**Amended** Determination 26.13.01

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

BETWEEN:

Applicant

and

Respondent

**REASONS FOR THE AMENDED DECISION**

1. On 18 October 2013 the Respondent wrote to me advising of a mathematical error in my determination of 30 September 2013.

2. The Respondent requested that I review my decision pursuant to section 43(2) of the Act.

3. In undertaking that review, I found a material arithmetic error in the determination and I have amended the determination under section 43(2)(b) of the Act. Attached please find the amended pages of my determination showing the incorrectly calculated amounts in red struck through followed by the corrected amount in black bold.

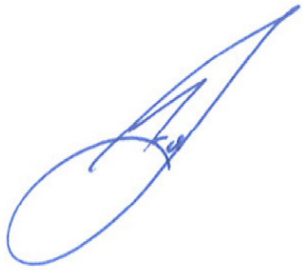
4. In consideration of the interest awarded in the determination, I also amend the determination under section 43(2)(a), slip or omission, to exclude the GST component applied to the interest awarded.

5. Under the *Goods and Services Tax Determination 2003/01* the Australian Taxation Office has ruled that GST is not payable on interest awarded in a determination.

6. In making these amendments under section 43(2) of the Act I also amend the day of payment of the sum awarded from 18 October 2013 to 24 October 2013.

7. In respect of the Applicant's claim for Adjudication dated 12 August 2013, I determine that the amount to be paid by the Respondent to the Applicant is amended to **$384,898.21** which sum includes Interest and GST and is to be paid in full on or before **24 October 2013.**

Date: 21 October 2013



Registered Adjudicator No. 26

**CONSTRUCTION CONTRACTS (SECURITY OF PAYMENTS) ACT**

**DETERMINATION 26.13.01**

Adjudicator: R.J. PERKINS
P.O. Box 868
NIGHTCLIFF NT 0814
(08) 8948 0942
0437 781 227

Applicant:

Respondent:

Date of Adjudication: 30 September 2013

In respect of the Applicant's claim for Adjudication dated 12 August 2013, I determine that the amount to be paid by the Respondent to the Applicant is **$384,898.21** which sum includes Interest and GST and is to be paid in full on or before **24 October 2013**.

The reasons for my determination are enclosed.

A list of information that, because of its confidential nature, is not suitable for publication by the Registrar is at paragraph 153 of this adjudication.

Date: 30 September 2013

Registered Adjudicator No. 26

Determination 26.13.01

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

BETWEEN: ("**the Applicant**")

And ("**the Respondent**")

**REASONS FOR DECISION**

1. On 13 August 2013 the Applicant served its Application dated 12 August 2013, on the Institute of Arbitrators and Mediators Australia (**"IAMA"**) as prescribed appointer under the Act. The Respondent confirmed it was also served a copy of the Application on 13 August 2013. By letter from IAMA dated 14 August 2013, I was appointed adjudicator to determine the payment dispute between the parties. I received the letter and Application on the same day.

2. On 20 August 2013 I wrote to the parties advising my appointment and declared no conflict of interest in the matter. I also sought submissions should either party object to the appointment. There were no objections to my appointment.

3. On 27 August 2013 I received the Respondent's Response. Having attended to both the Application and Response, and due to the numerous and complex issues of the matter, I wrote to the Construction Contracts Registrar on 4 September 2013 and sought some additional time in which to make my decision under section 34(3)(a). On that date the Construction Contracts Registrar approved my request for additional time, which gave me up to and including 30 September 2103 to determine the dispute. There were no objections from the parties.

4. On 17 September 2013 I wrote to the parties seeking submissions on two questions as set out below:

*"Having completed a preliminary reading of the considerable documentation in this matter and in looking to my jurisdiction, it occurred to me that there may be an argument as to the definition of a "site in the Territory" as prescribed in section 4 of the Construction Contracts (Security of Payments) Act ("the Act").*

*While section 4 defines a site in the Territory, section 11 binds the Crown to the Act conditional "….to the extent the legislative power of the Legislative Assembly permits…".* [the project site] *is presumably on Commonwealth Land.*

1. *Does the Act apply to the site in* [the project site] *for the purposes of this payment dispute? Or*
2. *Does the Application fall for lack of jurisdiction?"*

5. The Applicant provided its submissions on 19 September 2013 and the Respondent, who initially sought some additional time due to their client's policy requirements, advised by email on 25 September 2013 that they would not be making any further submissions on the questions from the Adjudicator.

***Introduction***

6. This adjudication arises out of a contract pursuant to which the Applicant agreed with the Respondent to build [the works] at [the project site], Darwin in the Northern Territory.

7. The Applicant claims it is entitled to be paid its Payment Claim No. 7 in the sum of $1,184,842.65 (including GST) for the Respondent terminating the contract for convenience on 22 May 2013. The Applicant's claim components comprise:

(a) work under the contract - $46,203.817 (including GST);

(b) provisional sums - $10,957.80 (including GST);

(c) variation sums - $40,801.97 (including GST);

(d) termination costs - $35,857.80 (including GST);

(e) sum not paid - $2,598.75 (including GST); and

(e) breach of contract damages - $1,048,404.50 (including GST).

8. The Applicant makes an alternative claim for suspension of the works in the sum of $281,945.54 (including GST), which sum is not included in the calculation of the sum of $1,184,842.65 (including GST). Essentially, the Applicant's payment claim may be valued at $1,184,842.65 (including GST) or, alternatively, the sum of $418,383.69 (including GST).

9. The Applicant also seeks interest and costs of the adjudication to be wholly borne by the Respondent.

10. The Respondent submits that the Applicant has not made out its entitlement to be paid and that the Respondent is also entitled to 287 days of liquidated damages in the sum of $1,435,000.00, accrued prior to their termination of the contract for convenience on 22 May 2103.

11. The Respondent also seeks costs of the adjudication to be wholly borne by the Applicant.

***Procedural Background***

The Application

12. The Application is dated 12 August 2013 and comprises six volumes enclosing a general submission and 112 listed attachments. The attachments, *inter alia*, include:

(a) a copy of the construction contract;

(b) a copy of the payment claim;

(c) a copy of the payment certificate; and

(d) supporting evidence including tender documents, design documents, statutory declarations, emails and correspondence between the parties and copies of general authorities relied upon in the general submission.

13. The Payment Claim was submitted to the Respondent on 21 June 2103 and the Respondent rejected the claim on 5 July 2013 certifying the payment to be made as *"$NIL"*.

14. The Application was served pursuant to section 28 of the Act.

The Response

15. The Response is dated 27 August 2013 and comprises a general submission and 17 listed attachments. The attachments, *inter alia*, include:

(a) copies of prior payment claims and payment statements;

(b) design reports and consultants' reports;

(c) email correspondence;

(d) statutory declarations; and

(e) copies of general authorities relied upon in the submissions.

16. The Response was served pursuant to section 29 of the Act.

***Adjudicator's Jurisdiction and the Act***

17. The following sections of the Act apply to the contract for the purposes of the Adjudicator's jurisdiction.

18. Section 5 of the Act - **Construction Contract** - the contract is a construction contract by reference to the contract documents and the parties agree that they entered into a construction contract in the terms set out in the contract documents. I am satisfied that the contract is a construction contract for the purposes of the Act.

19. Section 6 of the Act – **Construction Work** – the work is to erect and build [the works] inclusive of all services and s 6(1)(c) specifically provides for this type of building. I am satisfied that the work is construction work for the purposes of the Act.

20. Section 4 of the Act – **Site in the Territory** – I sought further submissions from the parties on the definition of "site" in relation to Commonwealth Land and whether section 11 of the Act binds the Crown. The Applicant submitted further and lengthy submissions in relation to a site in the Territory being a valid site on Commonwealth Land for the purposes of the Act.

21. The Respondent did not make any submissions in relation to this matter, effectively no contest.

22. In answering the questions, the Applicant cited the High Court in *Svikart v Stewart (1994) 181 CLR 548* at 555 in which Mason CJ, Dean, Dawson and McHugh JJ held that:

> *"(iv) There was nothing elsewhere in the Constitution which would inhibit s 122 so as to prevent it conferring power upon a Territory legislature to legislate with respect to Commonwealth places in a territory. There was no reason why, in a Territory, a separate legislature should not have power conferred upon it by the Parliament to legislate with respect to places acquired by the Commonwealth within the Territory."*
>
> Per Brennan J:

*"(v) The reference in s 52(i) to "all places acquired by the Commonwealth for public purposes" was to places outside a s 111 territory. The RAAF Base at Darwin was not such a place for the Northern Territory was a s 111 territory.*

*(vi) To construe the word "places" in s 52(i) as including areas within s 111 territory would be otiose, for the exclusivity of the legislative power of the Parliament with respect to "places" referred to in s 52(i) was effected in any event by s 111."*

23. In that case the defendant was charged with a range of offences related to drink driving and driving without a licence on a public street wholly within the RAAF Base Darwin.

24. The question was raised before a Stipendiary Magistrate hearing the charges against the defendant as to whether, assuming the RAAF Base was a Commonwealth place within the meaning of s.52(i) of the Constitution, the *Traffic Act* had any application to the roads in question.

25. Subsequently, the matters being heard by the Magistrate were removed to the High Court pursuant to s.40(1) of the *Judiciary Act 1903* (Cth) and a case was stated and questions were reserved for the consideration of the Full Court.

26. The questions reserved at 554 and the Orders made at 557 were:

1. *Does s.52(i) of the Constitution apply to places in the Northern Territory acquired by the Commonwealth for public purposes? – Answer: No.*
2. *Is the RAAF Base Darwin a Commonwealth place within the meaning of s.52(i) of the Constitution? – Answer: No.*

*3. If yes to 1 and 2, do the Acts and Regulations referred to in paragraph 1 of the Case Stated (the Traffic Act and the Traffic Regulations) apply to the driving by the defendant of the motor vehicle on the RAAF Base? – Answer: Unnecessary to answer.*

27. [The project site] similarly falls under the jurisdiction of the Act and section 11 binds the Crown. I am satisfied that the site for the construction of the [project] is a site within the Northern Territory for the purposes of the Act.

28. 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.*

29. The Applicant's claim has been lodged under clause 12.2(a) of the contract and annotated:

*"PROGRESS CLAIM No 7 (FINAL CLAIM) FOR WORK COMPLETED TO 21/06/2013"* ("No. 7 Final Claim").

30. Clause 12.2 sets out the payment claim provisions of the contract and the Applicant asserts that the claim it has made is a valid payment claim made by the contractor to the principal under the contract.

<u>Entitlement to make a payment claim</u>

31. The Respondent does not agree with the Applicant and submits at section B paragraph 8 of its Response that:

> *"…there is no such payment claim because:*
>
> *(a)* [the Applicant] *had no entitlement to make the payment Claim under the Contract because the Contract had been terminated; alternatively*
>
> *(b) the Payment Claim made by* [the Applicant] *was not validly made under the Contract."*

32. The Respondent's primary position is that the Applicant's entitlement to make a payment claim under clause 12.2 of the contract was extinguished when the contract was terminated for convenience on 22 May 2013. The Respondent does not deny that the Applicant is entitled to make a claim to be paid certain amounts under the contract, however it says that the relevant clause for making that claim is clause 14.8 and emphasises clause 14.8(a)(i) which is underlined and states:

> *"(a) will be entitled to payment of the following amounts as determined by the Contract Administrator:*
>
> *(i) for work carried out prior to the date of termination, the amount which would have been payable if the Contract had not been terminated and the Contractor submitted a payment claim for work carried out to the date of termination;*
>
> *(ii) the cost of goods or materials…."*

33. The Respondent asserts that clause 12.2 does not survive the termination and the only clause available to the Applicant to make its claim is clause 14.8 which expressly survives termination of the contract by stating after sub clause (b) that:

*“This clause 14.8 will survive the termination of the Contract by the* [Respondent] *under clause 14.7….”*

34. There is no express term in clause 12.2 that suggests a survival of the clause following a termination for convenience by the Respondent however, in itself the clause is the mechanism in the contract for the making of payment claims and expressly states at the head note of the clause that:

> *"…the Contractor must give the Contract Administrator claims for payment on account of the Contract Price and all other amounts then payable by* [the respondent} *to the Contractor under the Contract…"*

35. It is clear that the making of a payment claim under the contract is carried out using the mechanism found in clause 12.2 and, to the extent of the mechanism, those provisions would survive the termination of the contract, whereas the entitlement to make that claim can arise elsewhere in the surviving terms of the contract - in this instance, under clause 14.8 following termination of the contract for the convenience of the Respondent by the Respondent under clause 14.7 of the contract.

36. I am of the view that clause 12.2 of the contract, to the extent that it will provide a contractual mechanism for the making of a claim, will survive termination of the contract and will act in concert with clause 14.8 where the entitlement to make the claim arises following termination under clause 14.7 of the contract.

37. I do not support the Respondent's position that clause 12.2 wholly expires upon termination of the contract, but rather that it provides a legitimate and valid mechanism for the Applicant to make its payment claim.

38. On this point I am satisfied that the Applicant is entitled, under clause 14.8, to make a payment claim and has validly made its claim under

the surviving provisions and mechanism of clause 12.2 of the contract. I am also satisfied that the Applicant's payment claim is a valid payment claim for the purposes of the Act.

Condition precedent of the payment claim

39. The Respondent has also argued that the Applicant has not validly made its payment claim in that it did not comply with the conditions precedent in clause 12.3 when making the claim.

40. The conditions precedent that the Respondent asserts the Applicant has not complied with are:

(a) required insurance not obtained;
(b) programming obligations not complied with;

(c) relevant certificates not provided;

(d) computer readable Project Documents not handed over; and

(e) insufficient details to determine the amount payable.

41. When the Respondent terminated the contract for convenience it also released the Applicant from further obligations of technical compliance with these provisions of the contract. The Respondent cannot terminate the contract and then ask the Applicant to strictly comply with the contract they have just terminated.

42. The issue in the Respondent's argument, and one they have not raised, is: do the provisions of clause 12.3 survive termination of the contract?

43. When considering this issue one also must consider the backdrop of the two convertible instruments held by the Respondent in relation to the contract deliverables and the limited warranty for the work the Applicant has performed under the contract prior to termination.

44. For example, it is no longer relevant for the Applicant:

(a) to hold any insurances in relation to the contract;
(b) to undertake and provide any programming of the works; or

(c) to provide relevant certificates for the design under the contract which had been rejected by the Respondent on 10 February 2013.

45. If the Respondent requires any deliverables from the Applicant under the survivor provisions of the contract, these deliverables will become the subject items of the Bankers Guarantees held by the Respondent against the Applicant's performance of these obligations.

46. The Respondent cannot seek to prevent the making of an entitled claim by the attempted enforcement of condition precedent terms of a contract it has just terminated for its own convenience, as those conditions would be extinguished upon termination of the contract.

47. I am of the view that clause 12.3 of the contract, to the extent it relies on clause 5.4, 6.15 and 10.2, does not survive termination for convenience of the contract. A party to a contract cannot be obliged to provide insurance, programming of the work and design certificates after the contract has been terminated. The Respondent had valid insurance certificates, a current program of the works and current design certificates from the Applicant prior to terminating the contract for the Respondent's convenience.

48. When the Respondent terminated the contract it also terminated the obligations and requirements of the Applicant to comply with the insurance (clause 5.4), programming (clause 10.2) and design provisions (clause 6.15) of the contract. These clauses must expire upon termination of the contract.

49. On this point, I am satisfied that the Applicant has made a valid payment claim under the surviving provisions and mechanism of clause 12.2 of the contract. I am also satisfied that the Applicant's payment claim is a valid payment claim for the purposes of the Act.

Form of the payment claim

50. There are no clear administrative provisions in the contract that prescribe the form a payment claim is to take in the contract. To understand how the parties made, assessed, certified and paid the prior payment claims in the contract I turned to the Respondent's Response exhibits behind Tabs 3 and 12 for payment claims and Tab 4 for a payment statement.

51. I also turned to the Applicant's Application exhibits behind Tabs 38 and 40 for payment claims and Tab 39 for a payment statement.

52. By attending to these documents it becomes clear that both the Applicant and the Respondent were in agreement with the form that a payment claim would take for the purposes of clause 12.2 of the contract and the form the payment statement would take for the purposes of clause 12.4 of the contract.

53. A review of the payment claim No 7. Final Claim made by the Applicant on 21 June 2013 reveals that the information contained in that claim is of the same format and content as the prior six payment claims the Applicant had made and the payment statement issued by the Respondent on 5 July 2013 is of the same format and content as those previously issued under the contract. For example, the Respondent had assessed payment claim 4 from the Applicant on the same format and content as that contained in payment claim No. 7 Final Claim, issued a payment statement and paid the claim. No further particulars were required.

54. Had the Respondent required further and better particulars of claim, it ought to have asked for those particulars during the assessment period between 21 June 2103 and 5 July 2013. I can find no evidence in either the Application or Response where the Respondent requested further and better particulars of the Applicant's claims. The Respondent has assessed claim No. 7 Final Claim at *"$NIL"*. In my view, while this was not a *bona fide* assessment of the Applicant's claim, the claim is nonetheless a valid payment claim under the contract.

55. On this point I am satisfied that the Applicant has made a valid payment claim under the surviving provisions and mechanism of clause 12.2 of the contract. I am also satisfied that the Applicant's payment claim is a valid payment claim for the purposes of the Act.

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

> *(a) when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed; or*
>
> *(b) when an amount retained by a party under the contract is due to be paid under the contract, the amount has not been paid; or*
>
> *c) when any security held by a party under the contract is due to be returned under the contract, the security has not been returned.*

57. The Applicant made a valid payment claim No 7. Final Claim of 21 June 2013 in the sum of $1,184,842.65 (including GST) or, alternatively, in the sum of $418,383.69 (including GST). That claim

No 7. Final Claim was to be paid under the contract provisions by 20 July 2013.

58. The Respondent rejected the Applicant's claim No 7. Final Claim on 5 July 2013 and failed to pay any portion of the claim by 20 July 2013. The contract payment requirement of section 8 of the Act arose in *Department of Construction and Infrastructure v Urban and Rural Contracting Pty Ltd and Anor [2012] NTSC 22* at para 20 Barr J stated:

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

59. In this matter a payment dispute arose between the Respondent and the Applicant on 20 July 2013 and I am satisfied that there is a payment dispute for the purposes of the Act in which the Applicant has applied for an adjudication of the dispute under section 27 of the Act.

60. Section 28 of the Act – **Applying for Adjudication** – By reference to the Applicant's documents of the Application dated 12 August 2013, served on the Respondent and the Prescribed Appointer IAMA on 13 August 2013. I am satisfied that the Application is a valid Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 6.

61. Section 29 of the Act – **Responding to Application for Adjudication** – By reference to the Respondent's documents in the Response dated 27 August 2013, served on the Applicant and the Adjudicator on 27 August 2013. I am satisfied that the Response is a valid Response to the

Application for Adjudication for the purposes of the Act and contains the relevant information prescribed by the Act and Regulation 7.

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

***Merits of the Claims***

63. The claims made by the Applicant in their application are as follows:

    (a) breach of contract damages - $1,048,404.50 (including GST);

    (b) work under the contract - $46,203.817 (including GST);

    (c) provisional sum - $10,957.80 (including GST);

    (d) variation sums - $40,801.97 (including GST);

    (e) termination costs - $35,857.80 (including GST);

    (f) sum not paid - $2,598.75 (including GST); and as an alternative to (a) breach of contract claim,

    (g) suspension claim - $281,945.54.

64. The counter claims by way of set-off made by the Respondent is as follows:

    liquidated damages – $1,435,000.00 (excluding GST).

65. In dealing with these claims, it is appropriate to deal concurrently with the Applicant's breach of contract claim in (a), the Applicant's suspension claim in (g) and the Respondent's liquidated damages claim as these claims are inextricably linked to time in the contract.

Breach of contract claim - $1,048,404.50 (including GST)

66. The Applicant asserts that the Respondent is liable to pay the sum in the contract particulars of $2,365 per working day as agreed damages in the contract for breach of contract arising under clause 10.11. It is express in the contract particulars that these agreed damages only apply under clause 10.11 of the contract.

67. The head note in clause 10.11 states:

> *"…The Contractor will be entitled to be paid the amount in the Contract Particulars for each day by which the date for Completion of the Works or a Stage is extended due to a breach of the Contract by* [the Respondent]*…"*

68. The Respondent argues that the Applicant has failed to make out any breach of contract and states at section F paragraph 97 that:

> *"…the Contractor has to demonstrate that the extension of time has been granted due to a breach of the Contract by* the [Respondent] *(ie the delay-causing event giving rise to the extension was a breach of the Contract by* the [Respondent]*)."*

69. The Respondent also argues that it has, in any event, pursuant to clause 10.12, a clear contractual right to suspend part or all of the works.

70. On this claim I subscribe to the view held by the Respondent. The Applicant has not made out an event or series of events that would affect the critical path for construction. I am also of the view that the Applicant, due to the ongoing collaboration over design, and in particular, the connectivity of the mechanical services for the [project] into the existing site services, set out in the Minutes of a 'without

prejudice' meeting on 8 November 2012, has not yet commenced on the critical path for construction.

71. It is important that I deal with the notion of 'without prejudice' at this point. An Adjudicator is not a court of record and is not bound by the Rules of Evidence. I must determine the claim dispute before me on the balance of probabilities under the rules of natural justice, which includes all the documents before me. The Minutes of Meetings at Volume 3, Tab 28 and Volume 4, Tab 34 provide clear insight into the dealings between the parties in relation to the design, the site services, the tender exclusions and the programme of works.

72. While the Applicant did carry out some construction activities in 2011, those activities were promptly stopped by the Respondent when the Applicant attempted to go to site on 11 October 2011. Ms [B] and Mr [W], who were not parties to the contract nor nominated representatives under the contract, prevented the Applicant from commencing on site, which would be construed as a breach event for the Respondent. The Contract Administrator later that day confirmed that action and issued an instruction to suspend the work on site.

73. It is quite unclear whether at the time the Respondent actually suspended the Works or the Contractor's Activities. In any event, the Applicant continued with their design obligations under the contract and continued to work with the Respondent as they continually changed the design requirements.

74. The Respondent attempted to cure the suspension by issuing an instruction to the Applicant on 21 June 2012 to:

> *"…re-commence performance of all of the Contractor's Activities."*

However, two days earlier the Respondent had just issued version 3 of its Functional Design Brief and it was clear from the Minutes of the

Meeting of 8 November 2012 that design was ongoing and there were still several issues in relation to the existing site mechanical and electrical services' interconnection with the [works].

75. In the meeting of 8 November 2012 at point 6.1, the Respondent pointed out the Applicant's tender exclusions in relation to the existing site services and suggested their inclusion along with a contract price amendment. The Respondent was to advise and then place the mechanical and electrical services upgrades and design within the Applicant's scope of work by Deed of Agreement.

76. The Respondent has a broad power under clause 10.12 of the contract to suspend *"…all or part of the Contractor's Activities…"* and this would also include suspension of the Works and access to the Site. It is unclear whether the Site was again released to the Applicant for construction activities after the initial suspension of 11 October 2011.

77. I am satisfied that the Respondent, while temporarily breaching the contract on 11 October 2011, quickly remedied that breach and suspended and then prolonged the Applicant's Work on the Site from 11 October 2011 to the date of termination of the contract on 22 May 2013.

78. The Applicant's claim for breach of contract in the sum of $1,048,404.50 (including GST) therefore fails.

<u>Liquidated Damages claim – $1,435,000 (excluding GST)</u>

79. The Respondent asserts that it is entitled to liquidated damages, under clause 13.7 of the contract, for each day between 8 August 2012 (the Date for Completion) and 22 May 2013 (the Date of Termination for Convenience). The rate set out in the contract particulars is $5,000 per day and the Respondent has calculated its damages as being 287 days multiplied by $5,000 which equals $1,435,000 (excluding GST).

80. The causal link for liquidated damages to apply is a breach of contract by the Applicant in that the Applicant did not reach completion of the Work by the Date of Completion in the contract extended from time to time by the Respondent.

81. The issue which arises for the Respondent in this matter is whether or not they have acted reasonably, fairly and honestly when dealing with time in the contract.

82. Attending to the documents of the Application Volume 4, Tabs 50 to 59 inclusive, show that the Applicant made eight extension of time requests between 15 November 2012 and 1 March 2013, setting out the issues the Project faced and attached a program of works showing the impact on the Project.

83. The Respondent accepted the Applicant's first extension of time request dated 15 November 2012, for the suspension of the work, and categorised as 'prolongation', between 11 October 2011 and 21 June 2012. In their notice of 3 April 2012 the Respondent extended the Date of Completion by 33 days after the date on a 'notice to recommence'. Despite the uncertainty of the Respondent's notice of 3 April 2013, a notice to recommence dated 21 June 2012 was issued to the Applicant and the Date of Completion was extended to 8 August 2012.

84. In relation to the next seven extension of time requests from the Applicant issued to the Respondent over the period of 15 November 2012 to 1 March 2013, the Respondent wrote back to the Applicant on 10 February 2013, 19 February 2013 and 25 March 2013 respectively, setting out primarily that the Applicant had failed to provide "*Design Documentation*" and that this had caused the delay in the Project. In effect, that the Applicant had caused its own delay.

85. After reading the Minutes of the Meetings of 30 October 2012 and 8 November 2012, Consultant Norman Disney & Young's report, and the Applicant's 50% Design Report submitted on 19 December 2012, it

becomes clear that the existing site services, which were excluded from the Applicant's tender submission, were an ongoing problem in relation to capacity and connectivity and not "*Design Documentation*" as the Respondent's Contract Administrator suggests.

86. The Contract Administrator for the Respondent did not address this issue in his reasons for rejecting the Applicant's time request extensions, but chose instead to focus on the minor technicalities of the contract provisions which are largely unrelated to the nub of the issue causing the delay for the Project.

87. It is a requirement for the Contract Administrator to act impartially and in a fair, reasonable and honest manner when administering a contract, as set out in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd [2002] NSWCA 211*. That decision has, however, caused some controversy and the preferred method of delay analysis is through objective review of the event impact on the critical path for construction and then delays apportionment against the culpable party. This process provides a clear picture as to whether or not it is necessary to extend time in the contract.

88. The Contract Administrator for the Respondent did not attend to the events of the delay, despite these events being relatively obvious and ongoing. It is also uncontroversial between the parties that an Arbitrator or Adjudicator may step into the shoes of the Contract Administrator as set out in *Transgrid & Ors v Siemens Ltd & Ors [2004] NSWCA 395* and in *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2) Supreme Court of Victoria, Unreported 14 December 2006, BC 200610448*, in which Osborn J's decision followed that of Victorian Chief Justice Warren in *Kane Constructions v Sopov (2006) 22 BCL 92* that this can be to extend time in the contract.

89. I am satisfied that the events set out in the Applicant's extension of time requests are relevant to, among other things, the design of the

services on the Site and the issues with these existing services being either inadequate or undersized for connection to the [works].

90. The Respondent's 'Request for Tender', Volume 3, Tab 17 of the Application, at section 7.1(c) advised the respective Tenderers' that:

> *"…Existing site services information will be provided to the Contractor..."*

The connection of the [works] to these existing services was set out as an exclusion and clarification in the Applicant's tender, Volume 2, Tab 6 of the Application, which the Respondent accepted and then later referenced in the meeting of 8 November 2013 for inclusion into the contract via a Deed of Agreement between the parties. The Deed of Agreement was to also hold terms that extend time in the contract for the Works to be completed (the Respondent letter of 21 June 2012, Volume 4, Tab 46 of the Application). The Deed of Agreement never materialised and the Respondent then terminated the contract for convenience on 22 May 2013.

91. The Applicant's inability to even get up onto the critical path for construction on Site is relevant to these events and I am satisfied that I may stand in the shoes of the Contract Administrator for the Respondent and extend time in the contract until 22 May 2013, the date of termination for convenience of the contract by the Respondent.

92. The Respondent's claim for liquidated damages in the sum of $1,435,000 (excluding GST) therefore fails.

<u>Suspension claim - $281,945.54 (including GST)</u>

93. The Applicant has claimed suspension costs (prolongation) in the sum of $281,945.54 (including GST) for the period of 15 March 2012 to 22 May 2013. They have calculated this sum on a pro-rata basis of the earlier prolongation agreed payment made in Payment Claim 4 and approved in Payment Statement 5, copies of which are in Volume 4,

Tabs 42 and 43 of the Application, for the period of 11 October 2011 to 14 March 2012. The Payment Statement 5 categorises the suspension claim as:

> *"….1. the weekly ongoing amount of $525 for the period 15/03/2012 to 30/6/2012 being $8951.25; and*
>
> *2. $90,620.37, being the approved prolongation costs from 12/10/2011 to 14/03/2012;…."*

94. I have stepped into the shoes of the Contract Administrator for the Respondent and extended time in the contract to 22 May 2013, the date of termination for convenience by the Respondent. This was to take account of the time not assessed by the Respondent's Contract Administrator in the Applicant's extension of time requests issued between 15 November 2012 and 1 March 2013.

95. In responding to this claim, the Respondent has indicated at Section G, paragraph 149, that it has already paid "...weekly ongoing costs from 15 March 2012 to 30 June 2012…" of $5,775.00 (excluding GST) and that they should not have to pay these suspension costs again.

96. I agree with the Respondent in this matter, to the extent that they have paid for "*weekly agreed ongoing costs*". By attending to the Payment Claim 4 and Payment Statement 5 in Volume 4, Tab 42 and 43 respectively of the Application, it can be easily seen that these are not suspension costs, that is prolongation costs, but more ongoing costs, such as storage and vehicle costs incurred by the Applicant in Darwin. I accept that this component of costs has already been paid by the Respondent for the period of 15 March 2012 to 30 June 2012 and must be deducted from the Applicant's claim.

97. I am satisfied that the Applicant's suspension claim, more accurately categorised by the Respondent as prolongation costs, has merit and is to be calculated by firstly deducting the weekly ongoing costs monies

already paid by the Respondent for the period 15 March 2012 to 30 June 2012 as follows:

(a) Suspension Claim (prolongation) $281,945.54 (including GST)

MINUS

(b) Weekly ongoing costs already paid $6,352.50 (including GST)

TOTAL CLAIM AWARD

(c) Suspension Claim (prolongation) $275,593.04 (including GST).

98. I am satisfied that the Applicant has an entitlement to be paid their suspension claim, more accurately categorised by the Respondent as prolongation costs, in the sum of $275,593.04 (including GST) and I award this claim to the Applicant.

Sum not paid - $2,598.75 (including GST)

99. The Respondent certified the sum of $108,633.66 (including GST) in its Payment Statement 5 for the Applicant's amended Payment Claim 4, copies of which are at Volume 4 Tabs, 42 and 43 respectively of the Application. The Applicant invoiced and was paid by the Respondent the sum of $106,034.91 (including GST) and now seeks to recover the remaining $2,598.75 in their No. 7 Final Claim.

100. By attending to the Payment Statement 5 and the Payment Claim 4 it can be easily seen that the Respondent approved the sum of $8,951.25 (including GST) for the weekly ongoing costs of the Applicant and the Applicant has only claimed, invoiced and been paid $6,352.50 (including GST) of these costs.

101. Payment Statement 5 shows amounts approved in the sum of $98,757.87 (including GST) which sum includes, weekly ongoing costs and prolongation costs, of the Applicant's initial claim of $188,007.87 (including GST). The Applicant then revised and reissued its claim in the total sum of $106,034.91 (including GST).

102. The Respondent submits at section L, paragraph 264(d) that on or about 22 June 2012 the Contract Administrator issued the Applicant with a revised Payment Statement in the sum of $106,034.91 (including GST). The Applicant invoiced that amount and was paid that amount. I support this position.

103. The sum not paid of $2,598.75 (including GST) is for the amount of weekly ongoing costs for the period of 15 March 2012 to 30 June 2012 and, had that sum been paid by the Respondent, it would have been necessary to deduct that sum from the Applicant's suspension claim (prolongation costs).

104. As the sum was not paid by the Respondent I am satisfied that it is unnecessary to make any further deduction and the claim must fail as the sum of $2,598.75 (including GST) is wholly contained within the suspension award above.

Work under the contract - $46,203.82 (including GST)

105. The Applicant submits that it has not been paid the total of the scheduled works it carried on the initial approved design dated 19 August 2011. The bulk of the work and costs arise from the [omitted] subcontractor completing their works from 85% to 100% prior to the Site suspension on 11 October 2011.

106. The Respondent argues that the Applicant has not progressed any additional work that would warrant additional payment of the Contract Price. I disagree with this proposition. The [subcontractor] jobbing sheets at Volume 3, Tab 22 of the Application clearly show the materials advancement of the subcontract to completion following the date of 31 May 2012 through to 1 June 2012.

107. It would also be valid that the advancement of this component of the contract would incur an increase in the Preliminaries and General items of the contract. The photographs provided by the Applicant in Volume 5, Tab 68 show packs of materials and fabricated components, however it is difficult to see with any precision how these relate back to the [the subcontractor] jobbing sheets.

108. The Respondent has also argued that the [the subcontractor] components would not be fit for purpose because the final design had not been approved at the time of manufacture and would not meet the quality criteria under the contract.

109. The Respondent has led no evidence to support this position and the Applicant at Volume 3, Tab 21 shows approval of the design to proceed by the Respondent. At that time it was approved and it was only later, once the issue of Site suspension and stakeholder approval arose, that the design started to shift through several iterations of change and the approval was withdrawn.

110. On balance, I am satisfied the Applicant has incurred the cost of the manufacture through [the subcontractor] and their preliminaries and general items of the contract in the sum of $46,203.82 (including GST) and I award this claim to the Applicant.

Termination costs - $35,857.80 (including GST)

111. The Applicant submits that it has incurred termination costs for demobilisation from Site to their holding yards in Darwin and then their Brisbane offices in the sum of $35,857.80 (including GST). In support of these costs the Applicant at Volume 4, Tab 64, show detailed time sheets, daily diaries and third party invoices for ongoing engineering, freight, storage and transport removal.

112. The Respondent does not challenge the Applicant's entitlement to be paid their termination costs but suggests the Applicant have not provided sufficient details that the amounts claimed are valid.

113. I disagree with the Respondent on this point. There is ample information in the documents the Applicant have provided that would allow a Contract Administrator to thread through and establish the validity or otherwise of the claim. It is also illogical that the Applicant would be removing items other than contract related items from "[project site] to AL Logistics" holding yards. The Respondent has not at any material time requested details from the Applicant of how and when they were to remove their equipment and materials from the Site lay down area, following the Respondent's termination of the contract for convenience.

114. On balance, I am satisfied the Applicant has incurred the cost of the termination of the contract in the sum of $35,857.80 (including GST) and I award this claim to the Applicant.

Provisional sum - $10,957.80 (including GST)

115. The Applicant has claimed $10,957.80 (including GST) for a provisions sum for design work undertaken in relation to the connection of the services for:

(a) Electrical mains connection;

(b) Sewer, storm water and water connections; and

(c) Communications and fire connections.

116. The Respondent claims that the work in the provisional sum and a variation order dated 7 March 2013, namely a site visit to ascertain the location of the existing services, are for the same work and that the Variation Order was issued to correct a Contract Administrator error in the original instruction to proceed with the work.

117. By attending to the Variation Order of 7 March 2013 and the instruction to proceed of 12 July 2012, it is clear that the two items are not for the same component of work.

118. The work the subject of the provisional sum was contained in the Applicant's tender clarifications as a provisional sum of $25,000 for the connection of services to existing infrastructure.

119. The instruction from the Respondent to the Applicant of 12 July 2012 between the Project Managers, a copy of which is at Volume 5, Tab 70 of the Application clearly states:

*"…Please consider this email as an instruction to proceed (under clause 8.7 and 8.8) to design of the following Provisional Sum Work:*

- *Electrical mains connection.*
- *Connection of sewer stormwater and water services to existing infrastructure.*
- *Connect Communications and Fire to existing base facilities.*

*Please consider this email and [sic] instruction to delete the following Provisional Sum Work from the Contract;*

- *Provision of* [omitted] *gas delivery throughout the facility. (for the avoidance of doubt, external gas storage facility to remain)*
- [omitted]*……"*

120. It is quite clear that the Respondent was instructing the design of the connections and deletion of the other provisional sum work in the contract. While reference to the contract shows, as the Respondent has correctly pointed out in their submissions at section K, paragraph 233, that there are no provisional sums set out in the contract, the parties may vary the contract by agreement to include such sums.

121. By attendance to the email correspondence from the Respondent to the Applicant on 13 July 2011, at Volume 5, Tab 71, it is clear that the parties had intended such provisional sums for work in the contract of unknown scope at the time. This further developed over time and by attendance to the email and "Provisional Sum Work" instruction of 11 October 2012 at Volume 5, Tab 72 of the Application it can also be seen that there were two separate and distinct components of work instructed by the Respondent in relation to the site services connections:

    (a) design of the connections; and

    (b) site visit to ascertain the locations of the services.

122. The design is the subject of the provisional sum and the site visit is the subject of the variation order and the Respondent instructed the Applicant to do both portions of work under the contract.

123. I am satisfied that the Applicant has an entitlement to be paid the provisional sum claimed in the sum of $10,957.80 (including GST) and I award this claim to the Applicant.

Variation sums - $40,801.97 (including GST)

Variation 5.

124. The Applicant has claimed the sum of $5,500 (including GST) to carry out a site investigation to ascertain the location and connectivity of the existing services.

125. The Respondent instructed this work and provided a Variation Order 5 on 7 March 2013 to the Applicant to do the work. The Applicant subsequently carried out the work and has claimed for the work.

126. In its submissions the Respondent has argued that the work requested in the Variation Order 5 was scope work that the Applicant was obliged

to do in any event as part of their contract and, as such, the variation ought not be paid.

127. The Respondent sets out lengthy submissions for the Adjudicator to consider in relation to the tests that must apply when considering whether or not a variation has been ordered to the contract. Absent a written Variation Order, I would be inclined to consider such tests as relevant, however in this instance the Variation Order is quite precise in what the Applicant is to do.

128. I am satisfied that the Applicant has an entitlement to be paid the Variation 5 sum claimed of $5,500.00 (including GST) and I award this claim to the Applicant.

Variation 3 - $4,125.00 (including GST)

129. The Applicant has claimed the sum of $4,125.00 (including GST) to prepare a concept design for [vehicle bay] and Hardstand areas as requested by the Respondent on 16 May 2012.

130. The Respondent at section H, paragraph 173 accepts that this sum should be paid by the Respondent in relation to their request for the concept design for the [vehicle bay] and Hardstand areas.

131. As the parties are in agreement on this point, I award the Applicant the sum of $4,125.00 (including GST) for their work under Variation 3.

Variation 4 – 25,276.57 (including GST)

132. The Applicant has claimed the sum of $25,276.57 (including GST) for work completed by the Applicant that includes:

*"….a. Prelim and General;*

*b. concrete, formwork and reinforcement;*

*c. [the subcontractor] components;*

*d. Joinery; and*

*e. external works…."*

133. The Applicant also refers to evidence in Volume 5, Tab 82, of this work having been carried out, however the only document behind Tab 82 is a small spreadsheet showing a listing of the work as Variation 4.

134. The Respondent acknowledges Variation 4 at section H, Tab 174 of the Response and then at paragraph 177 states:

> *"…There is no evidence that the Respondent has received from the Applicant any deliverable of value in response to the variation Order* (meaning Variation Order 4)…"

135. The Respondent continues in that same paragraph and states:

> *"…Nowhere is there to be found any evidence of any work product being delivered to the Respondent that could be said to relate to the Applicant's variation no 4…"*

136. I am of the same view as the Respondent in this regard. I cannot find any evidence from the Applicant that would lead me to consider that this variation was in fact carried out in the contract. There are no invoices, purchase orders, freight notices, delivery dockets, site diaries or time sheets that could or would point to any component of the work.

137. On balance, I am not satisfied that the Applicant has incurred the cost of the Variation 4 as they have failed to support their claim evidentially.

138. The Applicant's claim for Variation 4 in the sum of $25,276.57 (including GST) therefore fails.

<u>Variation 1 - $5,900.40 (including GST)</u>

139. The Applicant has claimed the sum of $5,900.40 (including GST) for demobilization works instructed that includes:

*"….a. return flights from Brisbane to Darwin;*

*b. meal costs for the duration of the stay in Darwin;*

*c. labour costs for the duration of the stay in Darwin; and*

*d. repositioning and removal of building materials with additional weights."*

140. The Applicant has detailed this claim and the above information in their "*Delay Costs Summary*" of 15 November 2011 at Volume 4, Tab 47 of the Application.

141. The Respondent claims that it has already paid this claim as part of the Applicant's Payment Claim No. 3 and submits at Tab 4 of their Response the Payment Statement for payment number 4 to the Applicant in the sum of $309,904.16 (including GST).

142. By attending to the Applicant's Payment Claim No. 3 at Volume 4, Tab 40 of the Application and the Respondent's Payment Statement No. 4 at Tab 4 of the Response, it is clear that the Respondent has already paid the claim.

143. The Applicant's claim for Variation 1 in the sum of $5,900.40 (including GST) therefore fails.

***Interest on the claims***

144. In reconciling the claims, the amount the Respondent is to pay the Applicant is **$378,237.46 (including GST)**.

145. The interest rate for 1 July to 30 September 2013 pursuant to clause 12.13 of the contract is the Australian Taxation Office General Interest Rate ("GIC").

146. The GIC for this quarter is 9.82% on the sum payable of **$343,852.24 (excluding GST)** for the period of 20 July 2013 to 30 September 2013 calculates interest at **$6,660.75 (excluding GST)**.

147. I award interest until determination on the sum payable excluding GST from 20 July 2013, the date of due payment, to 30 September 2013, the date of determination, pursuant to section 35 of the Act.

***Summary***

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

(a) the contract to be a construction contract under the Act;

(b) the work to be construction work under the Act;

(c) the site to be a site in the Northern Territory under the Act;

(d) the claim to be a valid payment claim under the Act;

(e) the dispute to be a payment dispute under the Act;

(f) the Breach of Contract claim to fail;

(g) the Liquidated Damages claim to fail;

(h) the Suspension claim, correctly categorised by the Respondent as Prolongation costs to stand in the sum of $275,593.04 (including GST);

(i) the sum not paid claim to fail;

(j) the Work under contract claim to stand in the sum of $46,203.82 (including GST);

(k) the Termination costs claim to stand in the sum of $35,857.80 (including GST);

(l) the Provisional Sum claim to stand in the sum of $10,957.80 (including GST);

(m) the Variation 5 claim to stand in the sum of $5,500.00 (including GST);

(n) the Variation 3 claim to stand in the sum of $4125.00 (including GST);

(o) the Variation 4 claim to fail;

(p) the Variation 1 claim to fail; and

(q) Interest awarded in the sum of $7,930.75 (including GST).

149. Accordingly, I determine that the amount to be paid by the Respondent, the Respondent, to the Applicant, the Applicant, is **$384,898.21 (including GST)**.

150. This sum is to be paid to the Applicant by the Respondent on or before **24 October 2013**.

***Costs***

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

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

***Confidential Information***

153. The following information is confidential:

(a) the identity of the parties;

(b) the identity of the principal; and

(c) the location and nature of the works.

DATED: 30 September 2013

Rod Perkins
Adjudicator No. 26