Determination 26.15.09

IN THE MATTER of an Adjudication

pursuant to the Construction Contracts

(Security of Payments) Act (NT) (“**Act**”

BETWEEN:

(“**Applicant**”)

and

(“**Respondent**”)

**REASONS FOR DECISION**

1. On 13 November 2015 I was appointed adjudicator to determine a payment dispute between the Applicant and the Respondent by the Master Builders Northern Territory (“MBNT”) as prescribed Appointer under the Act. I received a Letter of Appointment on 13 November 2015 and I collected the application documents from the MBNT offices on 16 November 2015.
2. On 16 November 2015 I received an email from the Applicant confirming that it had served the Application on the Respondent on 16 November 2015.
3. On 18 November 2015 I wrote to the parties advising my appointment and that I had no conflict of interest in the matter. I sought submissions, should either party object to the appointment, by 2:00pm CST on Tuesday, 24 November 2015. I also advised the parties that, having read the Application dated 13 November 2015 and served on MBNT on 16 November 2015, there were some issues on which I would be seeking further submissions and that I would write to the parties in respect of those submissions once I had received the Response.
4. On 26 November 2015 I received by hand a copy of the Response, which the Respondent also served on the Applicant that same day.
5. After reading the Application and the Response I identified that were some complicated issues on which I would need further submissions from the parties.
6. On 3 December 2015 I wrote to the Construction Registrar and requested under section 34(3)(a) some additional time up to and inclusive of 23 December 2015 within which to make my determination. Later that same day, 3 December 2015, the Construction Registrar granted the extension of time up to and inclusive of 23 December 2015.
7. On 4 December 2015 I wrote to the parties with some questions I had in relation to the Application and the Response as follows:

 *“Dear Mr [M] and Ms [H]*

*In my correspondence of 18 November 2015, I indicated to the parties that I would be seeking further submissions after reading the Application and the Response.*

*The questions on which I seek further submissions from the parties in relation to the dispute are set out below:*

*1. In the Response at Tab 6 there is an email from the Applicant’s solicitor to the Respondent’s solicitor of 12 October 2015 which indicates that attached to that email there is a report prepared after the water leaks at Unit [A] were attended to.  Would either party please provide me a copy of that report.*

*2. In relation to Unit [A], it appears that occupancy of that unit was to have occurred shortly after 12 October 2015.  This would require an Occupancy Permit.  Would either party kindly provide me a copy of the Occupancy Permit and any exclusions which the Certifier may have provided in relation to the Occupancy Permit.*

*3. There is very little evidence provided in the Application other than some quotations and tax invoices, while the Response includes correspondence that was exchanged between the parties in relation to the issue of the water leaks, an issue central to this dispute.  At Tab 7 of the Response there is a letter dated 15 October 2015 from the Respondent to the Applicant attaching an “Expert Statement” referred to in the Response at paragraph 26 as an "expert opinion”.   On reading the statement, however, while an eminently qualified glazier, [Mr. X] also appears to have a vested interest in quoting for the rectification works and his report could not be construed as an independent expert report.  Has there been any independent, certified engineer’s report in relation to the water ingress through the windows of the building, particularly in relation to their non-conformance or the window sealing failure?*

*4. It appears that the Applicant has undertaken remedial work and that there was a significant reduction in water ingress between the first and second field based hose tests undertaken by the Respondent and these tests appear to have been conducted on Unit [A].  Is this the case and has there been any further rectification work or defect raised in respect of this particular unit?*

*5. In the Contract at Tab A3 of the Application, clause 4 allows for a security retention of 5% of each progress payment to a maximum of 5% of the lump sum. This clause was amended by agreement such that it would be payable on completion when the Certificate of Occupancy is issued.  Has there been any retention held by the Respondent under the Contract and, if so, was that retention payable to the Applicant on a per unit basis with each Certificate of Occupancy or upon the issue of a Certificate of Occupancy for the entire building?*

*6. The Respondent has argued that the windows form non-compliant works under clause 11 of the Contract, however it would appear that the works had reached practical completion before there was any indication of a non-conformance.  As such, the water leakage through the windows has been treated as a defect.  Has the window installation into the building reached practical completion and, if so, on what date?*

*Please provide the above submissions by* ***4.00pm on Friday 11 December 2015****.*

*Thank you for your assistance.”*

1. On 11 December 2015 and within time I received the further submissions from both the Applicant and the Respondent. The Respondent in its submissions sought to make further submissions once a report was made available from the Applicant on the leaks to Unit [A] of the complex. That report was made available in the Applicant’s further submissions.
2. On 17 December 2015 I wrote to the parties requesting further submissions from the Respondent and directed those submissions be limited to the content of the Applicant’s report on the water leaks to Unit [A] in the complex, as follows:

*“Dear Ms [H] and Mr [M],*

*Thank you for your recent submissions in relation to the questions I had in the above matter.*

*I note that Mr [M], in his submissions, sought to make further submissions once the report on the water leaks to Unit [A] was available from the Applicant.*

*That report was provided by the Applicant.*

*Having read the report and the further submissions in detail and to ensure procedural fairness, I will allow the Respondent to make further submissions on the content of the report provided by the Applicant.*

*Mr. [M] I request that you strictly limit the Respondent's submissions to the content of the report as I will not accept submissions on any other aspect of this matter.*

*I request that those further submissions be provided by* ***4:00pm CST on Monday, 21 December 2015.***

*In the meantime, I will also seek a further short extension from the Construction Registrar within which to make my determination in this matter.*

*I thank you for your assistance.”*

1. On 17 December 2015 I wrote to the Construction Registrar seeking a further short extension of time to make my determination under section 34(3)(a). I requested up to and including 31 December 2015. That same day, 17 December 2015 the Construction Registrar granted a further extension up to and including 31 December 2015.
2. Later that same day, 17 December 2015, I received the further submissions from the Respondent in relation to the Applicant’s report on the water leaks to Unit [A] of the complex.
3. I received no further submissions from the parties.

***Introduction***

1. The Applicant and the Respondent entered into a contract on 3 July 2014 whereby the Applicant was to supply and install aluminium windows and doors, fly screens and shower screens for the Respondent’s unit development project located at [*site details redacted*], Darwin in the Northern Territory (“Contract”), known generally as the [redacted] project (“Project”).
2. The Applicant provided two quotations to the Respondent as follows:
3. the first quotation on 8 May 2014 in the sum of $746,812.00 (including GST); and, after some additional scope of work was requested by the Respondent,
4. the second quotation on 3 July 2014 for the addition of on-site labour in the total sum of $779,152.00 (including GST).
5. The Respondent accepted the Applicant’s first quotation on or about 12 May 2014 and then added the on-site labour component in the second quotation on or about 3 July 2014. The parties then signed a subcontract agreement on that basis in the lump sum of $779,152.00 (including GST). The works commenced on site on or about 13 September 2014.
6. During the conduct of the work on site, the Respondent had the Applicant carry out four variations in the Contract as follows:
7. three additional commercial doors [redacted] in the sum of $8,250.00 (including GST);
8. installation of fall protection screens [redacted] in the sum of $4,620.00 (including GST);
9. upgrade of the shower panels and shower screens to several units of the complex in the sum of $3,850.00 (including GST); and
10. removal of the stacker doors from the scope of work being no longer required for the complex in the deduction sum of (-$6,600.00) (including GST).

A summary and calculation of these variations is set out in the Scotts Schedule at Table 1 below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Variations to Contract** | **Price** | **GST** | **Subtotal** | **Description** |
| **1** | $7,500.00  | $750.00  | $8,250.00  | Additional Commercial Doors |
| **2** | $4,200.00  | $420.00  | $4,620.00  | Fall Protection Screens |
| **3** | $3,500.00  | $350.00  | $3,850.00  | Shower Panel Upgrade |
| **4** | ($6,000.00) | ($600.00) | ($6,600.00) | Stacker Doors Removed |
| **Total of Variations** | **$9,200.00**  | **$920.00**  | **$10,120.00**  | **(including GST)** |

Table 1.

1. This adjudication arises out of the Contract in which the Applicant agreed with the Respondent to supply and install aluminium windows and doors, fly screens, fall protection screens and shower screens for the Respondent’s unit development project to the engineered design and drawings provided by the Respondent.
2. The Applicant made 24 progress payment claims and a claim for final payment in the Contract totalling $790,563.98 (including GST). It is unclear as to how the additional sum of $1,291.98 (including GST) came about in the invoicing or the Contract. A summary of these claims is set out in the Scotts Schedule at Table 2 below:

|  |  |
| --- | --- |
|  **INVOICING** | **[Applicant]** |
| **Item** | **Invoice No.** | **Price** | **GST** | **Sub-total** |
| 1 | 260 | $17,880.00 | $1,788.00  | $19,668.00  |
| 2 | 269 | $17,898.18 | $1,789.82  | $19,688.00  |
| 3 | 271 | $17,898.18 | $1,789.82  | $19,688.00  |
| 4 | 274 | $17,898.18 | $1,789.82  | $19,688.00  |
| 5 | 277 | $17,898.18 | $1,789.82  | $19,688.00  |
| 6 | 278 | $17,898.18 | $1,789.82  | $19,688.00  |
| 7 | 284 | $17,898.18 | $1,789.82  | $19,688.00  |
| 8 | 289 | $17,898.18 | $1,789.82  | $19,688.00  |
| 9 | 290 | $24,180.00 | $2,418.00  | $26,598.00  |
| 10 | 291 | $17,898.18 | $1,789.82  | $19,688.00  |
| 11 | 297 | $27,630.00 | $2,763.00  | $30,393.00  |
| 12 | 298 | $17,898.18 | $1,789.82  | $19,688.00  |
| 13 | 302 | $27,630.00 | $2,763.00  | $30,393.00  |
| 14 | 303 | $17,898.18 | $1,789.82  | $19,688.00  |
| 15 | 304 | $17,898.18 | $1,789.82  | $19,688.00  |
| 16 | 306 | $23,400.00 | $2,340.00  | $25,740.00  |
| 17 | 307 | $24,180.00 | $2,418.00  | $26,598.00  |
| 18 | 308 | $23,400.00 | $2,340.00  | $25,740.00  |
| 19 | 318 | $27,630.00 | $2,763.00  | $30,393.00  |
| 20 | 327 | $23,400.00 | $2,340.00  | $25,740.00  |
| 21 | 331 | $23,400.00 | $2,340.00  | $25,740.00  |
| 22 | 334 | $27,630.00 | $2,763.00  | $30,393.00  |
| 23 | 341 | $4,363.64 | $436.36  | $4,800.00  |
| 24 | 350 | $50,300.00 | $5,030.00  | $55,330.00  |
| **Sub-total** | **$521,903.62** | **$52,190.36** | **$574,093.98** |
| 25 | 368 | $196,790.91 | $19,679.09  | $216,470.00  |
| **TOTAL** | **$718,694.53** | **$71,869.45**  | **$790,563.98**  |

Table 2.

1. According to the Applicant, the Respondent paid a total of $740,584.00 (including GST) for the work the Applicant has done in the Contract. The Applicant confirmed this in an email to the Respondent on 14 September 2015 when acknowledging the part payment of the final payment in the Contract (**Tab 9** of the Response).
2. The Applicant’s claim for the final payment in the Contract was in the sum of $216,470.00 (including GST) and was made on Tax Invoice 368 dated 5 August 2015, **Tab E2** of the Application. Of that final payment invoice the Respondent part paid the sum of $166,090.00 (including GST) (**Paragraph 3.7** of the Application).
3. Based on the correctly calculated Contract total of $789,272.00 (including GST and Variations), which has been agreed between the parties, and a payment of $740,584.00 (including GST), which has been confirmed by the Applicant’s Director, and included an additional $400.00 (including GST) of payment to that set out in the Application, leaves an amount not paid under the Contract of **$48,688.00 (including GST)**. This amount has been confirmed by the Applicant’s Director in the same email to the Respondent on 14 September 2015 (**Tab 9** of the Response).
4. In its Application the Applicant appears to have incorrectly calculated and invoiced the Contract in the sum of $790,563.98 (including GST), at **Paragraphs 2.11, 2.12, 3.7 and 3.8** of the Application. A summary of the corrected contract calculations is set out in the Scotts Schedule at Table 3 below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Contract Value** | **Price** | **GST** | **Subtotal** | **Description** |
| **Variation No. 1** | $7,500.00  | $750.00  | $8,250.00  | Additional Commercial Doors |
| **Variation No. 2** | $4,200.00  | $420.00  | $4,620.00  | Fall Protection Screens |
| **Variation No. 3** | $3,500.00  | $350.00  | $3,850.00  | Shower Panel Upgrade |
| **Variation No. 4** | ($6,000.00) | ($600.00) | ($6,600.00) | Stacker Doors Removed |
| **Total of VOs** | **$9,200.00**  | **$920.00**  | **$10,120.00**  | Subtotal |
| **Quote No. 2** | $708,320.00  | $70,832.00  | $779,152.00  | Agreed contract sum |
| **Contract Total** | **$717,520.00**  | **$71,752.00**  | **$789,272.00**  | **(including GST)** |

Table 3.

1. The Applicant says it is entitled to be paid for the work it has done in the Contract. The Applicant’s Payment Claim is Tax Invoice No. 368 dated 5 August 2015 and is in the sum of $216,470.00 (including GST) (“Tax Invoice 368”).
2. On or about 14 September 2015 the Respondent part paid the Applicant’s Payment Claim in the sum of $166,090.00 (including GST) and refused to pay the balance of Tax Invoice 368 in the sum of $50,380.00 (including GST).
3. The Applicant has claimed the sum of $50,380.00 (including GST) in its Payment Claim and also seeks interest on the Payment Claim, under the implied provisions of the Act, and its costs of the Adjudication.
4. The Respondent does not dispute the part payment made on the Applicant’s Payment Claim but says that the Applicant’s work contains defective materials and workmanship that have caused water leaks into some of units in the complex. The Respondent says that, because of these defects, which it characterises as non-conforming works not fit for their intended purpose, it has not ‘signed off’ on the Applicant’s work. The Respondent also says that it gave the Applicant an opportunity to rectify the defects in the works but the Applicant failed to rectify the non-conforming works.
5. The Respondent has provided a quotation dated 20 November 2015 from [a contractor] to rectify the defects in the Applicant’s works, being window defects, in the sum of $157,828.00 (including GST). The Respondent says it is entitled to set off the Applicant’s Payment Claim in its entirety and make no further payment to the Applicant.
6. The Respondent says that, in the alternative, it has not received the deduction of the negative variation for the removal of the stacker doors in the sum of $6,600.00 (including GST) and this amount should be deducted from any amount payable to the Applicant for its Payment Claim.
7. The Respondent seeks costs on the adjudication in the sum of $6,600.00 (including GST) for its legal professional fees to respond to the dispute and costs of the adjudication, being the Adjudicator’s fees.

***Procedural Background***

The Application

1. The Application is dated 13 November 2015 and comprises the following:
2. a general submission;
3. copies of the progress claim tax invoices;
4. a copy of the first quotation dated 8 May 2014 in the sum of $746,812.00 (including GST);
5. a copy of the acceptance letter from the Respondent dated 22 April 2014;
6. a copy of the subcontract agreement, undated but executed on or about 3 July 2014 following acceptance of the second quotation of even date;
7. a copy of the second quotation dated 3 July 2014 in the sum of $779,152.00 (including GST);
8. a copy of the works program dated 3 July 2014;
9. a copy of the Payment Claim Tax Invoice 368 dated 5 August 2015 in the sum of $216,470.00 (including GST); and
10. supporting email evidence.
11. The Payment Claim was submitted to the Respondent on 5 August 2015 in the sum of $216,470.00 (including GST).
12. The Respondent part paid the Applicant’s Payment Claim in the sum of $166,090.00 (including GST), leaving an unpaid balance of $50,380.00 (including GST) being claimed.
13. The Application was served pursuant to section 28 of the Act.

The Response

1. The Response, served by the Respondent on 26 November 2015, comprises the following:
2. a general submission;
3. a thumb drive containing photographs of window water leaks and a video of the Respondent applying a pressure hose onto various windows in the complex;
4. copies of correspondence between the parties, including email evidence;
5. a statement from Mr. [X] of [a supplier and installer of windows screens and doors] (“[the window supplier]”);
6. a copy of a quotation dated 20 November 2015 from [the supplier] in the sum of $157,828.00 (including GST); and
7. a copy of a quotation dated 23 June 2015 from [a door supplier] in the sum of $32,120.00 (including GST), sent by the Applicant in relation to the stacker door variation deduction in the Contract.
8. The Respondent confirms it has part paid the Applicant’s Payment Claim in the sum of $166,090.00 (including GST) leaving an unpaid balance of $50,380.00 (including GST) being claimed and says it is entitled to set off the remaining payment due to defective and non-conforming work by the Applicant.
9. The Response was served pursuant to section 29 of the Act.

Further Submissions

1. On 4 December 2015 I sought further submissions from the parties in relation to several questions I had after reading the Application and the Response. I received both the Applicant’s and the Respondent’s further submissions on 11 December 2015.
2. In its submissions, the Respondent sought to make further submissions on a report from the Applicant in relation to water leaks on a unit in the complex. On 17 December 2015 I allowed those further submissions from the Respondent, strictly limiting the submissions to the report only, and I received the Respondent’s further submissions on the same day, 17 December 2015.

***Adjudicator’s Jurisdiction and the Act***

1. The following sections of the Act apply to the contract for the purposes of the Adjudicator’s jurisdiction.
2. Section 4 of the Act – **Site in the Territory** – the site is at [address redacted], Darwin in the Northern Territory. I am satisfied that the site is a site in the Northern Territory for the purposes of the Act.
3. Section 6 of the Act – **Construction Work** – the work is for the supply and installation of aluminium windows and doors, fly screens, fall protection screens and shower screens for the construction of a multi-story residential unit complex for the Respondent and section 6(1)(c) of the Act specifically provides for this type of work. I am satisfied that the work is construction work for the purposes of the Act.
4. Section 5 of the Act - **Construction Contract** - the contract is a written subcontract agreement between the parties, a copy of which is provided in the Application at **Tab A3**. The parties also agree that they entered into a construction contract.
5. The agreed contract value, including variations directed by the Respondent is $789,272.00 (including GST) and, according to the Applicant’s Director, the Respondent has paid the sum of $740,584.00 (including GST) for the Contract.
6. I am satisfied that the Contract is a construction contract for the purposes of the Act and that the agreed value of the Contract is in a lump sum of $789,272.00 (including GST).
7. 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.”*

1. The Applicant has made a payment claim on 5 August 2015 in the sum of $216,470.00 (including GST) on Tax Invoice 368.
2. The making of a payment claim in the Contract falls under clause 13 “**Payment**” of the Contract which states:

 *“****…..13. PAYMENT***

 ***13.1 Payment***

*(a) The Head Contractor is to pay the Subcontractor the Lump Sum (less any retention payable under clause 4(a)).*

*(b) By the 25th day of each month, the Subcontractor must give the Head Contractor a payment claim in relation to work carried out to the end of that calendar month which must include:*

 *(i) the amount of the Lump Sum and other costs or amounts the Head Contractor has agreed or determined are payable to the Subcontractor under the Subcontract;*

 *(ii) details of the part of the Subcontract Works carried out in the period to which the payment claim relates;*

 *(iii) the amount claimed by the Subcontractor for that part of the Subcontract Works completed;*

 *(iv) any amounts previously paid; and*

 *(v) the total claimed.*

*(c) Within 21 days of receipt of the payment claim, the Head Contractor must issue a payment statement to the Subcontractor and the Head Contractor which must set out:*

 *(i) the payment claim to which it relates;*

 *(ii) the value of the work carried out by the Subcontractor in accordance with the Subcontract as at the date of the payment claim;*

 *(iii) the amount already paid to the Subcontractor;*

 *(iv) any amount the Head Contractor is entitled to retain, deduct, withhold or set-off under the Subcontract;*

 *(v) the amount (if any) which the Head Contractor proposes to pay the Subcontractor on account of the Lump Sum and otherwise under the Subcontract; and*

 *(vi) if the amount to be paid is less than the claimed amount, the reason why the amount is less, including any reason for retaining, deducting, withholding or setting-off where relevant.*

*(d) Subject to clause 13.1 (e) and 13.2, the Head Contractor must pay the amount set out in the payment statement within 14 days of receiving the payment statement…..”*

1. Neither party has strictly followed the contractual requirements for the making, assessing and paying of a payment claim, however the course of conduct between the parties over the prior 24 payment claims made in the Contract shows a regular payment claim in the form of a tax invoice issued by the Applicant and then regular assessment and payment of that payment claim by the Respondent.
2. The Applicant issued its Tax Invoice 368 on 5 August 2015 as a payment claim in the same manner it had done throughout the Contract and the Respondent then assessed that payment claim and part paid the claim. The Respondent fully understood the claim and in the Response acknowledged the part payment of the claim.
3. The Applicant’s Payment Claim Tax Invoice 368 generally complies with the stipulations of clause 13.1(b) of the Contract and also complies with the varied process of claim, assessment and payment conducted between the parties throughout the Contract.
4. I am satisfied that Tax Invoice 368 is a valid payment claim that complies with the stipulations of the Contract, as varied by agreement through conduct between the parties to the Contract, and is therefore a valid payment claim for the purposes of the Act.
5. 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 partially 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.”*

1. The Applicant made a valid payment claim on 5 August 2015 in the sum of $216,470.00 (including GST) on Tax Invoice 368.
2. The Respondent part paid the claim on 14 September 2015 in the sum of $166,090.00 (including GST) and refused to pay the balance of the claim on the basis that there was defective and non-conforming work carried out by the Applicant on the windows in the complex. In short, the windows leaked and the Respondent refused to pay the full sum under the Contract until this was rectified by the Applicant.
3. The Respondent has argued that the implied provisions of the Act, the Schedule, Division 5 section 6(2)(a) and section 6(2)(b), which deal with the requirements of responding to a claim for payment, have been triggered by the Respondent’s failure to provide a payment statement as required by clause 13.1(c) of the Contract.
4. I am not with the Respondent on this point. The Contract stipulations for the making of and responding to payment claims are detailed at clause 13 of the Contract and make full provision for the making of and responding to payment claims under the Contract. In this dispute, however, the parties’ conduct throughout the Contract when making and responding to payment claims was condensed into a straightforward commercial process by the Applicant issuing a tax invoice and the Respondent then assessing and paying that invoice. The time this process would take varied from claim to claim, presumably through the Applicant’s agitation for payment from time to time, however it appears that both parties were content with the varied process as they undertook this commercial tax invoice process over the 24 progress payment claims in the Contract. The Applicant has also confirmed in its Application that the 24 progress payment claims in the Contract have been paid in full.
5. When the Respondent part paid Tax Invoice 368 and refused to pay the balance due to the water leaks in the windows, a payment dispute then arose under section 8(a)(i) of the Act.
6. It is for the parties to set and agree the terms and processes by which they will make, assess and pay payment claims under a construction contract. If the parties wish to vary that process, the Act simply cannot step in and attempt to imply provisions into the contract so as to unravel the bargain the parties have made. In this contract, the parties conducted themselves on a commercial tax invoice basis throughout the 24 payment claims made, assessed and paid in the Contract.
7. When the Respondent part paid the Applicant its Payment Claim Tax Invoice 368 on 14 September 2015 and then disputed the balance of payment for leaking windows, a payment dispute for the claim then arose that same day **14 September 2015**, under section 8(a)(i) of the Act, that would trigger the making of an application for adjudication under section 28 of the Act.
8. I am satisfied that there is a payment dispute for the purposes of section 8 of the Act in which the Applicant has applied for an adjudication of the payment dispute under section 28 of the Act.
9. Section 28 of the Act – **Applying for Adjudication** – by reference to the Applicant’s documents and its further submissions, the Application is dated 13 November 2015 and was served on the Appointer MBNT on 13 November 2015. The Application was also served on the Respondent on 16 November 2015 and within time.
10. The Application contains the relevant information prescribed by section 28(2) of the Act and regulation 6 of the *Construction Contracts (Security of Payments) Regulations* (“Regulations”).
11. 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 the Regulations.
12. Section 29 of the Act – **Responding to Application for Adjudication** – by reference to the Respondent’s documents and its further submissions, the Response is dated 26 November 2015 and was served on the Adjudicator and the Applicant on 26 November 2015 and within time.
13. The Response contains the relevant information prescribed by section 29(2) of the Act and regulation 7 of the Regulations.
14. I am satisfied that the Response is a valid Response for the purposes of the Act and contains the relevant information prescribed by the Act and the Regulations.
15. Section 34 of the Act – **Adjudication Procedure** – Further Submissions.

I requested further submissions from the parties on several questions I had after reading the Application and the Response. Both the Applicant and the Respondent prepared and submitted further submissions to me within the times I had requested.

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

***Merits of the Claims***

1. The claims made by the Applicant in the Application are as follows:
2. Tax Invoice 368 in the sum of $50,380.00 (including GST) but correctly calculated as **$48,688.00 (including GST)**, for the supply and installation of aluminium windows and doors, fly screens, fall protection screens and shower screens into the Respondent’s project;
3. Interest under the implied provisions of the Act on the sum calculated at a daily rate of $11.04 from 27 August 2015 to the date for payment in the determination; and
4. cost of the adjudication.
5. The Applicant says that there is no basis for the Respondent *“…refusing and/or failing to pay the full amount of the Payment Claim…*” for the work the Applicant has done.
6. The Respondent has refused to pay the balance of the Tax Invoice 368 Payment Claim because of the leaking windows installed by the Applicant. The Respondent says that the windows “…*are not fit for their intended purpose in that they are not watertight*…” and, as such, are defective and non-conforming for the installation into the Respondent’s Project.
7. The Respondent has lodged a counterclaim to rectify the Applicant’s defective and non-conforming work, based on an “…*expert opinion*…” from Mr. [X] of [the window supplier] and a quotation from [the window supplier] to rectify the defects in the window installation, as well as costs of the adjudication as follows:
8. Cost of rectification of defective work to the windows in the sum of $157,828.00 (including GST) but a counterclaim of full set-off against the Applicant’s Payment Claim and make no further payment to the Applicant; and
9. Costs of the adjudication in the sum of $6,600.00 (including GST) for its legal professional fees to respond to the dispute and costs of the adjudication, being the Adjudicator’s fees.
10. The Respondent’s total counterclaim over the two components of claim could be calculated in the sum of **$55,288.00 (including GST)** plus the fees of the Adjudicator, however the Respondent has not fully quantified this counterclaim.
11. In the alternative, the Respondent submits that it has not received the deduction of $6,600.00 (including GST) from the Lump Sum of the Contract for removal of the stacker doors from the Applicant’s scope of work. This sum “…*should be deducted from the amount of $50,380 claimed*…” by the Applicant.
12. I am not with the Respondent on this point. As set out in the Scotts Schedule Table 1, at paragraph 16 of this determination, the negative variation for the stacker doors has already been reconciled into the Lump Sum of the Contract and the Respondent has received that benefit from the Applicant.

The Applicant’s Tax Invoice 368, dated 5 August 2015

*The Payment Claim of $50,380.00 (including GST)*

1. The Applicant’s payment claim presupposes a contract value of $790,563.98 (including GST). However, as I have reasoned with the supporting evidence at paragraphs [18] to [22] above, the agreed lump sum contract value is **$789,272.00 (including GST)**.
2. By calculation of the payments made in the Contract, the Applicant’s Payment Claim is in the sum of **$48,688.00 (including GST)** and not the sum of $50,380.00 (including GST) as set out in the Application.
3. The Respondent has disputed the Applicant’s claim and in its Response says that it is entitled to set off against the Applicant the costs of having another contractor correct the non-conforming work of the Applicant.

The Respondent’s Counterclaim for Defective Work Rectification

*The Defective Work Counterclaim so as to make no further payment*

1. The Respondent has received a quotation from [the window supplier] in the sum of $157,828.00 (including GST) for the rectification of the defects and non-conforming work not rectified by Applicant in the Contract. The scope of that work is extensive and comprises, *inter alia*, repacking of all the windows to prevent Sagging and Dambing [*sic*] of the frames, including the fly-screens.
2. The Respondent seeks to set off the value of this work against the Applicant’s Payment Claim such that the Respondent makes no further payment to the Applicant for the work it has done in the Contract.
3. The Respondent has also reserved the right to bring another Application for the difference in the cost of rectification of the defects and non-compliant work carried out by the Applicant in the Contract.
4. I do not agree with the Respondent on this point. The issue that the Respondent faces is that, while there was water leaking into a unit “…*randomly selected on the ground floor*…”, the field test undertaken by the Respondent is not consistent with any controlled testing and amounted to applying a pressure hose on the window which is likely to cause leakage in most sliding windows. As it was, the Applicant then attended and inserted the missing packing rubbers provided by the window manufacturer into the windows which, by the Respondent’s admission, then reduced any flow of water into the unit. The unit in question was Unit [A], which appeared to be sold and was to be shortly occupied by the owner.
5. In its further submissions the Applicant provided a report on the water leaks in Unit [A] which indicated that the rubber baffles on the windows were also rendered and painted shut, thereby not allowing the sill to drain properly through the drainage holes provided. The Applicant removed the render and paint from the baffles to let the window drain properly.
6. In response to the Applicant’s report, the Respondent says that there are insufficient weep-holes in the window track, which contributes to the leakage problem with the windows and, in any event, that it was the Applicant’s responsibility to test the windows to ensure they were watertight prior to the scaffold being taken down from the building.
7. I agree with the Respondent on this last point. The Respondent paid the Applicant an additional sum in the Contract to provide labour for the installation of the windows to the building. Generally, the block layers install the bare window frames, which are supplied by the window subcontractor and once the building is at the finishing stage the window subcontractor then installs the moving panes and commissions the windows for proper operation. The fact that the packing rubbers were not installed into the windows and the sill baffles checked for operation at the time the fly-screens were installed, and before the scaffolding was removed from the building, shows a serious deficiency on the part of the Applicant to properly commission the windows for operation.
8. The Applicant has a 12 month defects and liability obligation under clause 14 of the Contract and the Respondent must provide each owner a Statutory Warranty period under section 54 of the *Building Act*. The Respondent has adopted a “*wait and see*” approach to this warranty in relation to the water leakage in the windows, as access is no longer available, and the Respondent must deal with each leakage issue as and when it should arise.
9. Further, there is no retention available to the Respondent in the Contract for the Applicant’s performance of the defects and liability period under the Contract. Practical Completion of the works, according to the Respondent in its further submissions, was on or about 8 September 2015 and an Occupancy Permit was issued for the building on 26 August 2015 and, as such, there is no retention available to the Respondent in the Contract for the Applicant’s performance of the defect and liability period. The retention clause 4 “SECURITY” was amended to provide for the return of any retention held by the Respondent “…*when Certificate of Occupancy is issued*…”. In its further submissions the Respondent confirmed it did not hold any component of retention in the Contract as the parties were known to each other prior to entering the Contract.
10. In its report on Unit [A], the Applicant attended to the paint and render on the sill baffles at a cost of $412.50 (including GST) for 2.5 hours of labour which, in my view, is an excessive labour cost and an excessive time for attendance to such a minor problem in one main bedroom window. The Applicant had an obligation to check and test the sill baffles on all the windows in the Project for their correct operation when installing the moving panes and fly-screens to the windows and failed to do so under the Contract. The Respondent paid the Applicant for this service in the lump sum contract, but has not received the full and final commissioning of the windows in the building and now faces an ongoing issue with possible water leakage into the building.
11. I am satisfied that the commissioning work was necessary and was not properly performed by the Applicant in the Contract. [Calculation of the cost of rectification work based on unit numbers, redacted] The cost of the work not performed by the Applicant is calculated to be $15,048.00 (including GST).
12. I award the counterclaim sum of **$15,048.00 (including GST)** to the Respondent for the commissioning work not performed by the Applicant in the lump sum contract which sum is to be deducted from the Applicant’s Tax Invoice 368 in the sum of $48,688.00 (including GST).
13. The remainder of the Applicant’s Payment Claim is to be paid by the Respondent and I award the Tax Invoice 368 payment claim to the Applicant in the sum of **$33,640.00 (including GST)**.

***Interest on the claims***

1. In reconciling the claims, the amount the Respondent is to pay the Applicant is $33,640.00 (including GST).
2. There are no written contract terms in relation to interest in the Contract and therefore the implied provisions of the Act are implied and form the contract terms applicable to the amount of interest to be paid to the Applicant. Interest on overdue payments is set out in section 7 of the Schedule and states:

*“ (1) Interest is payable on the part of an amount that is payable under this contract by a party to another party on or before a certain date but which is unpaid after that date.*

*(2) The interest must be paid for the period beginning on the day after the date on which the amount is due and ending on and including the date on which the amount payable is paid.*

*(3) The rate of interest at any time is equal to that prescribed by the Regulations for that time.”*

1. The rate of interest prescribed by regulation 9 of the Regulations is:

*“….the interest rate is the rate fixed from time to time for section 85 of the Supreme Court Act.”*

1. The Supreme Court Act refers to the Rules. The Supreme Court Rules follow Rule 39.06 of the Federal Court Rules and provides that the interest rate is to be the rate that is 6% above the cash rate set just before the 6 month period being considered. The Reserve Bank cash rate is currently 2.0%, therefore the interest rate applicable to this contract is 8.0% *per annum*.
2. Interest is not calculated on the GST component of the amount the Respondent is to pay the Applicant and GST is not payable on an interest amount awarded in a determination under Goods and Services Tax Determination 2003/01.
3. I award interest of **$730.61** on the sum of $30,581.82 (excluding GST) from 14 September 2015, the date of due payment, to 31 December 2015, the date of determination, pursuant to section 35 of the Act.

***Costs***

1. 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.
2. 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.”*

1. 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.
2. I determine that the parties bear their own legal costs under section 36(1) of the Act and the parties pay the cost of the adjudication of the dispute in equal shares under section 46(4) of the Act.

***Summary***

1. In summary of the material findings, I determine:
2. The contract to be a construction contract under the Act;
3. The work to be construction work under the Act;
4. The site to be a site in the Northern Territory under the Act;
5. The claim to be a valid payment claim under the Act;
6. The dispute to be a payment dispute under the Act;
7. Tax Invoice 368 payment claim to stand in the reduced sum of $33,640.00 (including GST);
8. Counterclaim for the Applicant’s failure to perform the window commissioning to stand in the sum of $15,048.00 (including GST) to be deducted from Tax Invoice 368 in the full sum of $48,688.00 (including GST);
9. Counterclaim for legal expenses to fail; and
10. Interest awarded in the sum of $730.61.
11. Accordingly, I determine that the amount to be paid by the Respondent to the Applicant is **$34,370.61 which sum includes a GST component of $3,058.18 only**.
12. This sum is to be paid to the Applicant by the Respondent on or before **28 January 2016**.

***Confidential Information***

1. The following information is confidential:
2. the identity of the parties; and
3. the location and nature of the works.

DATED: 31 December 2015



Rod Perkins

Adjudicator No. 26