

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 19 October 2018 I was appointed Adjudicator to determine a payment dispute between the Applicant and the Respondent by the Resolution Institute, formerly the Institute of Arbitrators and Mediators Australia (**the Resolution Institute**) as a Prescribed Appointer under r.5 of the *Construction Contracts (Security of Payments) Regulations* (**the Regulations**). A copy of the Letter of Appointment dated 19 October 2018 and the Application dated 16 October 2018 were delivered to me on 22 October 2018.
2. On 23 October 2018 I wrote to the parties advising of my appointment and declared no conflict of interest in the matter. I sought submissions until 2:00pm CST on Friday, 26 October 2018 should either party object to the appointment. There were no objections to my appointment.
3. In my letter of 23 October 2018, I requested that the parties confirm the date and method of service of the Application on the Respondent for jurisdictional clarity and consistency. I confirmed that on the basis of service of the Application on 16 October 2018, by my calculation the Response would be due on or before 30 October 2018. I requested that the parties let me know immediately if that was not the case.

4. In my letter of 23 October 2018, I also confirmed that I would accept service of the Response by email with any attachment documents to be made available through a drop box accessible by all parties to the adjudication and that service by electronic means would comply with ss.8 and 9 of the *Electronic Transactions (Northern Territory) Act*. I requested that the parties confirm in writing their acceptance or otherwise of the electronic service process by 2:00pm CST on Wednesday, 24 October 2018.
5. That same day 23 October 2018 the Applicant sent me an email with an attachment Letter of Service dated 16 October 2018 signed by the Respondent which showed that the Application had been served on the Respondent on 16 October 2018. The Applicant also confirmed they would accept service of the Response electronically.
6. On 24 October 2018, the Respondent sent me an email advising that the Application was served on the Respondent on 16 October 2018 and confirmed that the Respondent agreed to electronic service of the Response.
7. On 25 October 2018 I wrote to the parties confirming my telephone discussion with each of them as follows:

"...I confirm my recent telephone discussion with each of you in relation to the following:

1. *I have been appointed to undertake a further adjudication;*
2. *that adjudication is entirely unrelated to the above matter and has no bearing whatsoever on the above matter;*
3. *for confidentiality, I have not identified any of the parties, the site or the construction contract relating to that adjudication;*
4. *I confirm that both the Applicant and the Respondent has no objection, and consent to my undertaking that adjudication at the same time as the above matter.*

I confirm that the above requirements follow the provisions of the Construction Contracts (Security of Payments) Act s.34(3)(c) as determined in the decision of The Northern Territory of Australia v Woodhill and Sons Pty Ltd [2018] NTSC 30.

I thank you for your continued assistance.....”

8. On 30 October 2018 and within time the Respondent served the Response and a download link to the Response including the attachments and list of authorities.
9. On 8 November 2018 I wrote to the parties requesting further submissions under s.34(2) of the Act on some questions that I had in relation to the Application and Response as follows:

“.....I confirm receipt of the Response documents on 30 October 2018 and within time under s.29 of the Construction Contracts (Security of Payments) Act (the Act).

Having read the documents of the Application and the Response, there are several questions on which I would invite the parties to make further submissions under s.34(2) of the Act.

1. *There seems to be disagreement between the parties as to the value of the lump sum component of the Contract. The Applicant says that the Contract was adjusted from \$961,565 (excluding GST) to \$1,280,355 (excluding GST) on the basis of an increase of scope following execution of the Contract on 16 October 2017. The Respondent, however, maintains that the contract lump sum component is \$961,565 (excluding GST). There appears to be no clear variation document to account for the \$318,790 increase in contract value. There are, however, additional line items in the progress claim spreadsheet which are not included in the contract lump sum pricing schedule in Annexure Part C of the Contract. In particular, items relating to mobilisation and transport. Accordingly, I request that both parties provide me with a detailed reconciliation of the Contract to date, including but not limited to the following:*

- (a) *the contract value, including a full description by line item for each component of the Contract to include all variations;*
- (b) *all claims made to date against each line item and a percentage complete basis for each line item and claim; and*
- (c) *payments made to date against each line item and claim.*

*I will require the reconciliation in **native Excel format**.*

2. *There is also disagreement between the parties as to the Day Work Rate for labour. It appears this was not agreed at the time the Contract was entered into. Accordingly, I require a detailed breakdown of the Day Works Rate for labour and supervision as understood by each party, which is to include profit and overhead components.*

3. *I require the Progress Claim 9 and the Revised Progress Claim 9 be provided in **native Excel format**.*

4. *It is clear how each Site Instruction which gives rise to variation to the Contract is performed and assessed, however there appears to be no clear mechanism for assessing the percent complete against each line item for the fixed lump sum portion of the Contract. Generally, percent complete would be assessed in a contract by a party's quantity surveyor following inspection of the Works. It is clear that there are supervisory staff from both parties on site who perform this function, however there does not appear to be any corresponding documentation or mechanism as to how this function is performed. Accordingly, I require a detailed explanation as to how the percent complete has been calculated and established by the Applicant and the Respondent for Progress Claim 9 and the Revised Progress Claim 9 of the Contract.*

*I request that the parties provide any further submissions on or before **5.00pm CST on Friday 16 November 2018**.*

In calling for further submissions, I follow the reasoning of Barr J. in Hall Contracting Pty Ltd v Macmahon Contractors Pty Ltd and Anor [2014] NTSC 20 at 42 and, in particular, His Honour's conclusions at 42.

In the meantime, I will seek a short extension from the Construction Registrar to consider this new material and will advise the new date by which my determination will be handed down.

I thank you for your continued assistance in this matter.....”

10. On 9 November 2018 I wrote to the Construction Registrar seeking an extension of time within which to make my determination as follows:

“.....Dear Registrar,

I refer to the above matter.

I have sought further submissions under s.34(2) from the parties in relation to several questions, including a full contract reconciliation as the contract lump sum value appears to be in dispute, and have given them a deadline within which to provide me their submissions.

The date for the submissions is beyond the current date for the determination of 13 November 2018.

I therefore respectfully request an extension of time under s.34(3)(a) up to and inclusive of 30 November 2018 within which to make my determination.

Thank you for your consideration of this request and I look forward to your earliest response.....”

11. On 12 November 2018, the Construction Registrar granted the additional time for the determination to 30 November 2018.
12. On 16 November 2018 and within time both the Applicant and the Respondent provided further submissions in relation to the questions I had asked.
13. On 17 November 2018 I wrote to the parties confirming the following:

“.....I confirm receipt of both the Applicant’s and the Respondent’s further submissions and within time. I require no further information or submissions from the parties and the shutters are now closed.

On 9 November 2018 I wrote to the Construction Registrar and sought an extension of time under s.34(3)(a) of the Act up to and inclusive of 30 November 2018 within which to make my determination.

The Construction Registrar has granted the request with the extended date for my determination now 30 November 2018.

I thank you for your continued assistance in this matter.....”

14. I received no further correspondence from the parties in relation to the Adjudication.

Introduction

15. This Adjudication arises out of a building contract pursuant to which the Applicant agreed with the Respondent to undertake the site building activities for [project details and location redacted] in the Northern Territory of Australia (**the Contract**).
16. The Applicant claims that it is entitled to be paid its Progress Claim 9 initially issued on 27 June 2018 in the sum of **\$185,197.82 (excluding GST)**, or, in the alternative, following discussions with the Respondent regarding errors in the initial claim, its Revised Progress Claim 9 issued on 13 July 2018 in the sum of **\$219,440.90 (excluding GST)**. The Applicant’s claim is for work carried out [project details redacted] (**the Project**) that had been either part of the scope of work under the Contract or had been directed as variational work to the Contract.
17. The Applicant does not seek interest on any amount due to be paid, however the Applicant does seek that any amount awarded in the Adjudication to be paid to the Applicant not more than seven days from the date of determination.
18. The Applicant seeks costs of the adjudication to be paid by the Respondent in full and the Applicant’s legal costs of preparing the Application fixed in the sum of **\$7,000.00**.

19. The Respondent submits that the Applicant's claim is not a valid claim within the meaning of the Act and, as such, there is no payment dispute. In the alternative, the Respondent submits that the Revised Progress Claim 9 in the sum of **\$219,440.90 (excluding GST)** is a recycled claim that is prohibited under the Act and is therefore invalid and that Progress Claim 9 in the sum of **\$185,197.82 (excluding GST)** is the only payment claim that gives rise to the payment dispute in the Adjudication.
20. The Respondent submits that the Applicant is not entitled to a payment as the claim has not been properly supported with the required documentation, or, in the alternative, the payment that the Applicant is entitled to be paid is:
 - (a) The sum of \$48,640.00 (excluding GST) using reasonable rates; or
 - (b) The sum of \$61,085.00 (excluding GST) using the day rates claimed by the Applicant.
21. The Respondent makes no submission in relation to interest.
22. The Respondent submits that the Applicant ought to be liable for payment of the Adjudicator's fees in full.

Procedural Background

The Application

23. The Application is dated 16 October 2018 and comprises a general submission, a statutory declaration with 29 attachments with numerous exhibits in each attachment. The attachments include:
 - (a) a copy of the Contract;
 - (b) a copy of the Applicant's Payment Claim 9 and the Revised Payment Claim 9; and

- (c) supporting evidence, including spreadsheet reports of each claim, day work sheets and site instructions, drawings, and letter and email correspondence between the parties relied upon in the general submission.
24. The Applicant's Payment Claim 9 was submitted to the Respondent on 27 June 2018 and the Revised Payment Claim 9 was submitted to the Respondent on 13 July 2018.
25. The Application was served on 16 October 2018 pursuant to s.28 of the Act.

The Response

26. The Response is dated 30 October 2018 and comprises a general submission, a statutory declaration with 16 attachments and with exhibits in each attachment. The attachments include:
- (a) copies of the Payment Claims from the Applicant, some annotated with hand written comments in the margins;
 - (b) claim assessment spreadsheets; and
 - (c) additional supporting evidence, including day work sheets, site instructions and email correspondence between the parties relied upon in the general submission.
27. The Response was served on 30 October 2018 pursuant to s.29 of the Act.

Adjudicator's Jurisdiction and the Act

28. The following sections of the Act apply to the Contract for the purposes of the Adjudicator's jurisdiction.
29. Section 4 of the Act – **Site in the Territory** – the site is [*site details redacted*] in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of s.4 of the Act.

30. Section 5 of the Act - **Construction Contract** - the Contract is an amended 'Australian Standard' AS 4906-2002, incorporating amendment No.1, an 'Amended Minor Works Contract' which is 'Principal' administered for use in undertaking 'construct-only' projects. The parties agree that they entered into a construction contract for the purposes of s.5(1) of the Act, in the terms set out in the Contract. I am satisfied that the Contract is a construction contract for the purposes of the Act as prescribed under s.5(1)(a) of the Act.
31. Section 6 of the Act – **Construction Work** – the work is for the site building activities for [*project details redacted*]. That work falls within the provisions of s.6(1) of the Act and I am satisfied that the work is construction work for the purposes of the Act.
32. 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.”*
33. In its submissions the Applicant says that it made a valid payment claim in that “....*the only requirements contained in the Contract in respect of the form of a progress claim are that it:*
- 31.1 *is in writing;*
- 31.2 *includes details of the value of WUC done;*
- 31.3 *may include details of other moneys due to the Applicant pursuant to the Contract....”*
34. The Applicant contends that Progress Claim 9 made on 27 June 2018 fulfils those requirements for the making of a payment claim under the Contract.

35. The Applicant also says that the Revised Progress Claim 9 made on 13 July 2018 corrected errors in the earlier Progress Claim 9, which errors were discussed and the amendments agreed between the parties, and that the Revised Progress Claim 9 is the valid and amended claim for the work done under the Contract for that period, which was fully approved by the Respondent.
36. The Respondent submits that Progress Claim 9 does not comply with the Contract and is therefore invalid and cannot cause a payment dispute for the purpose of adjudication. The Respondent says that the Applicant:
- (a) failed to submit progress claims in a timely manner;
 - (b) failed to include sufficient supporting documentation or, if the documentation was provided, it was in disarray and impossible to assess;
 - (c) failed to properly communicate with the Respondent when issues over the claim were raised by the Respondent;
 - (d) failed to provide the required documentary evidence that all subcontractors had been paid; and
 - (e) submitted inaccurate or incorrect progress claims.
37. The Respondent also submits that Progress Claim 9 must be made strictly in accordance with Item 14 of the Contract Annexure Part A – Item Schedule that “...*The Contractor may only submit progress claims (a) monthly, on the 20th day of each month...*”. The Respondent says that means the Applicant “...*may ONLY submit progress on the 20th of each month...*” without any “...*latitude or leeway...*”. The Respondent submits that as the Applicant did not submit Progress Claim 9 or Revised Progress Claim 9 claim on the 20th day of the month they are therefore invalid for the purpose of causing a payment dispute for adjudication.

38. The Respondent further submits that Revised Progress Claim 9 is a “...recycled claim...” of Progress Claim 9 and as determined in *AJ Lucas Operations Pty Ltd v Mac-Attack Hire Equipment Hire Pty Ltd* [2009] NTCA 4 (**Mac-Attack**) at [10] that the Act does not permit a payment claim that includes an amount that has previously been claimed in another payment claim.

Making a payment claim under the Contract

39. The terms for the making of a claim for payment under the Contract are set out in clause 23 of the Contract which states:

“.....**23 Payment**

23.1 Progress claims

The Contractor shall claim payment progressively in accordance with Item 14.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Principal and shall include details of the value of the WUC done and may include details of other moneys then due to the Contractor pursuant to the provisions of the Contract.

23.2 Certificates

The Principal shall.....”

40. The Contract - Annexure Part A – Item Schedule at item 14 states:

“.....**14 Times for progress claims**
(subclause 23.1)

The Contractor may only submit progress claims:

(a) monthly, on the 20th day of each month, up until the date of practical completion;

(b) once upon the date of practical completion; and

(c) in accordance with clause 23.3.....”

41. The Contract clause 23.3 are the terms that govern the “...*Final payment claim and certificate...*” and are not applicable to Progress Claim 9 or Revised Progress Claim 9 for the purposes of this adjudication.

Responding to a claim for payment under the Contract

42. The terms for responding to a claim for payment are set out in clause 23.2 of the Contract which states:

“.....23.2 Certificates

The Principal shall, within 14 days after receiving such a progress claim, assess the claim and shall issue a progress certificate stating the moneys due to the Contractor or the Principal, as the case may be. The Principal shall set out in the progress certificate the calculations employed to arrive at the amount certified and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

Within 21 days after receipt by the Principal of such a progress claim, the Principal or the Contractor, as the case may be, shall pay

(a) the amount certified, if the Principal has issued a progress certificate with respect to the progress claim; or

(b) the amount of the progress claim, if the Principal has not so certified.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment only.

Except as provided elsewhere in the Contract, the Principal shall not be obliged to pay for unfixed plant and materials....”.

43. The Respondent has not issued a “*progress certificate*” and accepts, at paragraph 19 of the Response, that it did not provide the certificate because it was of the view that the claim had not been made in accordance with the Contract and that “...*the Respondent is therefore not required to issue a progress certificate....*”. The Respondent has not made any payment to the Applicant.

Progress Claim 9 and the Revised Progress Claim 9

44. The Respondent submits in the first instance that Progress Claim 9 does not strictly comply with the Contract and is therefore not a valid claim.
45. In the alternative, the Respondent submits that Revised Progress Claim 9 is a recycled claim which is prohibited under the Act and the first iteration Progress Claim 9 is valid and caused a payment dispute.
46. The Applicant maintains that Progress Claim 9 is a valid claim and was amended by consent between the parties as Revised Progress Claim 9.
47. I am not with the Respondent on this point.
48. The Respondent has attempted to 'get a bet each way' in relation to Progress Claim 9 while at the same time attempting to invalidate Revised Progress Claim 9.
49. There is clear evidence in the correspondence between the parties at Attachment 22 of the Application which shows that the Respondent has accepted the Revised Progress Claim 9 following amendment of Progress Claim 9.
50. I am of the view, and after considering the evidence and the format of both Progress Claim 9 and Revised Progress Claim 9, that both claims comply with the Contract provisions of clause 23. There is sufficient information in both claims such that a contract administrator could perform an assessment and issue a progress certificate. The Contract imposed an obligation on the Respondent to issue a progress certificate, regardless of whether it thought it was not obliged to do so and, if the claim was invalid, to set out the reasons for making no payment to the Applicant. By its own admission, the Respondent did not do this.

Revised Progress Claim 9 - a recycled claim

51. The Respondent submits, in the alternative, that Revised Progress Claim 9 is a recycled claim which is prohibited under the Act.

52. There is no specific provision in the Act to prevent the recycling of payment claims, however in Mac-Attack the Court found that repeat claims were not envisaged by the Act and that the Act does not specifically permit a second or subsequent payment claim for an amount that has already been the subject of a previous payment claim. That decision was followed by the Western Australian State Administrative Tribunal in *Georgiou Group Pty Ltd v MCC Mining Pty Ltd* [2011] WASAT 120.
53. The issue with this claim for payment, however, is whether Revised Progress Claim 9 can be categorised as a repeat claim in the circumstances.
54. I am of the view that Revised Progress Claim 9 came about through consultation between the parties and the evidence of email correspondence between the Applicant and the Respondent of 13 July 2018 in relation to the Revised Progress Claim 9 after it had been submitted for assessment which states:
- “.....has approved the numbers on your claim. Can you please issue an invoice and I will get it processed....”*
55. Clearly, the Respondent has assessed Progress Claim 9 and asked for some changes, and those changes were provided by the Applicant on 13 July 2018 and the Respondent accepted the changes. This would be considered a normal and reasonable process of claim assessment and the Respondent was within its rights to discuss the claim with the Applicant.
56. I am of the view that Revised Progress Claim 9 superseded Progress Claim 9 as the valid payment claim for review by the Respondent of the scope and variational work carried out in the Contract for that period of claim.
57. I am also of the view that the claim process under the Contract provides for a ‘rolling claim’ given the claim spreadsheet showing the percentage of work done against each line item for the scope and variation to the Contract, the amounts already paid against that line item and the remaining amount now claimed in the current progress claim for the percentage of work done to-date.

58. The terms of clause 23 provide for a “rolling claim” as Her Honour Justice Kelly described in *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd & Anor* [2011] NTCA 1 at [122]. It directs the Applicant “....to specify the whole of the value of the work said to have been performed, from which must be deducted the amount already paid, the balance being the amount claimed on that payment claim....”. I am satisfied that there is no merit in the Respondent’s argument on this issue.
59. I am also satisfied that the Applicant’s Revised Progress Claim 9 made on 13 July 2018 in the sum of \$219,440.82 (excluding GST) complies with the stipulations of the Contract for the making of a claim for payment for work done and is therefore a valid payment claim for the purposes of s.4 of the Act.
60. Section 8 of the Act - **Payment Dispute** – A payment dispute arises if:
- “(a) a payment claim has been made under a contract and either:
- (i) the claim has been rejected or wholly or partly disputed; or
- (ii) when the amount claimed is due to be paid, the amount has not been paid in full; 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.”
61. The Applicant made a valid payment claim on 13 July 2018 as Revised Progress Claim 9 under clause 23 of the Contract for the provision of scope and variational works in the Contract.
62. The Contract at clause 23.2 provides for payment of a valid payment claim “....Within 21 days after receipt by the Principal of such a progress claim....”.
63. The Respondent was to have certified by way of a progress certificate any amount due to be paid to the Applicant for the work done in Revised Progress Claim 9 within “...14 Days...”. The Respondent did not issue a progress certificate and did not make any payment to the Applicant for its claim.

64. There is no definition of “Days” found in the Contract and as such a day would be calculated as a calendar day.
65. The payment claim was sent to the Respondent on 13 July 2018 and, by calculation, payment was due on or before 3 August 2018. The Respondent did not issue a progress certificate and did not make any payment to the Applicant under the Contract within this period.
66. I am of the view that Revised Progress Claim 9 was not paid by the Respondent on or before 3 August 2018 and that a payment dispute commenced the next day on 4 August 2018.
67. I am satisfied that there is a payment dispute for the purposes of s.8 of the Act and that that payment dispute commenced on 4 August 2018 under section 8(a)(ii) of the Act.
68. Section 28 of the Act – **Applying for Adjudication** – By reference to the documents of the Application dated 16 October 2018, served on the Respondent and the Prescribed Appointer the Resolution Institute on 16 October 2018. 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 r.6 of the Regulations.
69. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the documents of the Response dated 30 October 2018, served on the Applicant and the Adjudicator on 30 October 2018. 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 r.7 of the Regulations.
70. 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 Claim

71. The Revised Progress Claim 9 made by the Applicant in the Application comprises scope work agreed in the Contract and variation work requested by the Respondent through Site Instructions (SI) totalling the sum of **\$219,440.90 (excluding GST)**.
72. The Revised Progress Claim 9 spreadsheet submitted by the Applicant to the Respondent identifies each item of claim with a description, SI number and the quantum claimed for that item. The components of claim for Revised Progress Claim 9 are set out in Table 1 below. Included in Table 1 is the original Progress Claim 9, for comparison use only, and the certified amount assessed by the Respondent and provided as a certificate in the Response.
73. I am required by s.37 of the Act to consider the Respondent's certified assessment of the Applicant's claim as it holds the evidentiary weight I consider appropriate in the Adjudication.

Item	Description	Site Instruction	Progress Claim 9	Revised Progress Claim 9	Certified in Response (s.37)
1	Labour to install (20) steps and handrails	Scope	\$22,800.00	Removed now SI	N/A
2	Labour to install (4) ramps	Scope	\$26,600.00	Removed now SI	N/A
3	Unpack and install window shades to accommodation windows	Scope	\$950.00	Removed now SI	N/A
4	Installation of Partitions to Wet Toilets	Scope	\$4,560.00	\$4,560.00	\$4,560.00
5	Creation of Void for ductwork and bulkhead and work for VAE	14	Not claimed	\$14,996.00	\$0.00
6	Additional Mobilisation and Demobilisation	29	\$60,700.91	\$133,492.41	\$8,610.00
7	Install repaired doors and door furniture	30	\$2,660.00	\$2,660.00	\$1,960.00
8	Labour and Supervision to construct (7) walkways	32	\$4,940.00	\$8,645.00	\$3,640.00
9	Labour to assist Electricians	36	\$3,325.24	Withdrawn	\$0.00

10	Supervision and direction of works on site	39	\$11,500.00	\$7,897.50	\$3,990.90
11	Labour to install shower screens	40	Not claimed	\$1,900.00	\$0.00
12	Supply Carpenters, Labour and Tools to install ramps and stairs	41	\$9,500.15	Withdrawn	\$0.00
13	Factory Defects rectification	43	\$6,175.00	\$18,070.00	\$4,550.00
14	Install missing security screws	44	\$5,415.00	\$5,415.00	\$3,990.00
15	Rooftrimmers at SAT Dish	45	\$5,415.00	Withdrawn	\$0.00
16	Remove Stach scaffold	46	\$950.00	\$950.00	\$700.00
17	Complete vinyl reworks	47	\$2,300.00	\$3,450.00	\$1,400.00
18	Replace vinyl	48	\$2,870.00	\$2,870.00	\$1,820.00
19	Concrete to stairs	49	\$14,535.00	\$14,535.00	\$12,530.00
TOTAL			\$185,196.30	\$219,440.91	\$47,750.90
Taken Direct from Claim Spreadsheet					

Table 1.

74. A total claim of **\$219,440.91 (excluding GST)**.
75. There also appears to be an error in Progress Claim 9 calculations made by the Applicant. I have taken the value of the claim direct from the claim spreadsheet as indicated in Table 1 above.
76. I deal with each component of the Revised Progress Claim 9 below.

Scope Works under the Contract

Item 4 – Install partitions to the wet toilets in the sum of - \$4,560.00 (excluding GST)

77. The Applicant and the Respondent agree that this component of claim relates to the scope work under the Contract and the quantum is not in dispute.
78. The scope component of work for the installation of partitions to the wet toilets stands in the sum of **\$4,560.00 (excluding GST)**.

Variational Works directed to the Contract

79. Before I deal with each variational component of the claim, I will first deal with the applicable labour rates for SI work carried out by the Applicant in the Contract.
80. The Applicant has used rates of \$95 per hour for the general labour component of its variations or SI works in the Contract. The Applicant submits that this rate was agreed between the parties on 8 August 2018 and have used that rate for earlier SI work which was approved and paid by the Respondent.
81. The Respondent submits that this rate was not been agreed as “...*the applicable daily hour rate has been determined on a variation by variation (or site instruction) basis...*”. The Respondent also submits that the rate of \$95.00 per hour for general labour is unreasonably high and that it should be more reasonably set at \$70.00 per hour for the SI work undertaken by the Applicant in the Contract.
82. I am not with the Respondent on this issue.
83. The Applicant was directed by the Respondent on 8 August 2018 on how it was to submit claims for its SI work in the Contract. The Respondent’s “*Senior Contracts Administrator*” advised, among other things, that “...*You do SI works on an hourly rate, either \$95, \$97.50 or \$115 depending on the trade...*”.
84. It is clear from the above direction that the applicable rate for the SI work is \$95.00 per hour and by attendance to the rate breakdown provided by the Applicant in its further submissions that rate is reasonable for remote site work.

Item 5 – SI 14 - Creation of void for ductwork, bulkhead and VAE work in the sum of - \$14,996.00 (excluding GST)

85. The Applicant says that the claim was “...*for \$14,996.00 to close out that site instruction based on dayworks sheets...*”. The Applicant has also included several dayworks sheets at Attachment 21 which shows the hours expended on the SI 14 works in the Contract.

86. The Respondent submits that the SI 14 dayworks sheets submitted by the Applicant have already been assessed and paid in previous progress claims. The Respondent says that the dayworks sheets are dated January 2018 and the work was completed in February 2018. The Respondent also says that it would have been impossible to perform these works after February 2018 as the ceilings had been installed and access was no longer available to the Applicant to perform any work.
87. I am not with the Applicant on this component of claim.
88. The Applicant's day works sheets at Attachment 21 are dated between 6 January 2018 and 22 January 2018 and the Applicant has claimed a total of 45.5 hours for the SI 14 work in the Contract.
89. The Respondent's claim assessment spreadsheet provided in its further submissions shows a claim total already paid for SI 14 in the sum of \$5,065.95 (excluding GST).
90. There are no further dayworks sheets or evidence from the Applicant in relation to SI 14.
91. I value the SI 14 variation to the Contract at "**Nil**" in this Adjudication.

Item 6 – SI 29 – Additional Mobilisation and Demobilisation in the sum of - \$133,492.41 (excluding GST)

92. The Respondent issued SI 29 to the Contract for "...*Additional flights, mobe/demobe outside scope of work...*".
93. The Applicant submits that the claim component comprises airfares, fuel, car hire and labour as follows:
- (a) Airfares at agreed rate;
 - (b) Fuel \$788.98 + 15%;
 - (c) Car Hire March – June 2018 \$26,269.19 + Margin;

- (d) Labour 562.5 Hours; and
 - (e) Materials \$76,339.61 + Margin.
94. A total claim component of \$133,492.41 (excluding GST) which the Applicant has supported with day works sheets totalling 178 hours and car hire invoices in the sum of \$8,792.63 (excluding GST).
95. The Respondent submits that on the evidence provided by the Applicant the claim component is only valued at \$8,610.00 (excluding GST) as follows:
- (a) Airfares (rate not agreed) valued at nil – no evidence;
 - (b) Fuel valued at nil – no evidence;
 - (c) Car Hire – invoices at \$9,672.10 no entitlement valued at nil;
 - (d) Labour 123 hours; and
 - (e) Materials included with the labour.
96. The Respondent also says that the airfare rate of \$1,897.50 per person for a return flight from Perth to Darwin was not agreed between the parties.
97. I am not with either the Applicant or the Respondent on this claim component.
98. From the dayworks sheets it is clear that 13 people were mobilised to the site and 4 people were demobilised from site for the SI work in the Contract. It is also clear that car hire was necessary to transport these people to and from Darwin and the site, which would include fuel. The Applicant has provided evidence of labour hours and car hire which would also attract airfares and fuel respectively for mobilisation and demobilisation to and from the site.

99. The Respondent has confirmed prior correspondence of 20 March 2018 from the Applicant stating that “....*Today’s bookings for flights on Thursday are costing \$1,650.00 per person, with mark up its \$1,897.50...*” which sum presumably includes GST. The return cost exclusive of GST would be \$1,725.00 but would include mark-up of 15%. The Applicant has incurred the cost of 17 one-way airfares for the work in the daywork sheets which would be a cost of \$14,662.50 (excluding GST). The Contract at clause 23.2 provides that all payments are on account and the Applicant has provided details of the costs incurred in performing the SI work in accordance with clause 23.1 of the Contract.
100. Similarly, the cost of fuel would reasonably be incurred in transporting personnel to and from site. The cost of fuel exclusive of GST but with mark-up would be \$824.84 (excluding GST).
101. The Applicant has also included costs of \$76,339.61 (excluding GST) for materials, however there is no evidence whatsoever supporting that claim component. The value of this component would be “Nil” as it is not difficult to provide evidence by way of delivery notes and supplier invoices that would show the quantum and type of materials supplied into the SI work for the Contract.
102. In pulling the various threads together, I find the claim component for the additional mobilisation and demobilisation to be as follows:
- (a) Airfares for 17 half fares at \$14,662.50 (excluding GST);
 - (b) Fuel at \$824.84 (excluding GST);
 - (c) Car Hire at \$8,792.63 (excluding GST);
 - (d) Labour 178 hours at \$95 per hour - \$16,910.00 (excluding GST); and
 - (e) Materials at “Nil”.
- A total value of \$41,189.97 (excluding GST).

103. The SI 29 claim component for mobilisation and demobilisation stands in the sum of **\$41,189.97 (excluding GST)**.

Item 7 – SI 30 – Install repaired doors and door furniture in the sum of - \$1,960.00 (excluding GST)

104. The Applicant has provided dayworks sheets showing 28 hours of labour expended in completing the SI 30 variational work in the Contract.

105. The Respondent does not dispute the hours and disputes only the rate which it says should be \$70.00 per hour for general labour.

106. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.

107. By calculation, this claim component ought to be \$2,660.00 (excluding GST), however the Applicant has claimed only \$1,960.00 (excluding GST) for its claim component leaving an amount of \$700.00 yet to claim for the SI 30 work in the Contract.

108. The SI 30 claim component for installation of repaired doors and door furniture stands as claimed in the sum of **\$1,960.00 (excluding GST)**.

Item 8 – SI 32 – Labour and Supervision to construct (7) walkways in the sum of - \$8,645.00 (excluding GST)

109. The Applicant has provided dayworks sheets showing 91 hours of labour expended in completing the SI 32 variational work in the Contract.

110. The Respondent does not dispute 52 hours and submits that there are only two valid dayworks sheets submitted by the Applicant. The Respondent also submits that the variational rate should be \$70.00 per hour for general labour.

111. I am not with the Respondent on this issue.

112. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.

113. Turning to the dayworks sheets provided by the Applicant, there are four dayworks sheets provided by the Applicant, however the Respondent submits that because two sheets are dated 22 June 2018 they fall outside the period of the Revised Progress Claim 9 and are therefore not valid. I disagree.
114. The Applicant was asked by the Respondent to resubmit their claim and did so on 13 July 2018, which was well after the claim period, and which included some work done for the next period. Some of the claim components increased, some were withdrawn and new claim components added to arrive at the Revised Progress Claim 9. That claim was accepted by the Respondent for processing and the Respondent was fully aware of the components of the claim and the date of the claim.
115. The Applicant has submitted dayworks sheets showing 91 hours of labour expended on the walkways and, by calculation, that component of claim is valued at \$8,645.00 (excluding GST).
116. The SI 32 claim component for labour and supervision to construct (7) walkways stands in the sum of **\$8,645.00 (excluding GST)**.

Item 9 – SI 36 – Labour to assist Electrician – Withdrawn

117. The Applicant has withdrawn this component of claim and I am not required to consider it further.

Item 10 – SI 39 – Supervision and direction of works on site in the sum of - \$7,897.50 (excluding GST)

118. The Applicant has provided dayworks sheets showing 81 'Supervision' hours for the SI 39 variational work in the Contract.
119. The Respondent does not dispute 61 hours and submits that there are only two valid dayworks sheets submitted by the Applicant. The Respondent also submits that the variational rate for a Supervisor should be \$80.00 per hour.
120. I am not with the Respondent on this issue.

121. The rate for general labour in the Contract has been reasoned at paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour. A supervisor generally receives approximately 20% uplift on the general labour rate and, given the nature of the construction work, it would not be unreasonable for a supervisor on a remote site to attract this rate.
122. The increase in rates for specific skills has been directed by the Respondent on 8 August 2018 where the Respondent's Senior Contracts Administrator stated "...You do SI works on an hourly rate, either \$95, \$97.50 or \$115 depending on the trade...". This would also extend to a supervisor for each trade.
123. It is clear from the above direction that the applicable rate for the SI work is \$95.00 per hour and a reasonable uplift of at or about 20% would extend this rate to \$115.00 per hour as indicated by the Respondent on 8 August 2018.
124. Turning to the dayworks sheets provided by the Applicant, there are eight dayworks sheets provided by the Applicant, however the Respondent submits that because two sheets are dated 21 June 2018 and 22 June 2018 respectively they fall outside the period of the Revised Progress Claim 9 and are therefore not valid. I disagree.
125. The Applicant was asked by the Respondent to resubmit their claim and did so on 13 July 2018, which was well after the claim period, and which included some work done for the next period. Some of the claim components increased, some were withdrawn and new claim components added to arrive at the Revised Progress Claim 9. That claim was accepted by the Respondent for processing and the Respondent was fully aware of the components of the claim and the date of the claim.
126. The Applicant has submitted dayworks sheets showing 81 supervision hours for the works on site and, by calculation, that component of claim is valued at \$9,315.00 (excluding GST). The Applicant has only claimed \$7,897.50 (excluding GST) for its claim component leaving an amount of \$1,417.50 yet to claim for the SI 39 work in the Contract.

127. The SI 39 claim component for Supervision and direction of works_stands as claimed in the sum of **\$7,897.50 (excluding GST)**.

Item 11 – SI 40 – Labour to install shower screens in the sum of - \$1,900.00 (excluding GST)

128. The Applicant has provided one dayworks sheet showing 20 hours of labour expended in completing the SI 40 variational work in the Contract.
129. The Respondent submits that because the dayworks sheet is dated 22 June 2018 it falls outside the period of the Revised Progress Claim 9 and is therefore not valid. I disagree for the reasons set out in paragraph [114] above.
130. The Applicant has submitted a dayworks sheet showing 20 hours of labour expended in fitting the shower screens and, by calculation, that component of claim is valued at \$1,900.00 (excluding GST).
131. The SI 40 claim component for labour to install shower screens stands in the sum of **\$1,900.00 (excluding GST)**.

Item 12 – SI 41 – Supply Carpenters, labour and tools to install ramps and stairs - Withdrawn

132. The Applicant has withdrawn this component of claim and I am not required to consider it further.

Item 13 – SI 43 – Factory defect rectification in the sum of - \$18,070.00 (excluding GST)

133. The Applicant has provided dayworks sheets showing 176 hours of labour expended in completing the SI 43 variational work in the Contract.
134. The Respondent does not dispute 65 hours and submits that these hours are from the appropriate dayworks sheets submitted by the Applicant. The Respondent also submits that the variational rate should be \$70.00 per hour for general labour.
135. I am not with the Respondent on this issue.

136. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour and for the reasons set out in paragraph [114] above all the dayworks sheets are applicable to the Revised Progress Claim 9 in the Contract.
137. The Applicant has submitted dayworks sheets showing 176 hours of labour expended in completing factory defects rectification and, by calculation, that component of claim is valued at \$16,720.00 (excluding GST).
138. The Applicant has claimed the sum of \$18,070.00 (excluding GST) but has not provided any additional evidence that would show how the additional amount has been calculated and supported.
139. The SI 43 claim component for labour expended in completing factory defects rectification stands in the sum of **\$16,720.00 (excluding GST)**.

Item 14 – SI 44 – Install missing security screws in the sum of - \$5,415.00 (excluding GST)

140. The Applicant has provided dayworks sheets showing 57 hours of labour expended in completing the SI 44 variational work in the Contract.
141. The Respondent does not dispute the 57 hours in the dayworks sheets provided by the Applicant. The Respondent maintains that the variational rate should be \$70.00 per hour for general labour.
142. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.
143. The Applicant has submitted daywork sheets showing 57 hours of labour expended in installing missing security screws and, by calculation, that component of claim is valued at \$5,415.00 (excluding GST).
144. The SI 44 claim component for labour expended to Install missing security screws stands in the sum of **\$5,415.00 (excluding GST)**.

Item 15 – SI 45 – Roof trimmers at the SAT Dish - Withdrawn

145. The Applicant has withdrawn this component of claim and I am not required to consider it further.

Item 16 – SI 46 – Remove Stach scaffold in the sum of - \$950.00 (excluding GST)

146. The Applicant has provided dayworks sheets showing 10 hours of labour expended in completing the SI 46 variational work in the Contract.

147. The Respondent does not dispute the 10 hours in the daywork sheets provided by the Applicant. The Respondent maintains that the variational rate should be \$70.00 per hour for general labour.

148. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.

149. The Applicant has submitted daywork sheets showing 10 hours of labour expended in removing Stach scaffold and, by calculation, that component of claim is valued at \$950.00 (excluding GST).

150. The SI 46 claim component for labour expended in removing Stach scaffold stands in the sum of **\$950.00 (excluding GST)**.

Item 17 – SI 47 – Complete vinyl reworks in the sum of - \$3,450.00 (excluding GST)

151. The Applicant has provided two dayworks sheets showing 30 hours of labour expended in completing the SI 47 variational work in the Contract.

152. The Respondent does not dispute 20 hours and submits that these hours are from the appropriate dayworks sheets submitted by the Applicant. The Respondent also submits that the variational rate should be \$70.00 per hour for general labour.

153. I am not with the Respondent on this issue.

154. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour and for the reasons set out in paragraph [114] above, all the dayworks sheets are applicable to the Revised Progress Claim 9 in the Contract.
155. The Applicant has submitted dayworks sheets showing 30 hours of labour expended in completing vinyl reworks and, by calculation, that component of claim is valued at \$2,850.00 (excluding GST).
156. The Applicant has claimed the sum of \$3,450.00 (excluding GST) but has not provided any additional evidence that would show how the additional amount has been calculated and supported.
157. The SI 47 claim component for labour expended in completing vinyl reworks stands in the sum of **\$2,850.00 (excluding GST)**.

Item 18 – SI 48 – Replace vinyl in the sum of - \$2,870.00 (excluding GST)

158. The Applicant has provided a dayworks sheet showing 26 hours of labour expended in completing the SI 48 variational work in the Contract.
159. The Respondent does not dispute the 26 hours in the dayworks sheets provided by the Applicant. The Respondent maintains that the variational rate should be \$70.00 per hour for general labour.
160. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.
161. The Applicant has submitted dayworks sheets showing 26 hours of labour expended in replacing vinyl and, by calculation, that component of claim is valued at \$2,470.00 (excluding GST).
162. The Applicant has claimed the sum of \$2,870.00 (excluding GST) but has not provided any additional evidence that would show how the additional amount has been calculated and supported.

163. The SI 48 claim component for labour expended in replacing vinyl stands in the sum of **\$2,470.00 (excluding GST)**.

Item 19 – SI 49 – Concrete to stairs in the sum of - \$14,535.00 (excluding GST)

164. The Applicant has provided a dayworks sheet showing 153 hours of labour expended in completing the SI 49 variational work in the Contract.

165. The Respondent does not dispute the 153 hours in the dayworks sheets provided by the Applicant. The Respondent maintains that the variational rate should be \$70.00 per hour for general labour.

166. For the reasons set out in paragraphs [79] to [84] above, the applicable rate agreed between the parties is \$95.00 per hour.

167. The Applicant has submitted dayworks sheets showing 153 hours of labour expended in concrete stairs work and, by calculation, that component of claim is valued at \$14,535.00 (excluding GST).

168. The SI 49 claim component for labour expended in completing concrete stairs work stands in the sum of **\$14,535.00 (excluding GST)**.

169. Pulling the threads together for each component of the Revised Progress Claim 9, it can be seen in Table 2 below the value of the Applicants claim is \$109,092.47 (excluding GST).

Item	Description	Site Instruction	Revised Progress Claim 9	Certified in Response (s.37)	Determination
1	Labour to install (20) steps and handrails	Scope	Removed now SI	N/A	N/A
2	Labour to install (4) ramps	Scope	Removed now SI	N/A	N/A
3	Unpack and install window shades to accommodation windows	Scope	Removed now SI	N/A	N/A
4	Installation of Partitions to Wet Toilets	Scope	\$4,560.00	\$4,560.00	\$4,560.00
5	Creation of Void for ductwork and bulkhead and work for VAE	14	\$14,996.00	\$0.00	\$0.00
6	Additional Mobilisation and Demobilisation	29	\$133,492.41	\$8,610.00	\$41,189.97

7	Install repaired doors and door furniture	30	\$2,660.00	\$1,960.00	\$1,960.00
8	Labour and Supervision to construct (7) walkways	32	\$8,645.00	\$3,640.00	\$8,645.00
9	Labour to assist Electricians	36	Withdrawn	\$0.00	\$0.00
10	Supervision and direction of works on site	39	\$7,897.50	\$3,990.90	\$7,897.50
11	Labour to install shower screens	40	\$1,900.00	\$0.00	\$1,900.00
12	Supply Carpenters, Labour and Tools to install ramps and stairs	41	Withdrawn	\$0.00	\$0.00
13	Factory Defects rectification	43	\$18,070.00	\$4,550.00	\$16,720.00
14	Install missing security screws	44	\$5,415.00	\$3,990.00	\$5,415.00
15	Rooftrimmers at SAT Dish	45	Withdrawn	\$0.00	\$0.00
16	Remove Stach scaffold	46	\$950.00	\$700.00	\$950.00
17	Complete vinyl reworks	47	\$3,450.00	\$1,400.00	\$2,850.00
18	Replace vinyl	48	\$2,870.00	\$1,820.00	\$2,470.00
19	Concrete to stairs	49	\$14,535.00	\$12,530.00	\$14,535.00
TOTAL			\$219,440.91	\$47,750.90	\$109,092.47

Table 2.

170. I award the sum of **\$109,092.47 (excluding GST)** for the Applicant's Revised Progress Claim 9 in the Contract.

Interest on the claim

171. The amount the Respondent is to pay the Applicant is \$109,092.47 (excluding GST).

172. The Contract at clause 23.4 provides for interest on late payments as follows:

"....Interest in Item 15 shall be due and payable after the date of default in payment...."

173. The Contract Annexure Part A , Item Schedule at Item 15 states:

*"...15 Interest rate on overdue paymentsNil.... % per annum
(subclause 23.4) If nothing stated 18% per annum...."*

174. The parties have agreed that there will be no interest payable under the Contract on late payments.
175. The Act at s.35 provided a discretion to an adjudicator to make an award of interest, however that award is limited under s.35(1)(a) to “...*the payment in accordance with the contract...*”.
176. As the parties have agreed at Item 15 that there will be “*Nil*” interest on late payments I make no award of interest.

Summary

177. 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 Revised Progress Claim 9 to be the valid payment claim for adjudication under the Act;
 - (e) The dispute to be a payment dispute under the Act;
 - (f) The Application to be a valid application under the Act;
 - (g) The Response to be a valid response under the Act;
 - (h) The Applicant’s claim to stand as set out in Table 2 in the sum of \$109,092.47 (excluding GST); and
 - (i) There is no interest payable on late payments under the Contract.
178. I determine that the amount to be paid by the Respondent to the Applicant in relation to Revised Progress Claim 9 under the Contract, is **\$120,001.72 (including GST)**.

179. This sum is to be paid to the Applicant by the Respondent on or before **14 December 2018.**

Costs

180. The normal starting position for costs of an adjudication is set out in section 36(1) and section 46(4) of the Act is that each party bear their own costs in relation to an adjudication.

181. The Act at section 36(2) gives Adjudicators discretion to award costs:

“...if an appointed adjudicator is satisfied a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs...”.

182. I have not found either the Application or the Response 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.

183. The test for determining whether a proceeding is vexatious is set out by Roden J in *Attorney General v Wentworth* (1988) 14 NSWLR 481 at 491 where:

“1. Proceedings are vexatious if they are instituted with the intention of annoying or embarrassing the person against whom they are brought.

2. They are vexatious if they are brought for collateral purposes, and not for the purpose of having the court adjudicate on the issues to which they give rise.

3. They are also properly to be regarded as vexatious if, irrespective of the motive of the litigant, they are so obviously untenable or manifestly groundless as to be utterly hopeless.”

184. I have not found either the Applicant or the Respondent to have made any unfounded submissions or caused additional costs due to vexatious or frivolous conduct and I am not persuaded that either party has acted in a way that requires me to apply the provisions of s.36(2) of the Act.
185. I make no decision under s.36(2) of the Act.
186. I determine that the parties bear their own legal costs under s.36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under s.46(4) of the Act.

Confidential Information

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

Closing Remarks

188. This is already a lengthy set of reasons, necessarily in light of the fact that the claim and several arguments I have had to consider each involved factual consideration unique to that item. I have focused on what have seemed to me to be those submissions that are most central to the issues in dispute. But I have considered all the material put before me, and the parties should not assume that my not reciting any particular piece of submission or evidence means that I have overlooked it.

DATED: 30 November 2018



Rod Perkins
Adjudicator No. 26