fact, the Payment Claim appears to be a combined payment claim for the Barunga and Eva Valley works.

37. Lodgement of a Payment Claim under the Eva Valley Contract is through GC 2.18 of the PCWS terms, as amended by SC 2.18 of the Panel Contract which states:

    "The Contractor shall submit to the Superintendent a Tax Invoice every month showing the Contract value of the work carried out in the performance of the Contract and incorporated Works".

38. By reference to the Payment Claim documents and the Respondent's letter rejecting the claim, referred to as a "Progress Certificate" by the Respondent, it can be seen that the Applicant's claim fulfils the requirements under the Eva Valley Contract for making a Payment Claim and in so doing complies with section 4 of the Act.

39. The Applicant submits that the implied provisions of the Act are engaged as, in its view, there are no written provisions in the PCWS CGC 2.18 *"…about when and how the Principal (or the Superintendent on its behalf) must respond to a payment claim"*.

40. The Respondent submits that the Eva Valley Contract, which incorporates the SC 2.18.1 *"…is clearly and unequivocally a written*

provision enabling the Contractor to make a claim to the Principal for a progress payment for the obligations (e.g. the works and services) it has performed under the contract and a written provision about how the Principal is to respond to a payment claim made by the Contractor and when it must be made".

41. I do not agree with the Applicant's view on this point. The Eva Valley Contract holds broad written terms about the making of a claim, how and by when the claim is to be paid and how and by when the Respondent is to respond to the claim.

42. I am satisfied that the Applicant's Payment Claim lodged on 20 January 2014 was a valid payment claim made under the Contract. I am also satisfied that the Applicant's Payment Claim is a valid payment claim for the purposes of the Act.

43. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:

    (a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or

    (b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or

    c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.

44. The Applicant made a valid payment claim on 20 January 2014. The Respondent subsequently assessed and, by letter, rejected that claim on 28 January 2014. The Applicant's Payment Claim was to be paid

under the Eva Valley Contract provisions on or before 19 February 2014.

45. The Respondent rejected the Applicant's Payment Claim on 28 January 2014 and failed to pay the claim, in whole or part, by 19 February 2014, that is "*within thirty (30) days of receipt of claims*". The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor* [2012] NTSC 22 at para 20 where Barr J stated:

> *"In my opinion, the correct construction of s 8(a) is that the due date for payment under the contract is the only date on which a payment dispute may arise. That is the date at which the existence of the relevant fact (non-payment, rejection or dispute) is to be ascertained in order for the statutory definition to be satisfied. Therefore, even though there may be a rejection or dispute prior to the due date for payment, the "payment dispute" does not arise until the due date for payment''*.

46. The Respondent responded to the Applicant's Payment Claim of 20 January 2014 eight days after it was lodged, that is on 28 January 2014, rejecting part of the Payment Claim. The Applicant then had to 'mark time' for the remainder of the thirty days to expire under the Eva Valley Contract payment terms SC 2.18.1.

47. In this matter a payment dispute arose between the Respondent and the Applicant on 20 February 2014 and I am satisfied that there is a payment dispute for the purposes of the Act in which the Applicant has applied for an adjudication of the dispute under section 27 of the Act.

48. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant's documents of the Application dated 15 May 2014,

served on the Respondent and the Prescribed Appointer, MBANT, on 16 May 2014.

49. In its Response, the Respondent submits that the Applicant has failed to serve all of the Application because it failed to refer to or attach all the documents of the Panel Contract in the Application attachments. The Respondent submits that, because they have not been served with the Application which, under the Act, *"…must state or have attached to it all of the information, documents and submissions on which the party making it relies in the adjudication…"*, it does not meet the provisions of section 28(2) of the Act and must therefore be dismissed.

50. I do not share the Respondent's view on this point for the reasons set out in paragraphs 23 to 33 above. Both the Applicant and the Respondent frequently state and refer to the Panel Contract and the Eva Valley works RFT in the Application and the Response documents. A copy of the Panel Contract and the Eva Valley RFT was provided in the Response and extracts of the Panel Contract and Eva Valley RFT was provided in the Application.

51. The Respondent at paragraph 5.8 also says that the Application: *"…is deficient and non-compliant with the requirements of section 28 of the Act as it failed to attach the payment claim that gave rise to the payment dispute."*

52. Again, I do not share the Respondent's view for the reasons set out in paragraphs 23 to 33 above. Both the Applicant and the Respondent state and refer to the Payment Claim in the Application and the Response documents. In its Application, the Applicant specifically devotes a section of its submissions to the Payment Claim and the Respondent has written three letters expressly rejecting the Payment Claim and the Applicant's Tax Invoices 520 and 521 (Tabs 6 & 7 of the

Application and Tab MD11 of the Response). It is clear that the parties have stated the details of the Payment Claim, have expressly referred to it in their submissions and the Applicant has provided extracts of it in its Application.

53. The salient issue between the parties in this payment dispute is as to which documents comprise the Eva Valley Contract. Each has a different view and each has submitted substantial argument on their respective positions on this matter.

54. I do not share the view of the Respondent on this point. Failure by an applicant to submit all the documents of a contract where it contests the content and formation of the contract could not invalidate an application properly made under the Act. It may, however, prejudice an applicant's claims in the adjudication itself.

55. If the Respondent's position were correct, it would defeat the object of the Act. Any application could easily be described as 'invalid' by a respondent claiming that an applicant must provide information which the respondent subjectively thinks appropriate so as to fulfil the requirements of section 28 of the Act. While this position may be tactically advantageous to a respondent, it is also the case that an adjudicator has broad powers under section 34 of the Act to seek further information as he or she requires to make a determination. Under section 34(1)(b) an Adjudicator:

> *"is not bound by the rules of evidence and may inform himself or herself in any way the adjudicator considers appropriate"*.

56. In any event, under section 34(1)(a)(i) the Adjudicator must act informally and, if possible, make a determination on the basis of "*the application and its attachments"*. If an applicant does not attach all the

information on which it seeks to rely, it would likely be to the applicant's detriment.

57. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

58. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent's documents in the Response dated 30 May 2014, served on the Applicant and the Adjudicator on 30 May 2014. I am satisfied that the Response is a valid Response to the Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and by Regulation 7.

59. Having now considered the relevant sections of the Act and the Regulations, and following attendance to the documents of the Application and the Response, I find that I have jurisdiction to determine the merits of the payment dispute between the Applicant and the Respondent.

Merits of the Claims

60. The claims made by the Applicant in its Application are as follows;

    (a) Windows and Screens – Superintendent's direction to replace the installed louvre windows on the duplex house with Breezway proprietary brand products and the additional cost of Crimsafe screens over the cost of Amplimesh screens - $10,971.80 (including GST) for the windows and $7,136.00 (including GST) for the screens at a total of $18,107.80 (including GST);

(b) Verandahs – an additional cost for 2 x verandahs at $44,975.70 each not allowed for in the Contract - a total of $89,951.40 (including GST); and

(c) Engineering Consultant's costs – additional costs associated with consulting engineering advice for various non-compliance reports - a total of $7,876.00 (including GST).

61. The Applicant seeks interest payable on its claim under the Conditions of Contract ("GC") 2.18 at the 90 day bank bill rate published on 1 June each year at a current rate of 2.82% per annum.

62. The Applicant has also sought the costs of the Adjudication being:

(a) the Adjudicator's costs; and
(b) the Applicant's costs.

63. The Respondent has no counter claims in its Response.

Windows and Screens – Superintendent's Direction - $18,107.80 (including GST)

64. The Applicant claims that it had to replace the louvre windows following a direction from the Respondent. The Applicant also claims the additional costs it has incurred by installing 'Crimsafe' screens rather than 'Amplimesh' screens.

65. The Respondent says that the Applicant did not follow the schedule and specification that asked for proprietary brand products and, as such, the Respondent should not be liable for any costs incurred by the Applicant for not using the specified product.

<u>The Louvre Windows</u>

66. It is clear that the Applicant had installed Diamond Brand Louvre Windows ("Diamond Galleries") into the works. There is a lengthy evidential trail of correspondence between the parties throughout the attachments to the Application where the Applicant tries to convince the Respondent that the Diamond Galleries are acceptable and meet the specification and schedule of the Eva Valley works.

67. On 30 September 2013 the Respondent directed the Applicant to replace the Diamond Galleries with the specified schedule item Altair Breezway 131 Louver Windows ("Breezway Galleries") in accordance with the Eva Valley Contract (Tab 11 of the Application).

68. On or about 4 October 2013 the Respondent suspended its earlier direction of 30 September 2013 and gave the Applicant an opportunity to provide technical compliance information that the alternative Diamond Galleries met the same standard and performance of the specified schedule Breezway Galleries (Tab 10 of the Application).

69. Following this suspension, there was a continuing trail of correspondence culminating in a dispute notice issued by the Applicant to the Respondent, where the Applicant attempts to convince the Respondent that the alternative Diamond Galleries are of the same standard and performance as the specified schedule Breezway Galleries.

70. On 22 November 2013, following the Applicant's failure to convince the Respondent to accept the Diamond Galleries, the Respondent directed the Diamond Galleries be replaced with the proprietary Breezway Galleries as required under the Eva Valley Contract (Tab 24 of the Application).

71. On the same day, 22 November 2013, the Applicant confirmed they would replace the Diamond Galleries with Breezway Galleries and should be completed by 13 December 2013 (Tab 24 of the Application).

72. The specification schedule, which the Applicant had, is precise in that it specifies proprietary brand Breezway Galleries (Tab MD4B of the Response) to be installed into the Eva Valley Contract. The Applicant did not comply with this requirement but attempted to have the Respondent accept an alternative product that they had already installed into the Eva Valley works. The Respondent directed the specification schedule be complied with under the Eva Valley Contract and the Applicant complied with that direction.

73. In so doing, the Applicant has claimed $10,971.80 for performing the Respondent's direction.

<u>The Security Screens</u>

74. The Applicant has installed 'Crimsafe" security screens into the Eva Valley works, despite the RFT drawings specifying 'Amplimesh' security screens. The Applicant says it should be entitled to a variation of $7,136.00 including GST for the difference in price between the two products.

75. The Respondent says that the Applicant departed from the specification unilaterally and did not advise the Respondent or request approval from the Respondent. The Respondent also says that the Applicant overlooked the specification and cannot now expect the Respondent to accept and approve a variation so that the Applicant

can bring the Eva Valley works back into conformity with the specification.

76. The Applicant acknowledges it departed from the RFT drawings specifying 'Amplimesh' screens (paragraph 6.3.1 of the Application).

77. It is clear that, in both instances of the louver windows and the security screens, the Applicant departed from the specification of the Eva Valley Contract. In so doing the Applicant cannot now expect the Respondent to pay a variation of $18,107.80 including GST for the Applicant to conform with the specification of the Works to fulfil its contractual obligations.

78. I am of the view that the Applicant cannot, in the circumstances of its non-conformance with the specification, succeed in this claim.

79. The Applicant's claim for the louver windows and security screens fails for lack of compliance with the Eva Valley Contract specifications.

Verandahs – not allowed for in the Contract - $89,951.40 (including GST)

80. The Applicant claims $89,951.40 including GST for constructing the verandah roof sections of the duplex dwelling (two verandah roof sections in all). In making the claim, the Applicant says that the *"…Department of Infrastructure confirmed in email correspondence dated 26 March 2013 that the carports and driveways were not included in the contract for the Eva Valley project (Folder 1, Tab 9)".* However, when referring to Folder 1, Tab 9 of the Application, there is no such email and after looking through the evidence in the other folders I failed to locate such an email. The evidence at Folder 1, Tab 9 is a request to use Diamond Galleries instead of Breezway Galleries. There is however, at Folder 1 Tab 8, a drawing B12-14573 amendment

2 showing that the verandahs form part of the duplex dwelling which the Applicant is to construct.

81. The Respondent says that the verandahs are and always were part of the Applicant's scope of work and this much can be established by reference to the drawings, in particular Drawing No. B12-14552 and B12-14554 which contain the verandah roof detail and notes for its construction (Tab MD4D of the response). The Respondent also says that the Applicant was informed of the difference between carports and the verandahs and that there was no requirement to build carports in the scope of works, only verandahs (Statutory Declaration Mark Dodt at 57).

82. It is clear from the drawings, particularly B12-14552 and B12-1459 containing the detail A thru G of paragraph 57 of Mr. Dodt's declaration, that the verandahs were to be built as part of each duplex dwelling in the Eva Valley Contract. The Applicant has not provided any substantive evidence that could establish the verandahs did not form part of the Eva Valley works. In fact, the Applicant has also provided evidence at Folder 1, Tab 8, that the verandahs actually formed part of its scope of works for the Eva Valley Contract.

83. I am satisfied that the Applicant's claim fails for lack of evidence.

Engineering Consultant's costs for NCR's - $7,867.00 (including GST)

84. The Applicant claims the sum of $7,867.00 including GST for additional costs incurred for the services of a consulting engineer, Davis Consulting Pty Ltd, to assist it with the Non Conformance Process ("NCR"), Diamond Louvre Windows dispute and some changes to the block walls of the building. The Applicant says that it incurred these

additional costs over and above that which was normally required by the Eva Valley Contract.

85. The Respondent says that the Applicant was required to conform to the specified scope of work and was required to take corrective action to any NCRs in the Eva Valley Contract at its own cost. The Respondent had issued two NCRs for the Applicant's work which required the Applicant to carry out the appropriate corrective actions to bring the works back to specification or as near as possible to specification.

86. It is not in contention that the NCR corrective action was necessary by the Applicant to return the Works to specification. The only issue between the parties is who should pay for any assistance, should it be necessary, in carrying out those corrective actions.

87. The Eva Valley RFT at section 6 expressly required the Applicant to undertake Quality Assurance ("QA") of the scope of work in the Eva Valley Contract. The QA requirements of inspection, sample test and hand over to the applicable standards and specifications fall to the Applicant as part of the Eva Valley Contract. The Applicant represented to the Respondent that they had a QA system in place that was capable of delivering the Works to the acceptable standard and specification required by the Respondent. The Applicant cannot now claim that as soon as the Respondent issued an NCR for a failure by the Applicant to produce conforming work in the Eva Valley Contract, any cost in corrective action is to be paid by the Respondent.

88. The two NCRs issued by the Respondent were the responsibility of the Applicant's corrective actions and any costs associated with rectification of works that were not up to specification must fall to the Applicant. The Applicant cannot benefit from a harm they have caused to themselves.

89. I am satisfied in these circumstances that the Applicant's claim fails.

Interest on the claims

90. In reconciling the claims, the amount the Respondent is to pay the Applicant is 'Nil' as all the Applicant's claims have failed for the various reasons set out in paragraphs 64 to 89 above.

91. I make no award of interest pursuant to section 35 of the Act.

Summary

92. In summary of the material findings, I determine:

(a) the contract to be a construction contract under the Act;
(b) the work to be construction work under the Act;
(c) the site to be a site in the Northern Territory under the Act;
(d) the claim to be a valid payment claim under the Act;
(e) the dispute to be a payment dispute under the Act;
(f) the windows and screens variation to fail;
(g) the verandah variation to fail;
(h) the engineer consultant costs variation to fail.
(i) there is no award of interest.

93. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **Nil**.

Costs

94. I have not found either the Application or the Response to be without merit and I do not consider the Applicant's conduct in bringing the Application to have been frivolous or vexatious or its submissions so unfounded as to merit an adverse costs order.

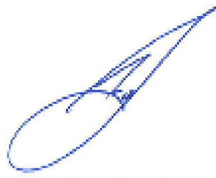
95. The Applicant's submissions have failed on either specification non-conformance or evidential grounds.

96. I make no decision under section 36(2) of the Act. The parties must bear their own costs.

Confidential Information

97. The following information is confidential:
    (a) the identity of the parties;
    (b) the identity of the principal; and
    (c) the location and nature of the works.

DATED: 7 July 2014



Rod Perkins
Adjudicator No. 26