

**Adjudicator's Determination**  
Pursuant to the Construction Contracts Act - NT

Adjudication Number	<b>34.13.02</b>
Prescribed Appointor	<b>RICS Dispute Resolution Service.</b>
Adjudicator	<b>Colin Bond (Adjudicator 34)</b>
Applicant:	
Respondent:	
Project:	.
Amount to be paid by Respondent	<b>Nil</b>
Due Date For Payment	Not applicable
Adjudication Fees Apportionment	Applicant: 50% Respondent: 50%
Date of Determination or Dismissal	16 <sup>th</sup> September 2013
Payment Claim	Claimed Amount : <b>\$23,024,444.72</b> excluding GST Dated : 25 <sup>th</sup> May 2013
Notice of Dispute / Response to Payment Claim	Notice of Dispute Amount : Nil
Adjudication Application	Dated 16th August 2013 (served on respondent on 19 <sup>th</sup> August 13)
Adjudicator Acceptance	Dated: 20 <sup>th</sup> August 2013
Adjudication Response	Dated: 2 <sup>nd</sup> September 2013

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### **The Determination or Dismissal**

1. I, Colin Bond, Registered Adjudicator Number 34, as the Adjudicator pursuant to the *Construction Contracts (Security of Payments) Act* (NT) (the Act), for the reasons set out in this determination, determine that:
  - a. The amount to be paid by the respondent to the applicant is Nil.
  - b. Interest is due on the adjudicated amount is therefore not applicable.

### **Background**

2. The application arises from an unpaid payment claim made by the applicant on the respondent in respect of construction work carried out under a contract between the parties for the [*work and project description omitted*] (the Project).

### **Appointment**

3. The applicant served its adjudication application on the RICS Dispute Resolution Service, a Prescribed Appointor under the Act, pursuant to section 28(1)(c)(iii) of the Act.
4. The adjudication application was referred to me as adjudicator on 20<sup>th</sup> August 2013 by the RICS Dispute Resolution Service pursuant to section 30(1)(a) of the Act.
5. The RICS Dispute Resolution Service served a notice of my acceptance of the appointment on the claimant and the respondent on 20<sup>th</sup> August 2013.

### **Material**

6. The following material was provided to me:
  - Adjudication Application dated 16<sup>th</sup> August 2013 (issued to the respondent on 19<sup>th</sup> August 2013)
  - Adjudication Response dated 2<sup>nd</sup> September 2013
7. On 20<sup>th</sup> August 2013 pursuant to section 34(2)(a) of the Act I requested further submissions from the applicant in respect of the service of the adjudication application on the respondent and requested the respondent to make its comments, if any, on the applicant's further submission. The following responses were received:

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- The applicant's further submission dated 21<sup>st</sup> August 2013
- The respondent's letter dated 23<sup>rd</sup> August 2013

### **Jurisdiction**

8. The work executed under the construction contract is 'construction work' as defined under section 6(1) of the Act.
9. The construction contract was entered into after the commencement of the Act pursuant to section 9(1) of the Act.
10. The claimant is a party who, under the construction contract concerned and under which a payment dispute has occurred, is entitled to apply to have the dispute adjudicated pursuant to section 27 of the Act.
11. To the best of my knowledge neither of the events stated in section 27(a) or 27(b) has occurred in respect of this matter.
12. I am therefore satisfied that the adjudication application falls within the jurisdiction of the Act.

### **Payment Claim**

13. The applicant served the respondent with its amended Payment Claim on 6<sup>th</sup> June 2013 and as Progress Claim No. 12. Invoice number 3274 in respect of [*work description*], claim 2 for [*work type*] standby rates and claim 3 for additional rates for geotechnical conditions encountered up to 25 May 2013 at the [*project site*] in the amount of \$25,326,889.19 including GST.
14. In its adjudication application the applicant concedes that it is only claim 2 being pursued in this adjudication.
15. Claim 2 relates to standby costs for the period between 1<sup>st</sup> December 2012 and 1<sup>st</sup> May 2013 which equates to \$14,490,000 less \$8,265,600 being the amount paid in respect of Claim 2 pursuant to the previous adjudication 34.13.01. This is equal to \$6,224,400.
16. The remaining claims are not being pursued in this adjudication.
17. The respondent has not denied receiving the applicant's invoice.
18. It is common ground that a construction contract exists.

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19. I am satisfied that the payment claim has not been issued in previous months and therefore do not consider it to be out of time.

### **Notice of Dispute / Response to Payment Claim**

20. An adjudication response was served by the respondent in accordance with section 29 of the Act and within the prescribed timeframes.
21. Pursuant to section 8(a) of the Act, the dispute is taken to have arisen on the day the amount claimed in a payment claim is due to be paid, the amount has not been paid in full or the claim has been rejected or wholly or partly disputed.

### **Adjudication Application**

22. Section 28(1) of the Act provides for the applicant to apply for adjudication of a payment dispute within 90 days after the dispute arises.
23. I am satisfied with the evidence provided that the payment dispute arose on 30<sup>th</sup> June 2013.
24. The applicant applied for adjudication of the payment dispute on 19<sup>th</sup> August 2013 and within the time allowed pursuant to section 28(1) of the Act.
25. The application is in writing pursuant to section 28(1) (a) of the Act.
26. The application was served on the respondent pursuant to section 28(1) (b) of the Act.
27. The application was served on RICS Dispute Resolution Service pursuant to section 28(1) (c) (iii) of the Act.
28. I am therefore satisfied that the adjudication application complies with the requirements of section 28 of the Act.

### **Adjudication Response**

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

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30. I am satisfied that the respondent served its response within the timeframes prescribed in the Act.

### **Reason for the Determination**

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

### **Contract**

32. The applicant in its adjudication application has provided a copy of the AS4000 Major Works Contract Conditions.
33. It is common ground that a Construction Contract exists between the parties for [*works omitted*] in relation to the [*project site omitted*] (the project).

### **Issues in Dispute**

34. In its adjudication response the respondent states that the application for adjudication must be dismissed as the applicant has failed entirely to prove its claim.
35. The applicant does state in its application that the claim is a rolled up claim for several months of standby from 1<sup>st</sup> August 2012 to 1<sup>st</sup> May 2013 less an amount paid for standby costs in the first adjudication.
36. I am satisfied that the 29<sup>th</sup> October 2012 letter from the Superintendent constituted a direction under the terms of the subcontract. This decision was reached by me in the first adjudication 34.13.01 based on the evidence provided by both parties.
37. The delay period claimed by the applicant in the first adjudication was from 1<sup>st</sup> December 2012 to 25<sup>th</sup> February 2013 for standby costs however the standby costs claimed in this adjudication are from 25<sup>th</sup> February 2013 to 1 May 2013.
38. I therefore agree with the statements made by the respondent in its adjudication response that the applicant is incorrect in stating that the "same facts and evidence" apply as the first adjudication.

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39. I therefore do not consider that the applicant has provided any relevant evidence in this adjudication to demonstrate an entitlement to claim any standby costs for the [equipment] for the period between 25<sup>th</sup> February and 1 May 2013. These standby costs relate to a separate time period and I do not consider it appropriate to simply multiply the standby rate of \$4,200 per hour by this further standby period.
40. The applicant in its adjudication application states that it is not seeking to adjudicate the same dispute however I am not satisfied that the applicant has provided any relevant evidence for me to evaluate these additional standby claims.
41. The information provided by both parties in the first adjudication satisfied me that the 29<sup>th</sup> October 2012 letter from the Superintendent constituted a direction under the terms of the subcontract and the 1<sup>st</sup> December 2012 to 25<sup>th</sup> February 2013 and the [equipment] had indeed been on the project "standing idle" during the period between 1<sup>st</sup> December 2012 to 25<sup>th</sup> February 2013.
42. However I have not been provided with any evidence to demonstrate that the [equipment] continued to be at the project for the period between 25<sup>th</sup> February and 1 May 2013.
43. The applicant refers me to section 43 of the CCA and states that the "adjudicator is bound by the decision in the first adjudication".
44. I do not support this conclusion and prefer to rely on the statements made by the respondent in that section 43 states that the adjudicator cannot amend the determination without the consent of the parties and a party to the dispute cannot later apply for an adjudication of the dispute.
45. The dispute in this context refers to the dispute in the first adjudication. The applicant states in its adjudication application that it is not seeking to adjudicate the same dispute, therefore I agree that section 43(b) has no application and as section 43(a) deals with amendments to determination then section 43 of the CCA is not relevant.
46. The applicant makes reference to Dualcorp. In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd (2009) NSWCA 69*, the court held that the valuation in a prior adjudication is not the only matter from the earlier adjudication that is binding on the subsequent adjudicator. If questions of entitlement have been determined in one adjudication, they cannot be reopened in a subsequent adjudication.
47. As the applicant has pointed out in its application this case relates to a New South Wales Court of Appeal decision relating to adjudication in NSW. Whilst the Dualcorp decision may be a leading authority relating to the re-agitation of the same issues that have been determined in a previous adjudication it relates to the *Building and Construction Industry Security of Payments Acts 1999 (NSW)* and not the CCA model in the Northern Territory.

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48. However even if this decision was binding on the Northern Territory I have previously stated in paragraph 36 above that the decision reached in the first adjudication regarding the Superintendent's letter dated 29<sup>th</sup> October 2012 constituted a direction under the terms of the subcontract.
49. My decision on this key issue is consistent with the first adjudication; however it is common ground that the time period being claimed for the standby time in this current adjudication is different from that being claimed in the first adjudication.
50. I am not convinced that any specific evidence has been provided to demonstrate that the [equipment] was idle on the project for the period between 25<sup>th</sup> February and 1 May 2013.
51. *My determination in relation to this adjudication is as follows:*
- Summary of adjudicated amount is Nil for the reasons set out above.*

#### **Adjudication costs**

52. Pursuant to section 36(1) of the Act I determine that the parties shall bear their own costs in relation to this dispute and that the costs of the adjudication shall be shared equally by both parties.
53. The adjudication costs for this determination amount to 28 hours @ \$325.00 plus GST = \$10,010.00 including GST and as stated in paragraph 52 above, is to be paid by the equally by both parties. Tax invoices will be issued accordingly.

#### **Interest Costs**

54. I determine that interest is not applicable.

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**Confidential information**

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



Signed: .....  
Colin Bond – Registered Adjudicator No. 34

Dated: 16<sup>th</sup> September 2013