**Adjudicator’s Determination**

**Pursuant to the Construction Contracts Act 2004**

|  |  |  |
| --- | --- | --- |
| Adjudication Number | **34.16.01** | |
| Prescribed Appointor | **RICS Dispute Resolution Service.** | |
| Adjudicator | **Colin Bond** (Adjudicator 34) | |
| Applicant: | [redacted] | |
| Respondent: | [redacted] | |
| Project: | [redacted]. | |
| Amount to be paid by Respondent | **$3,372,045.80** | |
| Due Date For Payment | 21st April 2016 | |
| Adjudication Fees Apportionment | Applicant: | 50% |
| Respondent: | 50% |
| Date of Determination or Dismissal | 18th July 2016 | |
|  | | |
| Payment Claim | Claimed Amount : **$6,478,840.50** including GST | |
| Dated : 24th March 2016 | |
| Notice of Dispute / Response to Payment Claim | Dated: 31st March 2016 | |
| Adjudication Application | Dated: 15th June 2016 | |
| Adjudicator Acceptance | Dated: 16th June 2016 | |
| Adjudication Response | Dated: 27th June 2016 | |

**Table of Contents:**

[The Determination or Dismissal 3](#_Toc456465005)

[Background 3](#_Toc456465006)

[Appointment 3](#_Toc456465007)

[Material 3](#_Toc456465008)

[Jurisdiction 4](#_Toc456465009)

[Payment Claim 7](#_Toc456465010)

[Notice of Dispute / Response to Payment Claim 8](#_Toc456465011)

[Adjudication Application 9](#_Toc456465012)

[Adjudication Response 9](#_Toc456465013)

[Reason for the Determination 10](#_Toc456465014)

[Contract 10](#_Toc456465015)

[Issues in Dispute 10](#_Toc456465016)

[Delay Costs 32](#_Toc456465032)

[Deduction of Liquidated Damages 32](#_Toc456465033)

[Valuation of issues in dispute 33](#_Toc456465034)

[Adjudication costs 34](#_Toc456465035)

[Interest Costs 34](#_Toc456465036)

[Confidential Information 34](#_Toc456465037)

# The Determination or Dismissal

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the Construction Contracts (Security of Payments) Act 2004 (NT) (the Act), for the reasons set out in this determination, determine that:
   1. The amount to be paid by the respondent to the applicant is **$3,372,045.80** including GST
   2. Interest is due on the adjudicated amount at a rate of 8% per annum from 21st April 2016
   3. The respondent is to pay the adjudicated amount to the applicant within 7(seven) days of the date of the determination being released

# Background

* 1. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of the supply by the applicant of goods and services to construction works carried out under a contract between the parties for the supply of [*electrical equipment*] at the [*project site in the*] Northern Territory (the Project).

# Appointment

* 1. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
  2. The adjudication application was referred to me as adjudicator on 16th June 2016 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
  3. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 16th June 2016.

# Material

* 1. The following material was provided to me:
* Adjudication Application dated 17th June 2016
* Adjudication Response dated 27th June 2016
  1. On 18th June 2016 pursuant to section 34(2)(a) of the Act I requested further submissions from the parties. The following responses were received:
* The respondent’s further submission dated 18th June 2016 including unsolicited submissions
* The applicant’s further submission dated 20th June 2016
  1. On 26th June 2016, a copy of an e-mail letter addressed to Neil Kirkpatrick (Adjudicator 43) was received from the respondent with a copy of the letter from Neil Kirkpatrick dated 25th June 2016 advising of an extension to the *prescribed time* under section 33(3) of the Act for the adjudication number 43.16.01 being run concurrently between the same parties. This letter from the respondent also raised concerns relating to issue estoppel and natural justice for the matter 43.16.01.
  2. On 26th June 2016, an email letter was received from the respondent addressed to myself, (Adjudicator 34) concerning issue estoppel and natural justice for the matter 34.16.01
  3. I received a copy of an e-mailed letter addressed to Mr Kirkpatrick dated 28th June 2016 responding to the request for responsive submissions from Mr Kirkpatrick regarding the unsolicited submissions made by the respondent in its letter dated 26th June 2016.
  4. Any jurisdictional issues referenced in the unsolicited submissions have been addressed under the heading “**Jurisdiction**” below.

# Jurisdiction

* 1. The work executed under the construction contract is ‘construction work’ as defined under section 6(1) of the Act.
  2. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
  3. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
  4. The respondent has raised several issues relating to jurisdiction in its adjudication response and response to my request for submissions dated 18th June 2016[[1]](#footnote-1). Whilst several of the issues raised by the respondent in its letter dated 18th June 2016 were unsolicited I have addressed each one that relates to jurisdiction as follows:

1. *Invalid service of the Adjudication Application – respondent address and prescribed appointer*
   1. The respondent states that the service of the adjudication application was defective.
   2. Further to my request for submissions with regard to service of the adjudication application, the applicant has provided a detailed chronology of the location, date and time of service of each of the four separate copies of the adjudication application.
   3. Therefore, based on the information provided I do not agree that the service was defective and consider that the adjudication application has been properly served to the required addresses in accordance with the Act and the NT *Interpretation Act* and as explained in more detail in the **Adjudication Application** section.
2. *Two Adjudication Applications and Issue Estoppel and Natural Justice*
   1. The respondent identifies that there is another adjudication application on foot between the parties. It was commenced a matter of days before this application and it significantly duplicates matters in this application. In particular it contains claims for extension of time and related relief which are identical to claims in this adjudication application. The respondent states that as the other application had commenced earlier, the decisions on some of those matters will be made by Mr Kirkpatrick and those decisions will be binding on me as an adjudicator in this subsequent dispute.
   2. The NT Act does not prohibit two or more payment disputes from being adjudicated at the same time by different adjudicators nor does it contain any further provisions for the timing of any such applications. In fact the NT Act anticipates this will occur due to the timeframe of 90 days for lodging adjudication applications. The Act provides that the same adjudicator can adjudicate simultaneously two or more payment disputes between the parties with consent of the parties[[2]](#footnote-2). On two previous occasions I have adjudicated two adjudication applications concurrently for the same parties in relation to the NT Act.
   3. In addition, the respondent further states in its response[[3]](#footnote-3) that two further key matters that should be considered in paragraph 27 of the applicant’s letter dated 28th June 2016:
      1. *first, the submission of two applications by [the applicant] within a space of days is a clear indication of this vexatious and deliberate strategy; and*
      2. *second, and further evidence of this vexatious strategy, is that ABB’s submissions on the factual and legal issues in the Second Purported Adjudication Application were* ***lifted directly, word for word****, from the First Purported Adjudication Application….*
   4. As detailed above, the respondent states in its submissions that the matters the adjudicators are being asked to determine are identical, in particular in regard to extensions of time. However in the Statutory Declaration of [*A*][[4]](#footnote-4) for the respondent, a table has been presented showing the amounts claimed for Payment Claim 9 compared to Payment claim 10. It is self-evident that the amounts being claimed for payment claim 10 relate to unapproved VAR’s in the sum of $5,889,855.00 which are not the subject of any claim in Payment claim 9.
   5. Furthermore, I consider that the NT Act does not restrict a party making the same or similar submissions in relation to aspects of separate payment disputes in two applications made to two different adjudicators. I also agree that it is inevitable that there will be some overlap in submissions concerning disputes between the same parties under the same contract.
   6. Therefore, based on the evidence presented, I do not believe that issue estoppel and natural justice applies and that the applicant has properly exercised its statutory right under the NT Act to have two separate payment disputes adjudicated under two separate adjudication applications by two separate adjudicators.
3. *Invalid service of the Adjudication Application – not all information attached*
   1. The respondent states that it had previously requested an electronic version of the program that shows the critical path and delay events from the applicant and that not providing this information was a contravention of section 28(2)(c) of the Act and that the application should therefore be dismissed for not providing this information. Section 28(2)(c) states:

*“state or have attached to it all the information, documents and submissions on which the party making it relies in the adjudication”*

* 1. The Adjudication Application and associated submissions contained 7 lever arch files of documents and supporting submissions in relation to the application. As mentioned previously, I have addressed the Jurisdictional issue of address service in further detail below in the **Adjudication Application** section and therefore do not believe the omission of one electronic document can be a contravention of section 28(2)(c) and a reason to dismiss the applicant’s application as the applicant in its adjudication application and Expert Delay report has described and stated the nature of the critical delay events which occur on the critical path.
  2. I am therefore satisfied that the requirements of section 28(2)(c) have been complied with and that the Adjudication Application has been served validly.

1. *No valid Payment Claim*
   1. The respondent states that the payment claim was not valid. I do not agree that the payment claim was invalid and I consider that it has been served in accordance with the Act and as explained in more detail in the **Payment Claim** section.
2. *Complex Matter*
   1. Finally, the respondent also states that this matter is one of considerable complexity factually, contractually and legally, in addition this complexity is magnified by the technical issues raised.
   2. I have reviewed the application, response and submissions, including all technical and legal arguments and do not agree that this matter is overly complex. Therefore, I do not consider that I should dismiss this application under section 33(1)(a)(iv)(A).
3. *Alleged Waiver of Notice Requirements, No Estoppel Arises and Set-Off*

* 1. As I don’t see these as overarching Jurisdictional issues but more specific to the Variation claims and Extension of Time claims, I shall address these issues below under each relevant section in **Issues in Dispute**.
  2. I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

# 

# Payment Claim

* 1. The applicant served the respondent with its Payment Claim dated 24th March 2016 in respect of the supply of goods and services to construction works carried out under a contract between the parties for the supply of [electrical] equipment [*details redacted*] at [*project details redacted*] (the Project).
  2. The respondent has not denied receiving the applicant’s payment claim.
  3. It is common ground that a construction contract exists.
  4. The respondent does however state in its adjudication response the claim was not a valid payment claim for the purpose of the Contract as it failed to meet the requirements for a valid payment claim contained in the Contract.
  5. Clause 12.1 of the General Conditions of Contract states:

*“the applicant must submit a payment claim to the respondent on the 1st business day of each month or within 30 business days after completing the payment milestone”*

* 1. It is common ground that the payment claim was submitted on 24th March 2016 and whilst it was not submitted on the 1st of the month, the applicant is entitled to monthly progress payments and submission of a monthly payment claim later than the 1st of each month does not preclude the applicant from the entitlement to claim a monthly progress payments.
  2. The respondent goes on to state that the applicant is also not entitled to payment of the payment claim until a tax invoice is issued and therefore is not a valid payment claim under the Act. I do not consider that the failure to issue an invoice will render the payment claim invalid.
  3. It is common ground that the respondents response to the payment claim dated 31st March 2016 was to reject the amount claimed in the payment claim in its entirety. As the certified amount is Nil the applicant would therefore have no need to raise a tax invoice. A failure to raise a tax invoice when the certified amount is Nil could not logically be reason for an invalid payment claim under the Act.
  4. I am satisfied that the payment claim is valid for the purposes of the Act and do not consider it to have been issued outside the provisions of the contract.

# 

# Notice of Dispute / Response to Payment Claim

* 1. A response to the payment claim served by the respondent in accordance with section 20 of the Act and within the prescribed timeframes.
  2. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

# 

# Adjudication Application

* 1. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
  2. It is common ground that the respondent issued the applicant with its payment schedule on 31st March 2016 which indicated that no payment amount was payable. I am satisfied that the payment dispute arose on 31st March 2016 and therefore the 90 day period in relation to when the adjudication application may be served has been satisfied.
  3. The applicant applied for adjudication of the payment dispute on 15th June 2016 and within the time allowed pursuant to section 28(1) of the Act.
  4. The application is in writing pursuant to section 28(1)(a) of the Act.
  5. The application was served on the respondent pursuant to section 28(1)(b) of the Act.
  6. The application was served on RICS Dispute Resolution Service pursuant to section 28(1)(c)(iii) of the Act.
  7. Within the adjudication response and the submissions the respondent has stated that the adjudication application was not served within time at the appropriate address[[5]](#footnote-5) for service and in addition supporting documents were not served to the appropriate address.
  8. The applicant’s letter dated 20th June 2016 in response to my request for submissions provides a detailed chronology of how service of the adjudication application was made. This submission provides relevant reference to the particular sections of the NT *Construction Contracts (Security of Payments) Act*, the NT *Interpretation Act* and the NT Construction Contracts (Security of Payments) Regulations.
  9. From the evidence provided by the applicant I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

# Adjudication Response

* 1. Pursuant to section 29(1) of the Act the respondent has 10 working days after the date on which it is served with an application for adjudication in which to prepare and serve its written response on the adjudicator and the applicant.
  2. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

# Reason for the Determination

* 1. In making this determination I have had regard to the following matters, pursuant to section 34 of the Act:
     + the application and its attachments; and
     + the further written submissions validly made by the parties.

# Contract

* 1. The applicant in its adjudication application has provided a copy of the Subcontract General Terms and Conditions and Special Contract Conditions.
  2. It is common ground that a Construction Contract exists between the parties for the supply of [*electrical*] equipment – [*equipment details redacted*] at [*project site details redacted*] (the Project).

# Issues in Dispute

* 1. As discussed above, the respondent has disputed the validity of the adjudication application and payment claim for reasons as detailed in the Adjudication Response and submissions. I have addressed these issues above and I am satisfied that both the adjudication application and payment claim comply with the requirements of the Act.
  2. In addition to the jurisdictional issues which I have dealt with above I have summarised the key issues in dispute as follows:

1. Variations - The applicant is claiming payment in respect of 15 variation claims that have been categorised as follows:  
   1. Agreed Valuations - the applicant states that the **“Agreed Valuations”** are agreed variation claims in which the parties are agreed on valuation except that Milestone 6 and Milestone 7 have not been satisfied and therefore no Change Orders have been issued (as per [*A*] for the respondent’s Statutory Declaration). These include VAR26 and VAR27.
   2. Approved in Principle Changes Variations – the applicant states that **“Approved in Principal Changes”** are variation claims in which valuations have not been agreed as the applicant has not provided pricing details. These include VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46.
   3. Disputed Changes Variations – the applicant states that the **“Disputed Changes”** are claims that the respondent denies are changes under the Contract and disputes both liability and quantum. These include VAR17, VAR34, VAR35, VAR36, VAR37, VAR41 and VAR42.
2. Extension of Time Entitlement and Delay Costs
3. Deduction of Liquidated Damages

# i. Variations – a. Agreed Valuations (VAR26, VAR27)

**VAR26 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and the adjudication response that the reasons for withholding payment for VAR26 and VAR27 is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. It is common ground as stated in paragraph 90[[6]](#footnote-6) of [*A’s*] Statutory Declaration for the respondent, that the quantum of VAR26 and VAR27 has been agreed.
  2. In the payment schedule, the reason for withholding payment is due to the Change Order not being issued by the respondent and in the adjudication response the respondent goes on to further state that sufficient notice of claims was not given and therefore strict compliance with notice provisions under the Contract had not been adhered to.
  3. In the adjudication application, the applicant refers to clause 18 of the General Conditions of Contract regarding notice of claims and that the Contract allows for the applicant to make a claim for an increase in the Contract Price arising from a variation to the equipment or works. The applicant has provided documents supporting the applicant’s claim to entitlement, which I am satisfied complies with clause 18 of the General Conditions of Contract.
  4. Therefore I am satisfied with the information that the applicant has provided, that the provisions of clause 18 have been complied with regarding claims arising from a variation to the Works and I therefore consider that the contractual provisions in the contract have been adhered to in this regard and therefore failure to adhere to the provisions of the contract is not a valid reason for withholding payment.
  5. I have previously provided my reasons for not supporting the respondent’s view that the payment claim was invalid due to no tax invoice in the payment claim section above.

* 1. In the adjudication response and [*A’s*] Statutory Declaration, the respondent states that the obligation not to pay arises from milestones 6 and 7 not being reached. Milestone payments relate to the contract works and as these are variation claims, failure to achieve milestones 6 and 7 are not a precondition to payment of variations.
  2. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[7]](#footnote-7) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  3. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  4. Therefore I value VAR26 & VAR27 as follows. VAR26 in the sum of $7,965.00 (excl GST) less 5% ($398.25) which equals **$7,566.75 (excl GST)** and VAR27 in the sum of $26,698.00 (excl GST) less 5% ($1,334.90) which equals **$25,363.10 (excl GST)**.

# i. Variations – b. Approved in Principle Changes (VAR10, VAR20, VAR30, VAR39, VAR43, VAR46)

**VAR10 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order” and that an “itemised breakdown” and “supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.

* 1. In the adjudication application submissions, the applicant has provided extensive information in the form of spreadsheets, drawings, correspondence, minutes of meetings and quantities in support of these variations.
  2. With reference to VAR10 in particular, the Statutory Declaration from [*A*] on behalf of the respondent argues that the labour rate of $256.50/hr should not have been used and provides an alternative rate of $154/hr and a spreadsheet of recalculations. Without any further backup from the respondent to this affect and upon review of section 4 of General Terms of the Contract, Schedule 4 identifies a daily rate for a 10 hour day of $2,565.00 and I therefore prefer the position of the applicant in relation to the build-up of labour rate for this variation.
  3. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[8]](#footnote-8) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  4. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  5. In the Adjudication Application, the applicant has accepted that the applied rate for overhead and profit should be 12% as opposed to the actual claim which was closer to 13.5% and has reduced the claim value by $3,520.00.
  6. Therefore, based on the information provided by the applicant, I value VAR10 in the sum of $473,213.00 (excl GST) – 5% ($23,660.65) which equals **$449,552.35 (excl GST)**.

**VAR20 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order” and that an “itemised breakdown” and “supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.

* 1. In the adjudication application submissions, the applicant has provided extensive information in the form of spreadsheets, drawings, correspondence, minutes of meetings and quantities in support of these variations.
  2. With reference to VAR20 in particular, the Statutory Declaration from [*A*] on behalf of the respondent states that after requesting further information and breakdown, [*subcontractor name redacted*] (the applicant’s supplier/subcontractor) provided the applicant with certain pricing, indicative of a price of $2,350 + $28,630 (i.e. total of $33,330). Therefore, with a mark-up of 12%, the total for VAR20 would then be $37,329.00.
  3. In the adjudication application, the applicant submits that the supplier quote provided was mainly for conduit work but captured [details of other work redacted] and should be broken down as follows:
* Supplier costs: $33,330;
* Margin on supplier costs: $4,545 ($33,330/1-12/100=$37,875). Therefore, $37,875-$33,330=$4,545
* Engineering and Project Management: 56.9 hours x $256.50=$14,587.16
  1. It appears to be common ground that the supplier costs totalled $33,330. Based on the previous variation, the applicant accepted that the applied rate for overhead and profit should be 12% and the margin is closer again to the 13.5%, so adjustment should be made accordingly.
  2. The quote provided in the adjudication response from the applicant, clearly states that it does not include supply and installation and in the absence of any evidence to the contrary from the respondent, the Engineering and Project Management costs appear reasonable.
  3. Therefore, based on the information provided, I value VAR20 in the sum of the following:
     1. Supplier costs $33,330.00 + 12% margin ($3,999.60) = $37,329.60
     2. Engineering and Project Management costs: 56.9 x $256.50=$14,594.85
     3. Total of VAR20: $37,329.60 + $14,594.85 = **$51,924.45** (excl GST)
  4. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[9]](#footnote-9) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  5. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  6. Therefore, I the final value VAR20 in the sum of $51,924.45 (excl GST) – 5% ($2,596.22) which equals **$49,328.23 (excl GST)**.

**VAR30 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order” and that an “itemised breakdown” and “supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.

* 1. In the adjudication application submissions, the applicant has provided extensive information in the form of spreadsheets, drawings, correspondence, minutes of meetings and quantities in support of these variations.
  2. With reference to VAR30 in particular, the respondent has taken issue with the lump sum value In the adjudication application submissions, the applicant has provided an 8 point breakdown of the costs and in the absence of any further contrary reasons from the respondent for withholding payment with regard to this variation, I do not feel there are any valid reasons for withholding payment.
  3. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[10]](#footnote-10) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  4. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  5. Therefore, based on the information provided by the applicant, I value VAR30 in the sum of $370,730.00 (excl GST) – 5% ($18,536.50) which equals **$352,193.50 (excl GST)**.

**VAR39 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order” and that an “itemised breakdown” and “supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:

* + - 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.
  2. In the adjudication application submissions, the applicant has provided extensive information in the form of spreadsheets, drawings, correspondence, minutes of meetings and quantities in support of these variations.
  3. With reference to VAR39 in particular, the respondent has taken issue with the lump sum value. However, on review of Annexure F, Tab 4[[11]](#footnote-11) the applicant has provided a detailed price per distribution board (18 separate labour and material prices for each) that is not in the form of a lump sum. Therefore, in the absence of any further contrary reasons for withholding payment with regard to this variation, I do not feel there are any valid reasons for withholding payment.
  4. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[12]](#footnote-12) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  5. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  6. Therefore, based on the information provided by the applicant, I value VAR39 in the sum of $84,329.52 (excl GST) – 5% ($4,216.45) which equals **$80,112.55 (excl GST)**.

**VAR43 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order*” and that an “*itemised breakdown*” and “*supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.

* 1. In the adjudication application submissions, the applicant has provided extensive information in the form of spreadsheets, drawings, correspondence, minutes of meetings and quantities in support of these variations.
  2. With reference to VAR43 in particular, the respondent has taken issue with the lump sum value, and [*A*] states in the Statutory Declaration that he has provided a spreadsheet which summarises and compares the assessments of this claim. On review of the spreadsheet provided in Volume 4, Tab 24 of the Statutory Declaration[[13]](#footnote-13) the assessment appears to be the same as the applicant. Therefore, in the absence of any further contrary reasons from the respondent for withholding payment with regard to this variation, I do not feel there are any valid reasons for withholding payment.
  3. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[14]](#footnote-14) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  4. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  5. Therefore, based on the information provided by the applicant, I value VAR43 in the sum of $34,076.00 (excl GST) – 5% ($1,703.80) which equals **$32,372.20 (excl GST)**.

**VAR46 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that whilst the variations VAR10, VAR20, VAR30, VAR39, VAR43 and VAR46 were “*technically approved in principle, further substantiation of costs were required prior to the respondent issuing a Change Order” and that an “itemised breakdown” and “supporting evidence*” was required.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.

* 1. With reference to VAR46 in particular, the respondent states that the additional [*work details redacted*] for which the applicant submitted a price for $8,620. In the Statutory Declaration of [*A*], he disagrees with the applicant’s pricing and directs to Schedule 3, section 5 “Unit Pricing” for an applicable item, being:

|  |  |
| --- | --- |
| Description | Price |
| Add/delete pricings for [*work and equipment details redacted*] Include all material, engineering and installations costs. | [*Equipment details redacted*] is $950AUD per unit. |

* 1. Based on this clause in the contract, the respondent has valued this item as 3 x $950 = $2,850.
  2. On review of Schedule 3, section 5 “Unit Pricing” in the Contract, I agree with the respondent’s position on this variation.
  3. I do accept that if variation works have not been fully completed in relation to the milestone description in milestones 6 and 7 i.e. close out of punch list items and receipt of final documentation and as built drawings, then I should value the variations accordingly and reduce the amounts according to the milestone provisions. The evidence provided does not sufficiently prove that the punch list and final documentation have not been completed and handed over. However, the Statutory Declaration of [*B*][[15]](#footnote-15) for the applicant, states that the variations have been signed off except for as built drawings for open change orders or unapproved variations, refer to paragraph 17(b) of [*B’s*] Statutory Declaration.
  4. Within section 2 of Schedule 3 of the General Conditions of Contract 7 milestones are identified. Milestone no.7 describes receipt of final documentation and as built drawings and a percentage of 5% is aligned to this item. Based on the evidence it appears to be common ground that as built drawings for un-agreed and open variations have not been issued and therefore I believe a reasonable approach would be to deduct 5% from the value of each of the open and un-agreed variations.
  5. Therefore, I value VAR46 in the sum of $2,850.00 (excl GST) – 5% ($142.50) which equals **$2,707.50 (excl GST)**.

# i. Variations – c. Disputed Changes (VAR17, VAR34, VAR35, VAR36, VAR37, VAR41, VAR42)

* 1. In the adjudication application, the applicant states that the “**Disputed Changes**” are claims that the respondent denies are changes under the Contract and disputes both liability and quantum. These include VAR17, VAR34, VAR35, VAR36, VAR37, VAR41 and VAR42.
  2. The respondent also states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for these variations for the reasons described.

**Disputed Variations - VAR34, VAR35, VAR36, VAR37, VAR42**

* 1. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that the variations VAR34, VAR35, VAR36, VAR37 and VAR42 relate to the applicant’s claim for alleged costs incurred resulting from the increase in building size, additional walls, doors and associated transportation costs.
  2. The respondent states that the changes to building sizes and layout were largely the result of the applicant’s request to achieve its manufacturing and delivery of the [*equipment*] on its proposed optimized layout. The respondent also states on 16th June 2014 prior to signing the Contract[[16]](#footnote-16) that the applicant advised that it was critical for the layout to be revised to allow the applicant to achieve its schedule, manufacturing and loading at the plant.
  3. This letter was followed by the submission from the applicant of its General Arrangement drawing number 45414007-10-01002 Rev A 19th June 2014[[17]](#footnote-17). The respondent states that this revised layout was not a change instigated by them.
  4. The respondent states that the costs included in the applicant’s claim for these variations were driven by the changes that the applicant made in its optimized layout to assist itself with design transportation, prior to the Contract signing.
  5. I have reviewed all the documentation provided by the applicant in support of these disputed variations, however, I prefer the evidence provided by the respondent in that these changes were instigated by the applicant to provide an optimized layout for the buildings and I therefore do not consider these to be valid changes to the Contract.
  6. I therefore agree with the respondent’s position that variations VAR34, VAR35, VAR36, VAR37 and VAR42 should be valued as **NIL**.

**VAR17 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.
  2. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response, that this variation relates to the applicant’s claim for the cost of additional [*work details redacted*], which it alleges was required as a result of the respondent providing inaccurate [*specification details redacted*] at the time of tender and not providing sufficient area for [*equipment details redacted*] to be located adjacent to the [*site infrastructure details redacted*].
  3. The respondent further states that the additional [*work details redacted*] was as a consequence of the applicant’s inefficient design, which provided excessive HVAC over capacity that increased the number of [*equipment details redacted*] units required.
  4. The respondent denies that it increased the [*specification details redacted*] nor has it altered the original area available for [*equipment details redacted*] units, which was sufficient to supply the required [*equipment details redacted*] capacity. [*A*] for the respondent has attached a Design Freeze Matrix in the Statutory Declaration[[18]](#footnote-18) showing the [*specification details redacted*] across a 6 month period from June to December 2014. This shows that the final [*specification details redacted*] is less than the Scope of Works [*specification details redacted*], which confirms that the final [*specification details redacted*] decreased from the tender [specification details redacted].
  5. The respondent also states that the pre-Contract conceptual design was based on [*specification details redacted*] per unit[[19]](#footnote-19) and therefore the original [*equipment details redacted*] concept design of 3 units ([*specification details redacted*] total capacity) at the time of Contract has always been sufficient to achieve the design requirement.
  6. Therefore, the respondent’s view is that the applicant is not entitled to a variation for this work.
  7. I have reviewed all the documentation provided by the applicant in support of this disputed variation, however, I prefer the evidence provided by the respondent in that the applicant was originally required to design the [*equipment details redacted*] system and the final design resulted in significant [*equipment details redacted*] overcapacity requiring 2 additional units. There has been no evidence to lead me to the conclusion that this overcapacity was the responsibility of the respondent and therefore I agree with the respondent’s position that the applicant is not entitled to a variation for this work.
  8. I therefore agree that variation VAR17 should be valued at **NIL**.

**VAR41 –** [*work and equipment details redacted*]

* 1. The respondent states in the payment schedule and the adjudication response that the reasons for withholding payment is due to the following:
     + 1. Non Compliance with Contractual Provisions:
* Change Order under clause 8 and no tax invoice;
* Notice of Claims;
* Strict compliance with Notice Provisions
  + - 1. Milestones 6 and 7 not reached
  1. I have addressed these reasons for withholding payment in the paragraphs dealing with VAR 26 and VAR 27 above and conclude that these are not valid reasons for withholding payment for this variation for the reasons described.
  2. The respondent states in the payment schedule and [*A’s*] Statutory Declaration in the adjudication response that this variation relates to the applicant’s claim for alleged costs incurred resulting from additional [*equipment details redacted*] on [*site infrastructure details redacted*]. The changes occurred as a result of the applicant positioning the [*equipment details redacted*] units outside the original area to minimise its chassis design and transportation costs.
  3. The respondent disputes the allegations made by the applicant that it changed the building design. In the respondent’s response to this variation on 29 September 2015, the respondent in [*A’s*] Statutory Declaration[[20]](#footnote-20) clarified that it was the applicant’s design changes that resulted in the movement of the [equipment details redacted] units from the original allocated area in the East to the applicant’s design location of the North.
  4. I have reviewed all the documentation provided in support of this disputed variation, however, the evidence provided leads me to conclude that this was the applicant’s responsibility as it was their design changes that caused this work to suit the needs of their own installation. Therefore I agree with the respondent’s position that the applicant is not entitled to a variation for this work.
  5. I therefore agree with the respondent’s position that variation VAR42 be valued at **NIL**.

# ii. Extension of Time Entitlement and Delay Costs

* 1. The applicant is submitting two Extension of Time claims. One dated 30th September 2015 in the sum of $1,943,300.00 (excl GST) and one dated 4th March 2016 in the sum of $144,000.00 (excl GST).
  2. The respondent in the adjudication response states that the Extension of Time events should be rejected for the following reasons and will be addressed individually under each delay impact:
     + 1. The applicant fails to comply with the strict provisions of the Extension of Time clause 7 of the General Conditions of Contract
       2. Inherent problems with the applicant’s Expert Delay Report

**Main Causes of Delay**

* 1. The applicant groups the alleged causes of delay into the following categories:
     1. Delay impact 1 – NOD1 and NOD2 Delays to general arrangement drawings and design freeze;
     2. Delay impact 2 – VAR1 / CO1 (NOD3) Supply of [*equipment details redacted*];
     3. Delay impact 3 – VAR9 / CO3 (NOD4) Change of [*equipment details redacted*];
     4. Delay impact 4 – VAR16 V2 / CO6 [*equipment details redacted*];
     5. Delay impact 5 – VAR4 Additional [*equipment details redacted*];
     6. Delay impact 6 – VAR16 / CO2 [*equipment details redacted*];
     7. Delay impact 7 – [*equipment details redacted*] transportation and delivery; and
     8. Delay impact 8 – VAR31 (NOD8) [*equipment details redacted*] changes.

**Delay impact 1 - NOD1 and NOD2 Delays to general arrangement drawings and design freeze**

* 1. In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to these delay events. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.
  2. The applicant claims in its Notice of Delay 1 dated 2nd July 2014, that it was experiencing delays beyond its control in relation to [*site infrastructure and equipment details redacted*] because the respondent was still to provide complete Free Issue Equipment Information.
  3. In the Notice of Delay 2 dated 1st August 2014, the applicant claimed that 11 design documents had not been returned from the respondent, the building footprint for [*site infrastructure details redacted*] was only formalised on 29th July 2014 due to site plot-plan restrictions and pertinent building designs remained unfrozen.
  4. Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant[[21]](#footnote-21) and the respondent[[22]](#footnote-22) I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by Expert [*name redacted*] in analysing the impact of these delays.
  5. I therefore concur with his analysis that NOD1 and NOD2 have caused critical delays to the batch delivery of the main [equipment details redacted] as follows:
* Batch Delivery 1 – [*equipment details redacted*] – 91 day critical delay
* Batch Delivery 2 – [*equipment details redacted*] – 98 day critical delay
* Batch Delivery 3 – [*equipment details redacted*] – 98 day critical delay
* Batch Delivery 4 – [*equipment details redacted*] – 64 day critical delay
  1. The information provided in the [*name redacted*] delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur. In fact, paragraph 33 of this Expert Report makes reference to “*Clause 34 of the General Conditions establishes* ***Golding’s*** *entitlement to EOT*” which is clearly a cut and paste typo and reduces the credibility of the level of detail relating to this specific adjudication.

**Delay impact 2 - VAR1 / CO1 (NOD3)** [*equipment details redacted*]

* 1. In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to this delay event. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.
  2. The applicant claims in its Notice of Delay 3 dated 19th September 2014, that it was experiencing delays beyond its control in relation to the supply of [*equipment details redacted*].
  3. The Change Order 1 issued by the respondent, added to the supply of [*equipment details redacted*] to the applicant’s Scope of Works.
  4. Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by Expert [*name redacted*] in analysing the impact of these delays.
  5. I therefore concur with his analysis that NOD3 have caused critical delays to the batch delivery of the main [equipment details redacted] as follows:
* Batch Delivery 1 – [*equipment details redacted*] – 116 day critical delay
* Batch Delivery 2 – [*equipment details redacted*] – 139 day critical delay
* Batch Delivery 3 – [*equipment details redacted*] – 117 day critical delay
* Batch Delivery 4 – [*equipment details redacted*] – 176 day critical delay
  1. The information provided in the [*name redacted*] delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur. In fact, paragraph 33 of this Expert Report makes reference to “*Clause 34 of the General Conditions establishes* ***Golding’s*** *entitlement to EOT*” which is clearly a cut and paste typo and reduces the credibility of the level of detail relating to this specific adjudication.

**Delay impact 3 - VAR9 / CO3 (NOD4)** [*work and equipment details redacted*]

* 1. In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to this delay event. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.
  2. The applicant claims in its letter of 12th September 2014 and subsequent Notice of Delay 4 dated 8th December 2014, that it was experiencing delays beyond its control in relation to the delay of the procurement of [*equipment details redacted*] arising from the new [equipment details redacted] specifications.
  3. Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by Expert [*name redacted*] in analysing the impact of these delays.
  4. I therefore concur with his analysis that NOD4 have caused critical delays to the batch delivery of the main [*equipment details redacted*] as follows:
* Batch Delivery 1 – [*equipment details redacted*] – 142 day critical delay
* Batch Delivery 2 – [*equipment details redacted*] – 125 day critical delay
* Batch Delivery 3 – [*equipment details redacted*] – 80 day critical delay
* Batch Delivery 4 – [*equipment details redacted*] – 116 day critical delay
  1. The information provided in the [*name redacted*] delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur.

**Delay Impact 4 - VAR16 V2 / CO6 (NOD4)** [*work and equipment details redacted*]

* 1. In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to this delay event. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.
  2. The applicant claims in its letter of 12th September 2014 and subsequent Notice of Delay 4 dated 8th December 2014, that it provided information about delay to procurement of [*equipment details redacted*] and stated that in mitigating the effects of the delay [*equipment details redacted*] had not been ordered subject to the outcome of the new [*redacted*] specification review.
  3. On 25th August 2015, the respondent issued Change Order 6 for the revised [*equipment details redacted*] requirements. This change order expressly refers to the new specification for the programmable logic controllers which had been provided to the applicant on 10th September 2014 and which was the subject of the applicant’s Notice of Delay 4.
  4. Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by [*the applicant’s*] Expert [*name redacted*] in analysing the impact of these delays.
  5. I therefore concur with his analysis that NOD4 have caused critical delays to the batch delivery of the [*equipment details redacted*] as follows:
* Batch Delivery 1 – [*equipment details redacted*] – 375 day critical delay
* Batch Delivery 2 – [*equipment details redacted*] – 375 day critical delay
* Batch Delivery 3 – [*equipment details redacted*] – 399 day critical delay
* Batch Delivery 4 – [*equipment details redacted*] – 336 day critical delay
  1. The information provided in the [*name redacted*] delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur.

**Delay Impact 5 - VAR4** [*work and equipment details redacted*]

* 1. Due to the requirement to allow for further expansion of the plant, the respondent determined that providing additional [*equipment details redacted*] was necessary.
  2. The expert analysis undertaken by [*name redacted*] for the applicant concluded that this delay event **had no critical impact** to any of the batch delivery dates.

**Delay Impact 6 - VAR16 /** [*work and equipment details redacted*]

* 1. On 23rd October 2014, the respondent requested the applicant to provide a proposal for standardisation for light fittings and power outlets.
  2. The expert analysis undertaken by [name redacted] for the applicant concluded that this delay event **had no critical impact** to any of the batch delivery dates.

**Delay Impact 7 -** [*work and equipment details redacted*]

* 1. In the adjudication response, the respondent is stating that the applicant has failed to comply with the notice provisions in the Contract in relation to this delay event. Based on the information provided to me by the applicant in the adjudication application, I am satisfied that the notice provisions of clause 7.1(a) and clause 7.1(b) have been satisfied.
  2. On 9th March 2015, the applicant issued a Notice of Delay notifying the respondent that they were experiencing delay to switch room transportation and delivery caused by the respondent’s late confirmation of site preparedness and readiness to accept delivery of the switch rooms to the Delivery Place.
  3. Having reviewed all evidence in the adjudication application and adjudication response, including the Expert Reports provided by both the applicant and the respondent I consider the more persuasive argument has been provided by the applicant. In particular the time impact analysis technique adopted by [*the applicant’s*] Expert [*name redacted*] in analysing the impact of these delays.
  4. I therefore concur with his analysis that the Notice of Delay has caused critical delays to the batch delivery of the [*equipment details redacted*] as follows:
* Batch Delivery 1 – [*equipment details redacted*] – 4 day critical delay
* Batch Delivery 2 – [*equipment details redacted*] – 0 day critical delay
* Batch Delivery 3 – [*equipment details redacted*] – 0 day critical delay
* Batch Delivery 4 – [*equipment details redacted*] – 0 day critical delay
  1. The information provided in the [*name redacted*] delay report for the respondent, did not in my opinion sufficiently provide any convincing analysis and logic to dissuade me that the critical delays did not occur.

**Delay Impact 8 - VAR31 / CO4 (NOD8)** [*work and equipment details redacted*]

* 1. On 25th June 2015, Change Order 4 was issued to the applicant directing modifications to the three ACC distribution boards to meet the new design requirements.
  2. The expert analysis undertaken by [*name redacted*] for the applicant concluded that this delay event had no critical impact to any of the batch delivery dates.

**Overall Critical Delay**

* 1. I am in agreement with the analysis reached by [*name redacted*] for the applicant in relation to the overall critical delays as follows:

**Contractual Dates for Delivery**

* Batch Delivery 1 – [*equipment details redacted*] – 571 days – Adjusted date for delivery 23rd Aug 2016
* Batch Delivery 2 – [*equipment details redacted*] – 536 days - Adjusted date for delivery 23rd Aug 2016
* Batch Delivery 3 – [*equipment details redacted*] – 529 days - Adjusted date for delivery 23rd Aug 2016
* Batch Delivery 4 – [*equipment details redacted*] – 508 days - Adjusted date for delivery 23rd Aug 2016

# Delay Costs

* 1. I have reviewed the delay cost claim submitted by the applicant, the adjudication response and Expert Report prepared by [*name redacted*] for the respondent. I do not concur with the conclusion reached by [*name redacted*] that the information provided by the applicant in Table A was insufficient to provide a reasonable basis to review and assess the delay cost claim.
  2. Paragraph 33 of the Statutory Declaration of [*B*] for the applicant, states how the blended rate of $250/hr has been derived by taking a comparison between the 2015 hourly rate of $256.50/hr and the 2014 hourly rate of $242.20/hr. These rates have been taken from Section 4 of the Schedule of Rates in the General Conditions of Contract.
  3. I am satisfied with the information provided in the delay cost claim, coupled with the rates already contained in the Contract that there is sufficient information delay claim assessment based on the Extension of Time dates granted above.
  4. I agree with the costs included by the applicant in the Adjudication Application within the initial delay cost claim up to 16th January 2016 in the total sum of **$1,943,300.00 (excl GST)**.
  5. For the second delay cost claim up to 16th March 2016, the amount claimed in the payment claim was in the sum of $144,000.00 (excl GST), however, the sum in the Delay Cost section in the Adjudication Application at paragraph 798 is different. I have therefore valued the second delay claim in line with the valuation in the Adjudication Application, which represents 41 business days from 16th January 2016 to 16th March 2016 as claimed in the payment claim in the sum of **$123,000.00 (excl GST)**.

# Deduction of Liquidated Damages

* 1. From the above conclusion, it is apparent that I have supported the applicant’s position in relation to the Extension of Time entitlement and I therefore agree that the adjusted date for delivery is 23rd August 2016 for all equipment.
  2. Therefore, the deduction of Liquidated Damages in not applicable and deducting sums for Liquidated Damages on the Payment Claim is not applicable.

# 

# Valuation of issues in dispute

* 1. My determination in relation to this adjudication is as follows:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Item** | **Description** | **Payment Schedule** | **Payment Claim 10** | **Issues in Dispute** | **Adjudicated Amount** |
| 1.00 | Var 10 - [*work and equipment details redacted*] | $0.00 | $478,533.00 | $473,213.00 | $449,552.35 |
| 2.00 | VAR 17 - [*work and equipment details redacted*] Changes | $0.00 | $629,592.00 | $629,592.00 | $0.00 |
| 3.00 | VAR 20 - [*work and equipment details redacted*] | $0.00 | $52,461.00 | $51,924.45 | $49,328.23 |
| 4.00 | VAR 26 - [*work and equipment details redacted*] | $0.00 | $7,965.00 | $7,965.00 | $7,566.75 |
| 5.00 | VAR 27 - [*work and equipment details redacted*] | $0.00 | $26,698.00 | $26,698.00 | $25,363.10 |
| 6.00 | VAR 30 - [*work and equipment details redacted*] | $0.00 | $370,730.00 | $370,730.00 | $352,193.50 |
| 7.00 | VAR 34 - [*work and equipment details redacted*] | $0.00 | $568,514.00 | $568,514.00 | $0.00 |
| 8.00 | VAR 35 - [*work and equipment details redacted*] | $0.00 | $512,296.00 | $512,296.00 | $0.00 |
| 9.00 | VAR 36 - [*work and equipment details redacted*] | $0.00 | $414,877.00 | $414,877.00 | $0.00 |
| 10.00 | VAR 37 - Transportation charges | $0.00 | $282,620.00 | $282,620.00 | $0.00 |
| 11.00 | VAR 39 - [*work and equipment details redacted*] | $0.00 | $84,329.00 | $84,329.00 | $80,112.55 |
| 12.00 | VAR 41 - [*work and equipment details redacted*] | $0.00 | $159,330.00 | $159,330.00 | $0.00 |
| 13.00 | VAR 42 [*work and equipment details redacted*] | $0.00 | $171,914.00 | $171,914.00 | $0.00 |
| 14.00 | VAR 43 - [*work and equipment details redacted*] | $0.00 | $34,076.00 | $34,076.00 | $32,372.20 |
| 15.00 | VAR 46 - [*work and equipment details redacted*] | $0.00 | $8,620.00 | $2,850.00 | $2,707.50 |
|  | **Variations & LD's** | **$0.00** | **$3,802,555.00** | **$3,790,928.45** | **$999,196.18** |
| 16.00 | Delay costs - AT140062 30 Sept 15 | $0.00 | $1,943,300.00 | $1,943,300.00 | $1,943,300.00 |
| 17.00 | Delay costs - AT140076 4 Mar 16 | $0.00 | $144,000.00 | $144,000.00 | $123,000.00 |
|  | **Sub-total** | **$0.00** | **$2,087,300.00** | **$2,087,300.00** | **$2,066,300.00** |
|  | Back Charges - Post Deed (incl Liquidated Damages) | $0.00 | $0.00 | $0.00 | $0.00 |
|  | **Sub total** | **$0.00** | **$5,889,855.00** | **$5,878,228.45** | **$3,065,496.18** |
|  |  |  |  |  |  |
|  | **Less previously paid in relation to PC 10** | $0.00 | $0.00 | $0.00 | $0.00 |
|  |  |  |  |  |  |
|  | **Total** | **$0.00** | **$5,889,855.00** | **$5,878,228.45** | **$3,065,496.18** |
|  | **GST 10%** | $0.00 | $588,985.50 | $587,822.85 | $306,549.62 |
|  |  |  |  |  |  |
|  | **Totals** | **$0.00** | **$6,478,840.50** | **$6,466,051.30** | **$3,372,045.80** |

* 1. I therefore find that the adjudicated amount is **$3,372,045.80 including GST**.

# 

# Adjudication costs

* 1. Pursuant to section 36(1) of the Act I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.
  2. The adjudication costs for this determination amount to 108 hours @ $350.00 plus GST = $41,580.00 including GST and as stated in paragraph 192 above, is to be paid equally by both parties. Tax invoices will be issued accordingly.

# Interest Costs

* 1. I determine that interest is payable on the adjudicated amount in accordance with clause 35(1)(b) of the Act at rate of 8% per annum from the 21st April 2016.

# Confidential Information

* 1. Pursuant to section 38(e) identify the following information, that because of its confidential nature, is not suitable for publication by the Registrar under section 54 of the Act:
     1. The identity of the parties.
     2. The identity and location of the project.



Signed: ……………………………………………………

Colin Bond – Registered Adjudicator No. 34 Dated: 18th July 2016

1. Tab 5 of adjudication response [↑](#footnote-ref-1)
2. Refer to section 34(3)(b) of the Act [↑](#footnote-ref-2)
3. Refer to paragraph 1.10 and Tab 7 [↑](#footnote-ref-3)
4. Refer to paragraph 27 of Stat Dec. dated 27 June 2016 [↑](#footnote-ref-4)
5. Paragraph 1.5 of the adjudication response – as amended by JV letter 23 January 2016 [↑](#footnote-ref-5)
6. See [*A’s*] Declaration paragraph 90 [↑](#footnote-ref-6)
7. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-7)
8. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-8)
9. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-9)
10. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-10)
11. Annexure F, Tab 4 of Adjudication Application [↑](#footnote-ref-11)
12. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-12)
13. Volume 4, Tab 24, Stat Dec [*by A*], Adjudication Response [↑](#footnote-ref-13)
14. See [*B’s*] Declaration, Adjudication Application [↑](#footnote-ref-14)
15. See [B’s] Declaration, Adjudication Application [↑](#footnote-ref-15)
16. See [*A’s*] Declaration, Volume 4, Tab 26, Adjudication Response [↑](#footnote-ref-16)
17. See [*A’s*] Declaration, Volume 4, Tab 26, Adjudication Response [↑](#footnote-ref-17)
18. See [*A’s*] Declaration, Volume 5, Tab 50-54, Adjudication Response [↑](#footnote-ref-18)
19. See [*A’s*] Declaration, Volume 5, Tab 55, Adjudication Response [↑](#footnote-ref-19)
20. See [*A’s*] Declaration, Volume 5, Tab 65, Adjudication Response [↑](#footnote-ref-20)
21. Applicant’s Expert Report – [name redacted] [↑](#footnote-ref-21)
22. Respondent’s Expert Report – [*name redacted*] [↑](#footnote-ref-22)