ADJUDICATION SUMMARY

Decision pursuant to the *Building and Construction Industry Payments Act 2004*

Claimant	**PARSONS BRINCKERHOFF ARUP JOINT VENTURE ABN 88 642 968 608** **PARSONS BRINCKERHOFF AUSTRALIA PTY LTD ABN 80 078 004 798** **ARUP PTY LTD ABN 18 000 966 165**
Respondent	**THIESS PTY LTD ABN 87 010 221 486 and JOHN HOLLAND PTY LTD ABN 11 004 282 268 trading as THIESS JOHN HOLLAND JOINT VENTURE**
Project	**Airport Link, Northern Busway (Windsor to Kedron) and East-West Arterial Gateway Projects**
Adjudicator	**Warren Fischer** **Registration Number J1055362**
Nominating Authority	**Adjudicate Australia (a trading name of the Institute of Arbitrators & Mediators Australia)**
Adjudication Application	**25 March 2010**
Adjudicator Acceptance	**31 March 2010**
Adjudication Response	**1 April 2010**
Payment Claim	**1 March 2010**
Claimed Amount	**$16,804,140.41 (including GST)**
Payment Schedule	**15 March 2010**
Scheduled Amount	**$7,763,536.14 (including GST)**
Adjudicated Amount	**$16,284,244.37 (including GST)**
Due Date for Payment	**22 March 2010**
Rate of Interest	**10% per annum calculated on monthly rests**
ANA fees	**The Claimant and Respondent are equally liable for the ANA fees**
Adjudicator's fees	**The Claimant and Respondent are equally liable for the adjudicator's fees and expenses.**

In the matter of the

***Building and Construction Industry Payments Act* (QLD) 2004**

and

PARSONS BRINCKERHOFF ARUP JOINT VENTURE ABN 88 642 968 608
PARSONS BRINCKERHOFF AUSTRALIA PTY LTD ABN 80 078 004 798
ARUP PTY LTD ABN 18 000 966 165
(the "Claimant")

and

THIESS PTY LTD ABN 87 010 221 486 AND
JOHN HOLLAND PTY LTD ABN 11 004 282 268
TRADING AS THIESS JOHN HOLLAND JOINT VENTURE
(the "Respondent")

ADJUDICATOR'S DECISION

I, Warren David FISCHER, as the Adjudicator for this adjudication made pursuant to *the Building and Construction Industry Payments Act 2004* (the "Act"), for the reasons set out in this decision, decide that:

a. **the adjudicated amount in respect of the adjudication application dated 25 March 2010, is $16,284,244.37 (including GST);**
b. **the date on which the adjudicated amount becomes payable was 22 March 2010;**
c. **the applicable rate of interest payable on the adjudicated amount is 10% per annum calculated on monthly rests;**
d. **the Claimant and Respondent are equally liable for the fees of the Authorised Nominating Authority; and**
e. **the Claimant and Respondent are equally liable for the adjudicator's fees and expenses.**

Signed

Warren Fischer
Registered Adjudicator J1055362
Date: 23 April 2010

BACKGROUND

1 This adjudication arises from an adjudication application (the "Application") made in respect of a disputed Payment Claim made by the Claimant, Parsons Brinckerhoff Arup Joint Venture ABN 88 642 968 608, Parsons Brinckerhoff Australia Pty Ltd ABN 80 078 004 798 and Arup Pty Ltd ABN 18 000 966 165 (the "Consultant" and "PBAJV") on the Respondent, Thiess Pty Ltd ABN 87 010 221 486 and John Holland Pty Ltd ABN 11 004 282 268 trading as Thiess John Holland Joint Venture (the "Manager" and "TJHJV").

2 A written "Collaborative Consultancy Agreement", dated April 2008, ("the Contract") is in place between the Claimant and Respondent in respect of the work the subject of the Application.

3 The subject matter of the Payment Claim primarily relates to the provision of engineering design consultancy services by the PBAJV to the TJHJV for the Airport Link, Northern Busway (Windsor to Kedron) and East-West Arterial Gateway Projects (Queensland).

4 The Payment Claim is the twentieth claim for payment made by PBAJV in respect of the services provided. TJHJV have made at least nineteen previous progress payments totalling approximately $177,191,833.10. The Contract provides, at Clause 18.3(b), that "*(p)rogress payments by TJH will not be evidence of the value of work, or an admission of liability, or that the work has been executed satisfactorily, but will be deemed to be provisional payments on account and subject to a final verification audit by the Collaborative Agreement Auditor*".

5 Schedule 7 of the Contract sets out the Commercial Framework. That framework provides for three (3) elements of payment. The amounts the subject of dispute in the Application arise principally under "Element 1", being claims for the reimbursement of the "actual costs" incurred directly by the Consultant on Contract work.

6 There are eight (8) primary differences between the parties to be resolved in this adjudication, they are:

(i) 'Component 1', "Element 1 Multiplier", Consultant full-time staff, overtime, over 37.5 hours per week and up to 45 hours per week. It is the contention of PBAJV that the multiplier to be applied in these circumstances is 2.8, whereas it is the contention of TJHJV that the multiplier to be applied is 1.1. The Respondent submits that the difference in value between the amount claimed by the PBAJV and the amount proposed by the TJHJV arising from the application of the different multipliers is $4,990,661.71 (ex GST).

(ii) 'Component 1', "Element 1 Multiplier", Consultant in-house contract staff. It is the contention of PBAJV that a multiplier of 0.7 was applied to the Raw Rate of its in-house contract staff prior to the application of the multiplier of 2.8, whereas it is the contention of TJHJV that there is no evidence that the multiplier of 0.7 has been applied at all and that it ought be applied to the amount claimed by PBAJV. The Respondent submits that the difference in value between the amount claimed by the PBAJV and the amount proposed by the TJHJV arising from the proper application of the multipliers is $1,913,262.33 (ex GST).

(iii) 'Component 1', "Element 1 Multiplier", Casual staff. It is the contention of PBAJV that all its staff for which a claim has been made are "normal casual staff" thereby attracting a multiplier to be applied of 2.6, whereas it is the contention of TJHJV that certain of those staff are "casual staff, project specific" thereby attracting a multiplier to be applied of 1.1. The Respondent submits that the difference in value between the amount claimed by the PBAJV and the amount proposed by the TJHJV arising from the application of the different multipliers is $739,711.04 (ex GST).

(iv) 'Component 1', Disbursements. The Respondent submits that the Claimant has failed to identify the component items of the disbursements claimed and accordingly, for failure to adequately identify the related goods and services claimed, $343,750.26 (ex GST) ought to be disallowed for this item.

(v) 'Component 1', Raw Rate. The Respondent asserts that the Claimant has not established rates according to the Contract for certain of the personnel for whom costs have been claimed. The Respondent has allowed the amount of $125 per hour for each of the personnel so claimed by the Claimant. The Respondent submits that, for failure to adequately identify the related goods and services claimed, $373,851.36 (ex GST) ought to be disallowed for this item.

(vi) 'Component 1', Lump Sum Consultants. The Respondent submits that for failure to adequately identify the related goods and services claimed, $128,882.50 (ex GST) ought to be disallowed for this item.

(vii) 'Component 2', that part of the work undertaken pursuant to the CCA and the subject of Progress Claims 15, 16, 17, 18 and 19, submitted under the CCA, for which no payment has been made. The Respondent submits that for failure to adequately identify the related goods and services claimed, $4,643,085.34 (ex GST) ought to be disallowed for this item.

(viii) 'Component 3', Interest. The Respondent submits that $86,007.15 ought to be disallowed for this item as it asserts that the correct amounts have been paid in respect of each of the Claimant's claims.

7 To the extent that the sum of the amounts above exceed $8,226,549.98 (ex GST) (including $86,007.15 for interest), the Respondent submits that the total deduction sought is $8,140,542.83 (ex GST) plus $86,007.15 for interest.

APPOINTMENT OF ADJUDICATOR

8 The Claimant lodged the Application, dated 25 March 2010, with the Institute of Arbitrators and Mediators Australia ("IAMA") on 25 March 2010. In the Adjudication Response the Respondent confirms that it also received the Application on 25 March 2010.

9 By letter, dated and received on 26 March 2010, IAMA referred the Application to me. IAMA is an Authorised Nominating Authority ("ANA") under the Act, Registration Number N1057859.

10 By letter, dated 31 March 2010, forwarded by facsimile, post and email to the Claimant and the Respondent and also copied to IAMA, I accepted the Application. I thereby became the appointed Adjudicator. I am a Registered Adjudicator under the Act, Registration Number J1055362.

SCOPE OF THIS DECISION

11 The Act, at Section 26(1), requires that I am to decide:

a. the amount of the progress payment (if any) to be paid by the Respondent to the Claimant (the adjudicated amount);

b. the date on which any such amount became or becomes payable; and

c. the rate of interest payable on any such amount.

The Act, at Section 34(3)(b), gives me the discretion to decide:

d. the proportion of the contribution to be made by the Claimant and by the Respondent to the authorised nominating authorities fees.

The Act, at Section 35(3), gives me the discretion to decide:

e. the proportion of the contribution to be made by the Claimant and by the Respondent to the adjudicator's fees and expenses.

MATTERS REGARDED IN MAKING THE DECISION

12 Section 26(2) restricts the matters which I may consider in deciding the Application. In making this decision I have had regard to the following:

(i) The provisions of the Act;

(ii) The Payment Claim, dated 1 March 2010, including the attached documentation to which the Application relates ("the Claim"), namely:

a| a tax invoice (2 pages) with supporting calculations (1 page) and attached documentation;

b| Attachment 1, Data tables as follows (41 pages total):

1-1 Hours from 23/05/2008 – 12/02/2010 (2 pages)

1-2 Hours by area from 23/05/2008 -12/02/2010 (2 pages)

1-3 Hours by task from 23/05/2008 – 12/02/2010 (4 pages)

1-4 Cost / Task 23/05/2008 – 12/02/2010 including Disbursements (1 page)

1-5 Employee Hours 23/05/2008 – 12/02/2010 (12 pages)

1-6 Employee Hours by task by week 23/05/2008 – 12/02/2010 (20 pages);

c| Attachment 2, Consultant's register (1 page);

d| Attachment 3, Interest calculation (1 page);

e| Attachment 4, Claim / Payment register (1 page);

f| Attachment 5, Claim / Payment register, including approx difference in hours paid (1 page);

g| Attachment 6, Estimate of short paid hours (1 page);

h| Attachment 7, Claim 15 short payment details (24 pages);

i| Attachment 8, Claim 16 and 17 short payment details (138 pages);

j| Attachment 9, Claim 18 short payment details (8 pages);

k| Attachment 10, Claim 19 short payment details (11 pages).

(iii) The Payment Schedule, dated 15 March 2010, to which the Application relates ("the Schedule"), including:

a| Submissions in respect of the Claim, including a statement as to the Scheduled Amount and reasons why the Scheduled Amount was less than the Claimed Amount (13 pages);

b| Appendix A, summary of amount due under the Collaborative Consultancy Agreement (the Contract) (11 pages);

c| Appendix B, Easdown Establishment Review Audit Report, dated 25 July 2008 (27 pages);

d| Appendix C, minutes of Collaborative Leadership Team ("CLT") meeting number 3, dated 26 August 2008 (10 pages);

e| Appendix D, list of employees for whom no rate has been provided (2 pages);

f| Appendix E, detailed spreadsheet analysing Component 1 (1985 pages);

g| Appendix F, detailed spreadsheet analysing Component 2 (220 pages total):

Attachment 7, spreadsheet (16 pages)
Attachment 8, spreadsheet (178 pages)
Attachment 9, spreadsheet (14 pages)
Attachment 10, spreadsheet (12 pages)

(iii) The Adjudication Application, dated 25 March 2010, and attached documentation (in total five lever arch folders) including:

a| A glossary, executive summary and submissions;

b| Annexure S1, extracts of the collaborative consultancy agreement;

c| Annexure S2, the Collaborative Consultancy Agreement (the Contract);

d| Annexure S3, "Outline of the Legal and Commercial Framework", Mr Adrian Baron;

e| Annexure S4, Establishment Review Report of Easdown Consulting;

f| Annexure S5, a statutory declaration of Mr Roger Patterson, dated 23 March 2010;

g| Annexure S6, a statutory declaration of Mr Frank Vromans, dated 23 March 2010;

h| Annexure S7, minutes of CLT meeting number 3;

i| Annexures S8 and S9, correspondence between the parties;

j| Annexures S10 to S12, various compliance audits;

k| Annexures S13 to S31, minutes of various CLT meetings;

l| Annexures S32 to S51, various of the Claimant's progress claims;

m| Annexures S52 to S83, various correspondence between the parties;

n| Annexures S84 and S85, ASIC searches on the Respondent;

o| Annexure S86, the Payment Claim;

p| Annexure S87, the Payment Schedule.

(iv) The Adjudication Response, dated 1 April 2010, and attached documentation (in total two lever arch folders) including:

a| Adjudication Response submissions (15 pages);

b| Attachment 1, spreadsheet "Response to specific issues contained in the PBAJV Adjudication Application submissions" (13 pages);

c| Attachment 2, the Payment Schedule (without appendices);

d| Attachment 3, a statutory declaration of Mr William Buckland, dated 31 March 2010;

e| Attachment 4, a statutory declaration of Mr David Moran, dated 31 March 2010;

f| Attachment 5, a statutory declaration of Mr Craig Manly, dated 31 March 2010;

g| Attachment 6, a statutory declaration of Mr Josef Smogurzewski, dated 31 March 2010;

h| Attachment 7, a statutory declaration of Mr Adrian Baron, dated 31 March 2010.

13 On 9 April 2010, I wrote to the parties seeking a five (5) business day extension to decide the application. On 9 April 2010, PBAJV confirmed its agreement to the extension sought. On 13 April 2010, TJHJV confirmed its agreement to the extension sought. Thereafter the latest date for the delivery of this decision became 27 April 2010.

14 While within the adjudicator's discretion, by Section 25(4) of the Act, no conference or inspection was requested or conducted.

15 The Claimant and the Respondent have not requested that I do not include reasons. Pursuant to s26(3) of the Act, I therefore now set out to decide the Application and to set out my findings on material questions of fact and identify the material on which those findings are based.

THRESHOLD ISSUE, VALIDITY OF PAYMENT CLAIM

16 The Respondent raises in the Schedule a threshold issue in relation to the validity of the Claim. The Respondent asserts the Claimant has failed to adequately specify the construction work or related goods and services claimed so as to prevent the Respondent from adequately responding to the Claim. The Respondent then identifies three specific elements of the Claim, namely: claimable disbursements, raw rate and 'component 2' (being that part of the Work undertaken pursuant to the CCA and subject to Progress Claims 15, 16, 17, 18 and 19) which the Respondent asserts are so effected.

17 In response, in the Application the Claimant asserts that the documents provided in support of the Claim are largely the same as the documents provided to the Respondent with each of the previous 19 Progress Claims which the Respondent has had no difficulty interpreting. I have reviewed the previous Progress Claims, which have been included with the Application, and from that review I am satisfied that there is no material departure in the form of the Claim from the previous 19 Progress Claims. I can make no meaningful observation as to whether the Respondent had any difficulty interpreting those progress claims however it is relevant to note the Claimant's assertion that, prior to Progress Claim 15, the Respondent paid each of the Claimant's Progress Claims in the amount claimed.

18 The Claimant has also made a submission that to the extent that comments made by the Respondent suggest that it is unable to identify the work or services provided, for the purpose of Section 17 of the Act, the adjudicator or a court should have regard to:

- the background knowledge each of the parties derive from their past dealings and exchange of documentation;
- the terms of the contract between the parties and the history of their past dealings; and

- the fact that the Payment Claim and Payment Schedule have been exchanged between parties who, because of their experience in the building industry and with the particular contract, knew the history the project and the issues in dispute and that the documents would likely contain material in an abbreviated form unintelligible to the uninformed reader but comprehensible to the parties.

I have been referred for these propositions to the decisions of Santow J. in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, Wilson SC J. in *J Hutchinson Pty Ltd v Thunder Investments Pty Ltd* [2009] QDC 090 and Palmer J. in *Multiplex Constructions Pty Ltd v Luikins* [2003] NSWSC 1140, respectively.

19 In that regard I note, for example, the Respondent's complaints in respect of the Claimant's 'component 2' claim. In respect of that item the Claimant submits that it has been unable to precisely identify the work claimed as it is within the peculiar knowledge of the Respondent. The Claimant says this is because for each of those Progress Claims in respect of which the Respondent withheld funds it failed to identify the line items or work in relation to which it refused to pay. In support of that assertion of the Claimant, I observed the e-mail and attached Payment Certificate 17 from the Respondent dated 5 January 2010 (Attachment S60 of the Application). The Payment Certificate, in respect of deductions made, simply states "Overtime adjustment to 1.1 x" a "Quantity" of "66,174.9" and a "Rate" of "$144.64" to give a "Cost" of "-$3,760,298.89".

20 Furthermore, despite the Respondent's complaint, it has managed: in the Schedule, to assert that from its assessment the hours identified in the attachments have been paid in previous progress claims but "*that the difference is solely that of the multiplier applied to overtime*"; and, in the Response, to clarify that TJHJV "*has paid for all work*" in Progress Claims 15, 16, 17, 18 and 19 "*but at rates different to that claimed*" by PBAJV. It becomes apparent then that the Respondent is appraised and aware of the basis of the Claimant's claim.

21 The Respondent presses the point in the Response. The Respondent asserts that the Claim "*is not a valid payment claim made under the Act because it does not identify the construction work or related goods and services to which the progress payment relates within the meaning of section 17 of the Act*". (relying on: *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229, Hodgson JA., *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1, Palmer J., *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, Finkelstein J., *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2009] QSC 376, White J., and an adjudication, although not authority, *McNab Constructions Australia Pty Ltd and Advance Traders Pty Ltd*, Ms K Reardon.

22 The question being agitated is the level of detail required to identify the construction work or related goods and services to which a progress payment relates in respect of a payment claim as a whole. It appears to be the contention of the Respondent that a payment claim is required to provide the minutiae of the construction work or related goods and services so that the Respondent can fully comprehend each individual element of the payment claim without any effort and that if the Claimant fails to produce such a payment claim then the payment claim is invalid.

23 The underlying purpose of the Act is to provide only an interim resolution to payment disputes under construction contracts. The Act has been widely accepted as "*pay now, argue later*" legislation, s100 of the Act expressly provides for the ultimate resolution of disputes in circumstances where parties are not satisfied with the outcome of a decision under the Act.

24 As the Respondent has quoted, in *Protectavale Pty Ltd v K2K Pty Ltd* His Honour Finkelstein J observed that "*the payment claim must be **sufficiently** detailed to enable the principal to understand the basis of claim. If a **reasonable** principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a **meaningful** payment schedule. That is to say, the payment claim must put the principal in a position where he is able to consider whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in the payment schedule*" (my emphasis).

25 The Schedule is both extensive and meaningful; it would seem therefore that the Claim provides the sufficient level of detail to which His Honour Finkelstein J refers.

26 As the Respondent has also quoted, in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* His Honour Palmer J observed that "*a payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out* ***only*** *the facts and circumstances required to establish an entitlement to the relief sort;* ***the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defence it is to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded****.*

If it purports reasonably on its face to state what section 13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim*. It is then for the respondent either to admit the claim or decide what defences to raise"* (my emphasis).

27 A claimant simply cannot be required to provide the minutiae of every element of its claim in a payment claim. In the majority of cases, such a requirement would be both unnecessary and wasteful. In the present case, in which each individual cost is classed as a transaction (based on the assignment of transaction ID's), there are hundreds of thousands of transactions. If, when making an adjudication application, a claimant fails to adequately respond to defences raised by a respondent in a payment schedule then the claimant might well fail in its claim (subject to the effect of the defence). A claimant's failure to adequately respond to a defence raised in respect of its claim does not however make the payment claim invalid.

28 The Claim, under the heading "*Description of Work*", provides that it is "*for professional engineering services in relation to construction work undertaken and carried out in relation to Airport Link, Northern Busway & EWAG projects pursuant to the Airport Link, Northern Busway (Windsor to Kedron) and East-West Arterial Gateway Projects Collaborative Consultancy Agreement between Thiess Pty Ltd and John Holland Pty Ltd trading as Thiess John Holland Joint Venture and Arup Pty Ltd and Parsons Brinckerhoff Australia Pty Ltd dated April 2008 (CCA)*".

29 As identified when detailing the content of the Claim at paragraph 12(ii) above, the Claim includes over 200 pages of supporting documentation. That documentation identifies, inter alia: the total hours spent on hundreds of tasks on a week by week basis; the total hours worked by hundreds of staff members on a week by week basis; and, the hours worked by each staff member on each task on a week by week basis.

30 The Claim also provides an "*Invoice Total including Interest and GST (E&OE)*" of "*$16,804,140.14*" and bears the endorsement "*This Payment Claim is made under the Building and Construction Industry Payments Act 2004*".

31 It is not my view that any of the authority to which the Respondent refers supports its contention that the information provided with the Claim is insufficient, such that it might be said that the Claimant has failed to identify "*the construction work or related goods and services to which the progress payment relates*". In my view, as identified above, the Claim satisfies all of the criteria set out in s17(2) of the Act, and has done so in sufficient detail to enable the Respondent to provide a responsive payment schedule which runs to in excess of two thousand pages including a determination of a scheduled amount of $7,763,536.14 (incl GST).

32 I reject the Respondent's contention that the Claim is invalid and therefore now turn to consider the reasons posed for non payment.

THE CONTRACT

33 The Respondent spends some time at the outset of the Schedule providing its understanding of the Contract. In particular, the Respondent stresses that the Contract is a "*relationship-based form of agreement, which has similar characteristics to, but is not the same as, a 'project alliance agreement'*". The Respondent asserts that under the Contract the parties have appointed senior representatives of their respective companies to the Collaborative Leadership Team (the "CLT"). The overriding function of CLT is to provide the leadership and vision to the project team. The decisions of the CLT are binding on the parties. The Respondent then draws me to various clauses of the Contract in support of that assertion. I note additionally to the Respondent's summary, by clause 6.3 of the Contract to which the Respondent drew my attention, that each decision of the CLT must be unanimous (with limited exceptions).

34 The Respondent then goes on to state that "*it appears that, to date, the parties have not strictly followed the procedure set out in clause 18.1 of the CCA relating to the preparation of the Payment Certificate. However, to assist with the CCA objectives of transparency and collaboration, the Collaborative Agreement Manager ("the CAM") has recommended to the CLT that the procedure in clause 18.1 of the CCA must be followed by both parties for all future claims and Payment Certificates.*"

35 The Respondent also refers to certain of what it calls 'fundamental principles' in the Contract as behavioural commitments. They include undertakings to act in good faith, being fair and honest, and conducting the Contract in a manner consistent with the commitments and principles set out therein. In particular the Respondent refers to clause 20.1(a) which provides, inter alia, "*it is of paramount importance that all commercial aspects of this Agreement are administered in a transparent manner that demonstrates to both Participants that all payments made under this Agreement are in accordance with the terms of this Agreement*".

36 The Respondent then moves to discuss the methodology for payment under the Contract which it says is set out in clauses 18 and 20 together with the Commercial Framework contained in Schedule 7.

37 The Respondent asserts that clause 18.1 of the Contract provides that a claim for payment must be made each month which includes:

(a) costs incurred individually by each Participant, separated into the Airport Link, Northern Busway, and East-West Arterial Gateway (EWAG) elements of the Collaborative Agreement Work; and

(b) entitlements of the Consultant to Fees and (if applicable) Performance Adjustments.

38 The Respondent also asserts that the Commercial Framework makes it clear that payment is to be made by reference to the "3-Element" compensation model. I observe that in respect of "Element 1" the model provides as follows:

"*Element 1 = The following costs incurred directly by the Consultant on the Collaborative Agreement Work which will be reimbursed an actual costs subject to audit:*

- *The cost of personnel performing the Collaborative Agreement Work, including mistakes, rework and wasted effort, but not including costs incurred as a result of, or in committing, remedying or addressing a Wilful Default;*
- *Project-specific overheads related to the Collaborative Agreement Work; and*
- *Actual costs of Project-specific plant and materials...*

Reimbursement to the Consultant under Element 1 must not include any recovery of non Project-specific overheads or profit or costs arising under clause 22.4(b)(ii)."

REASONS FOR NON-PAYMENT

39 The Claimant has identified three (3) components in the Claim, namely:

"Component 1", work undertaken pursuant to the Contract from 9 January 2010 to 12 February 2010;

"Component 2", the part of the work undertaken pursuant to the Contract and the subject of Progress Claims 15, 16, 17, 18, and 19, submitted under the Contract, for which no payment has been made;

"Component 3", interest on outstanding late payments.

I also note that on certain items the Claimant has combined its claim for both "Element 1" and "Element 2" of the Commercial Framework compensation model. Oversimplified, the broad intention of "Element 1" is the recovery of expenditure on work under the Contract including direct costs but excluding profit. The broad intention of "Element 2" is then the recovery of the Claimant's fee, including profit and head office overhead contributions. The "Element 2" recovery is 'at risk' based on the outcome of "Element 3", the pain share and gain share element.

COMPONENT 1, ELEMENT 1 MULTIPLIER – FULL-TIME STAFF OVERTIME

40 In the Schedule, the Respondent asserts that the Claimant "*has claimed for hours worked which exceeded 37.5 hours a week (per employee) under "Element 1 costs" in Schedule 7 of the CCA using a multiplier of 2.8, when the agreed multiplier is 1.1*". The Respondent asserts that consequentially the Claimant has claimed, under Element 1 costs, costs which include recovery of non project-specific overheads and/or profit which is specifically prohibited.

41 Clause S7-3.1.2 relevantly provides:

"*Actual Element 1 rates for the Consultant's staff, Consultant's contracted staff, and subconsultants' staff will be calculated as 'multiplier' x "Raw Rate", with the "Raw Rate" to be confirmed during the Compliance Audit.*

	Raw Rate	*Element 1 Multiplier*
Consultant Full Time Staff	*= Total Salary Package / 1950 = $hrs*	*= 2.8*
Consultant Staff (other than Full Time) including Permanent Part Time Staff, and In-House Contract Staff	*= Hourly rate to be determined by CCA Auditor*	*= to be determined by CCA Auditor*
Consultant Contract Staff (staff employed by and	*= agreed hourly rate*	*= 1.5*

integrated into the Consultant team for ALNB or EWAG works only)		
Consultant's Sub-consultants	*= agreed hourly rate*	*= 1.1*

42 Clause S7-3.1.4 relevantly provides:

"Actual items included in the Element 1 staff rates comprise (without limitation) salary and salary related overheads, sick leave and the like, tax including superannuation, holiday leave and pay, training not specifically project related, work tools (including hardware and software normally used), staff procurement costs, home office administration support, bonuses, promotions (including salary increases associated with same), mobile phone (including costs), etc"

43 The Respondent asserts that the reference to 1950 in respect of Consultant Full Time Staff is a reference to the total hours worked in "normal" time per year (i.e. 1950 hrs / 52 weeks = 37.5 hours per week). I accept that assertion. The Respondent then attempts to draw an inference that the Element 1 Multiplier (which makes no reference to 1950) only applies to "normal" time. I do not accept the Respondent is correct in drawing such a conclusion. Neither party has provided any detail about how the Element 1 Multiplier was determined. The use of 1950 hrs as the denominator in the Raw Rate calculation is logical as the numerator is the "Total Salary Package" which would not usually include any overtime allowance, and what is being calculated is a base hourly pay rate (referred to as Raw Rate). I accept that the Raw Rate calculation will determine a "normal" hourly pay rate. However it does not by necessarily lead to the conclusion, which the Respondent advances, that the Multiplier is therefore only to be applied to "normal" hours.

44 The Respondent goes on to assert that "*for hours worked in excess of 37.5 hours per week (i.e. overtime), PBA is not incurring the same **actual costs**. Accordingly, if the same multiplier was applied to hours in excess of the usual working week of 37.5 hours, PBA would receive **profit** (which is expressly excluded from the Element 1 limb).*"

45 In the Application, the Claimant asserts that the Contract "*does not differentiate between "normal" and "overtime" hours when nominating the Actual Element 1 Rates. On the contrary, those rates apply to all hours contemplated to be worked in achieving the Collaborative Agreement Work*".

46 I have reviewed the Contract and I find that despite the differentiation that is made between multipliers, rates and employee categories in the Commercial Framework and tasks and locations for Target Hours, the Claimant is correct, the Contract does not differentiate between "normal" and "overtime" hours at all.

47 I am satisfied that there exists a provision to which the Claimant has referred that gives rise to an entitlement to payment for this element of the Claim and that it has satisfied its onus in the first instance to identify such an entitlement.

48 The Claimant also observes that "*each of Thiess, John Holland, PB* (Parsons Brinckerhoff) *and Arup is a large and sophisticated organisation with many years' experience in the construction industry*". And that "*it can be assumed that each has: in-house Counsel experienced in the industry and in the negotiation of construction contracts for large and complex projects; and sophisticated external legal advisers*". The Claimant goes on to identify that the parties worked together prior to entering into the Contract to prepare: the Scope Definition Documents to describe the extent of the Project Works; and, the Target Estimate for the Work, comprising: direct labour costs based on man-hours; and, project specific plant, materials and equipment; and, to agree the commercial model and other performance targets.

49 The Claimant then proposes that it can be assumed from the above and from the detail contained in the Contract and Schedule 7 in particular, that the parties engaged in detailed negotiations in concluding the commercial arrangements set out in the Commercial Framework at Schedule 7.

50 On the basis of the information put before me, all of which I have considered, I am satisfied that the Contract does not provide for any differentiation between "normal" and "overtime" hours. Whilst the Respondent has emphasised Contract provisions that, inter alia, the Claimant is not to recover non Project-specific overheads or profit under Element 1 costs, I have not been provided with the background to the determination of the Element 1 Multiplier of 2.8 and therefore I am unable to ascertain whether that multiplier makes allowance for overtime or not and whether it might lead to a recovery of non Project-specific overheads or profit. I have also not been taken to any provision in the Contract which provides for the relevant multiplier to be subject to either; audit or unilateral adjustment. I am left with the Claimant's observation that the parties engaged in detailed negotiations in concluding the commercial arrangements.

51 I am then taken to elements of clauses 6.3 and 6.4 of the Contract which provide the CLT power to amendment the Contract. In the case of the Commercial Framework, it would require a unanimous agreement of the CLT for an amendment to be made. There is no controversy on that point.

52 What has evidently transpired, at CLT Meeting No 3 held on 26 August 2008, is that discussions took place in respect of the Element 1 Multiplier to be applied to Consultant Full-Time Staff. It is in respect of what was agreed at that meeting that controversy next arises.

53 The Claimant asserts that it agreed to reduce the Element 1 Multiplier for Consultant Full-Time Staff, for hours in excess of 45 hours per week, from 2.8 to 1.1 and, if senior staff, no charge would be made in excess of 45 hours.

54 The Respondent asserts that the Claimant agreed to reduce the Element 1 Multiplier for Consultant Full-Time Staff, for hours in excess of 37.5 hours per week, from 2.8 to 1.1 and, if senior staff, no charge would be made in excess of 45 hours.

55 It is that difference, between 37.5 and 45, that is at the heart of the dispute between the parties. Both parties have provided statutory declarations from senior executives in support of their competing contentions.

56 The Respondent has referred to several additional things, including:

(i) the minutes of CLT Meeting No 3 which, whilst produced by the Respondent, were distributed and were unchallenged in respect of what is recorded in regard to the relevant decision which is that, “the CLT agreed that the multiplier should be 1.1 for all overtime hours”;

(ii) contractual provisions: regarding the obligation of the parties to act in good faith; that Progress Claims are to recover costs incurred and separately fees and performance adjustments; that Element 1 of the reimbursement model is stated to be at actual costs (albeit subject to audit), including the clarification that it is not to include non Project-specific overheads or profit; and, the reference to 1950 in the Raw Rate calculation;

(iii) The Establishment Review Report, the Easdown issues paper, dated 1 August 2008 (which was considered at the CLT Meeting No 3); and

(iv) “*standard industry practice for design consultants*”.

57 I have dealt with a number of these issues earlier and my observation, at paragraph 50, is relevant to many of them, that is that I have not been provided with a background to the determination of the Element 1 Multiplier of 2.8 and therefore I am unable to ascertain whether that multiplier makes allowance for overtime or not and whether it might lead to a recovery of non Project-specific overheads or profit. I repeat my observation at paragraph 43 above in regard to the 1950 hours. The provisions in the Contract that the recovery of actual costs is "subject to audit" (where that audit in not required to accompany every progress claim) and that payments are "provisional payments on account" take away from the Respondent's contention that payment is by necessity of actual costs, or that proof of costs being reasonably and properly incurred is required, in the first instance.

58 That is more so in the circumstances contended here by the Claimant that the audit requirement was suspended following the meeting of the CLT on 14 July 2009 during which, at the Respondent's request, the CLT decided to suspend audits until further notice. On 4 March 2010, the CLT decided to resume audits, again following the Respondent's request. The material provided by the Claimant with the Application support those contentions. Relevantly, 4 March 2010 is subsequent to the Claim, the Respondent cannot argue for satisfaction of audit requirements in respect of the Claim as there were no audit requirements at the relevant time, the CLT having suspended them pursuant to the Contract.

59 There exists express reference in Schedule 7 for various "rates" to be confirmed during the Compliance Audit and, in respect of the Element 1 Multiplier, for Consultant Staff "other than Full Time" to be determined by the CCA Auditor. I have not been directed to any express contractual term (and neither has an implied one been asserted) permitting the adjustment of the Consultant Full Time Staff Element 1 Multiplier. I accept the Claimant's assertions that the multiplier for this item was negotiated and is not subject to review by audit of some appeal.

60 Similarly, there exist express terms in Clause 6 of the Contract in respect to adjusting the Contract which could be utilised by the CLT to amend the Contract to insert a provision relating to "overtime". That express provision would require such an amendment to be made by a unanimous agreement of the CLT. I have not been directed to any other provision in the Contract which would allow such an amendment, and although the Respondent has not directly expressed such a contention, I do not consider that the provisions to which the Respondent has referred support such a contention.

61 The Claimant has referred to several additional things, including:

- contemporaneous (prior to the issue of the minutes of the meeting) e-mails between the Claimant and the Respondent "*to clarify the CLT agreement on overtime hours the agreement is: All staff charge 45 hours at 2.8 multiplier (this is how we build up our fee). Note for a 37.5 hour week our multiplier is normally 3.4 to 3.6.*";
- the handwritten notes from the meeting of Mr Vromans, attached to his Statutory Declaration, which include a reference to the "*O/T Factor Agreed propose 1.1 – above 45 hours*", albeit the Respondent refers to the items in "bubbles" as merely thoughts;
- the Compliance Audit of Progress Claim 3, dated 25 September 2008, which provides that "*during our review of the CLT minutes we noted that in their meeting held on 26 August 2008 the CLT approved the application of the multiplier of 1.1 to service hours in excess of 45 hours. The application of the 1.1 multiplier is to apply to all personnel with the exception of 13 identified personnel whose hours are limited to 45 hours*";
- that from Progress Claim 004 to Progress Claim 020 each Progress Claim has included 6 line items which clearly identify the reduction from the agreed Contract multiplier of 2.8 to 1.1. Four of those line items clearly refer to 45 hours, but have not been disputed prior to the commencement of the present dispute; and
- the Respondent has received and duly paid each of Progress Claim 003, dated 26 September 2008, to Progress Claim 014, dated 24 August 2009, on that basis. Each of Progress Claim 003 to 012 were audited prior to suspension of audits in July 2009.

62 As I decided at paragraph 50 above, the Contract does not refer to "normal" or "overtime" hours for the purpose of determining remuneration under the Commercial Framework contained in Schedule 7, that schedule refers only to "hours". On the basis of the information provided to me I am satisfied that, unamended, the Element 1 Multiplier of 2.8 set out in the table at S7.3.1.2 is to be applied to all hours worked by the Claimant's Full-Time Staff.

63 The onus then moves to the Respondent to demonstrate that the Claimant's entitlement is diminished in the way the Respondent contends for those hours between 37.5 and 45 per week and over 45 hours per week for senior staff. The Respondent has to do so in circumstances where such a provision is absent in the Contract other than in accordance with a decision of the CLT which requires the unanimous agreement of the CLT members.

64 Based on the material presently before me, whilst I am satisfied that there was a unanimous agreement of the CLT members to reduce the Element 1 Multiplier for Consultant Full-Time Staff from 2.8 to 1.1 for hours in excess of 45 per week and that no claim would be made for senior staff in excess of 45 hours per week, I am not satisfied that there was a unanimous agreement of the CLT members that the reduction in the Element 1 Multiplier to 1.1 would extend to those hours in excess of 37.5 per week. There is a significant amount of meritorious material which is against such a conclusion, in such circumstances adjudication is not a suitable forum for adducing the evidence necessary to make the finding for which the Respondent contends.

65 Accordingly, I am satisfied that the Claim has been made in accordance with the agreed reduction in the Element 1 Multiplier for Consultant Full-Time Staff from 2.8 to 1.1 for those hours in excess of 45 hours per week and no claim for senior staff in excess of 45 hours per week. There has been no dispute as to the number of hours claimed.

66 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's submission that $4,990,661.71 (ex GST) should not be allowed for this item must fail.

COMPONENT 1, ELEMENT 1 MULTIPLIER – IN-HOUSE CONTRACT STAFF

67 In the Schedule, the Respondent asserts that the Claimant has claimed for hours worked using the incorrect multiplier for specific classes of staff. In respect of this item the Respondent asserts that contrary to the Establishment Review Audit that In-House Contract Staff have an Element 1 Multiplier of 0.7 x 2.8 (= 1.96) applied, the Claimant has instead applied an Element 1 Multiplier of 2.8.

68 In the Application, the Claimant responds that the agreement letters for In-House Contract Staff were audited by the Collaborative Agreement Auditor for progress claims 003 to 012 prior to the suspension of audits in July 2009. The compliance audits during this time confirmed that the Claimant applied the 0.7 multiplier on the In-House Contract Staff hourly rate prior to the application of the 2.8 multiplier and hence the calculation of the Element 1 rate for In-House Contract Staff was correct and in accordance with the Establishment Audit. The Claimant asserts it has not changed the manner in which these calculations have been undertaken since the last compliance audit.

69 In the Response, the Respondent "*does not admit that this calculation has been performed*" and asserts that in circumstances where the Claim appears on its face to use a multiplier of 2.8, and the Claimant has provided no evidence of how the calculation was done or the actual number of In-House Contract Staff hours or the rates charged by the In-House Contract Staff that I should reduce the amount claimed by application of the 0.7 multiplier.

70 My review identified that the Element 1 ("E1") and Element 2 ("E2") rates identified in the Establishment Review Audit for the In-House Contract Staff, namely Employee ID's 210050, 211008 and 211346 of $188.16, $282.24 and $188.16 respectively for E1 plus E2, are properly applied in the attachments to the Claim. There appears to be a minor discrepancy in respect of one employee only, Employee ID 210992, however it is not my view that discrepancy is material in the present circumstances.

71 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's submission that $1,913,262.33 (ex GST) should not be allowed for this item must fail.

COMPONENT 1, ELEMENT 1 MULTIPLIER – CASUAL STAFF

72 In the Schedule, the Respondent asserts that the Claimant has claimed for hours worked using the incorrect multiplier for specific classes of staff. In respect of this item the Respondent asserts that contrary to the Establishment Review Audit that Casual Staff – Project Specific have an Element 1 Multiplier of 1.1 applied, the Claimant has applied an Element 1 Multiplier of 2.6.

73 In the Application the Claimant asserts it "*does not currently employ any project specific casual staff. It employs casual staff, who are not project specific and the audit confirmed the appropriate rate for non-project specific casual staff was 2.6*".

74 In the Response, the Respondent identifies that the definition of the difference between "normal" casual staff and "casual staff – project specific" is identified in the Establishment Review Audit as follows:

(For Permanent Staff) "*A multiplier of 2.6 would then be applicable. This multiplier would only relate to casuals already in the employ of Arup and Parsons Brinckerhoff.*

In respect of casuals engaged specifically for the project and who will be located at the site office, we believe a further reduction in the multiplier needs to be considered. Part of the Permanent Staff multiplier can be attributed to the Indirect Office Costs required to support staff in their home office and we are of the view that the majority of this cost would not be incurred in respect of Project Specific Staff. Assuming that the hourly rate is adjusted so as to include the Superannuation oncost, we are of the view that a multiplier of 1.1 would be reflective of cost."

75 The Respondent asserts that as the Claimant "*now alleges that no Project Specific Casual Staff are employed (by implication, all casual staff have been employed since prior to the beginning of the Project). That should not be accepted. Critically, PBA has provided no evidence to support that allegation.*

76 The Claimant has not responded to those points as they have only been raised in the Response.

77 I observe that the "definitions" set out in the Establishment Review Audit, to which the Respondent refers, do not address the present circumstance. Whilst a multiplier of 2.6 is identified to be applicable to "existing" casual employees. The Respondent has implied that to mean all other casual employees as subject to a multiplier of 1.1. However, I observe, the 1.1 multiplier is stated to be applicable to "*casuals engaged specifically for the project*" (which the Claimant has asserted they are not) and who are "*located at the site office*". Notably, the Respondent has not asserted that: the staff in question are only engaged on this project; and/or, they are located at the site office.

78 The Respondent has elected to rest its position on an assertion that as the staff are not captured by the description for the multiplier of 2.6, in that they may not be pre-existing employees, they must have a multiplier of 1.1 applied. However, based on the Claimant's assertions (which the Respondent has not denied) the description for the multiplier of 1.1 also does not apply.

79 The Respondent asserts that it *"has done a comparison of casual staff from the start of the project and for those staff which have not been engaged since that time, has applied a multiplier of 1.1*". The Respondent goes on to claim that a deduction of $739,711.04 should be made in respect of this adjustment. I have reviewed all of the documentation and I have been unable to locate the "comparison" to which the Respondent refers or any calculations that support the amount that the Respondent says should be deducted.

80 I anticipate that large international organisations, such as any of the parties to the Contract, are likely to require to employ casual staff in the normal course of business, other than for this project, during such extended periods as the two years that has already passed on this project (ie after the commencement of this project). I therefore do not accept the Respondent's implication that all such employees ought automatically be classified as project-specific, I also do not consider that to be the position promulgated in the Establishment Review Audit.

81 The Respondent has not provided details of its calculations. Neither do I find that the "definition" in the Establishment Review Audit in respect of a multiplier of 1.1 to apply to the circumstances of the employees, asserted by the Claimant, as the Respondent contends. It is my view, from the material provided, that a multiplier for such employees has not yet been determined, but is open to determination during the course of the project in accordance with the Commercial Framework.

82 It is also my view that confirmation of the multiplier to be applied to such staff could be determined and confirmed by the Contract Auditor. I note that the Auditor has been suspended and is presently due to recommence – both of those occurrences following a decision of the CLT acting on a request of the Respondent. It is not my view that in the interim that the Claimant should be disadvantaged because of the Respondent's requested suspension of audits. I consider that in the interim it is reasonable that the multiplier of 2.6 for non-project specific casuals be applied.

83 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's submission that $739,711.04 (ex GST) should not be allowed for this item fails.

COMPONENT 1, DISBURSEMENTS

84 Included in the claim are items for disbursements, under "Design Services" in the amount of "$307,282.82" for "Claimable Disbursements" as well as an item for "Variation related Disbursements" in the amount of "$1,527.00" and under "Construction Engineering Services" for "Claimable Disbursements" in an amount of $34,940.44. Each of those items include an "Item Reference, E1" which, in the context of the Claim, I take to be a reference to "Element 1" of the Schedule 7 Commercial Framework in the Contract. I have set out the relevant provisions of "Element 1" at paragraph 38 above, they include for the recovery of project specific overheads and the actual costs of project specific plant and materials. I am satisfied therefore that the Claimant has identified the basis on upon which it is entitled to make the claim.

85 The Claim goes on to refer to "attached supporting documentation", however I could find no supporting documentation in respect of the disbursements items attached to the Claim or expressly identified in the Application. From my review it appears that in previous Progress Claims the Claimant had included, at least, some calculations in respect of the disbursements claimed however I did not locate similar detail in the Claim.

86 In the Schedule, the Respondent complains that the Claim does not identify the components of the disbursements claimed and therefore that it is impossible for it to assess those disbursements.

87 In the Application, beside some observations in regard to the proper interpretation of the amount claimed, the Claimant concedes that the documentation was omitted by error and supplied, as requested by the Respondent, on 2 March 2010. The Claimant then goes on to assert that, even without the documentation for the month, on the basis of the preceding 19 Progress Claims and the Respondent's detailed review of the Claimant's disbursements in July 2009, the Respondent would be well aware of the nature of the disbursements claimed.

88 It may well have been that, having identified an amount claimed and the basis of entitlement in respect of that amount in the Claim, the Claimant might provide further details with the Application where the Respondent takes issue with the amount claimed. It is not sufficient in the Application to merely assert that further details have been provided to the Respondent, any such details are also to be provided with the Application.

89 It appears from the Response that the Respondent accepts that it has been provided with further detail but asserts that is insufficient.

90 I have reviewed all of the documentation provided and I have located documents included in Progress Claim 020 which are noted to have been provided on 2 March 2010. It is apparent that they have been provided in respect of the contractual claim rather than expressly in respect of the Claim. I have reviewed the documentation, which is in summary form. It refers to a number of items of a type potentially claimable under the Contract (such as lease payments and computer hardware and software), however the majority of dates and periods referenced do not coincide with the period of the Claim.

91 I find there is insufficient information for me to make any determination in respect of any payment which might be due in respect of the items listed in those documents.

92 Without sufficient material before me to enable proper consideration of the parties competing contentions, I find that the Claimant has failed to satisfy its onus.

93 Upon consideration of the reasons and findings set out above, I decide that the Claimant's claim for disbursements in the amounts of: $307,282.82 (ex GST), $1,527.00 (ex GST) and $34,940.44 (ex GST) [a total of $343,750.26 (ex GST)] fail.

COMPONENT 1, RAW RATE

94 In the Schedule, the Respondent asserts that the Claim has provided information which sets out the raw rate, multiplier and hours worked for only some of the hours claimed. The Respondent asserts that this has not been done for the majority of the Claim. The Respondent asserts the Contract makes it clear the Claimant is obliged to provide this information and payment is made on account only and should not be seen as acceptance of the rates in the absence of verification.

95 The Respondent asserts that the "raw rate" for a number of employees has not been identified by the Claimant in the Claim and that the amount claimed for those employees has never been specified, or verified, by the Contract audit process. The Respondent asserts that as the "raw rate" is a key factor in the calculation of the amount due under the Contract for the "Element 1" fees associated with staff costs it is not possible for it to assess whether or not the amount claimed is accurate or due under the Contract.

96 The Respondent then goes on to identify that where it asserts the Claimant has failed to identify the "raw rate" either in the Claim, or otherwise, then the Respondent has allowed payment at the rate of $125 per hour (being the rate contained in Schedule 7 Table S7.1 of the Contract). In the absence of identification or the "raw rate" by the Claimant, the Respondent says that the figure of $125 specified in the Contract is a fair and reasonable rate to be applied. The Respondent has provided an appendix listing 51 employees for whom it says no "raw rate" has been provided.

97 In the Application, the Claimant asserts that "*in "assessing" the rates at $125 (a rate which exist in Schedule 7 only for the purpose of calculating Element 2 payments and which is not available for any of the Element 1 rates), TJH has engaged in an activity which is not open to it under the CCA. In circumstances where PBA has not changed its systems or procedures since the audit was suspended and until such time as the audit process re-commences, PBA's progress claim should be paid. As is clear from clause 18.3(b) and Schedule 7, payment is on account only and remains subject to audit*".

98 In the Response, the Respondent asserts that the Raw Rates for those employees identified in Appendix D of the Schedule have not been provided to it. The Respondent asserts that is therefore not possible for it to assess whether or not the amount claimed is accurate or due under the Contract. The Respondent goes on to assert that the payments to date have been made on account and subject to verification and audit. The Respondent stated in the Schedule that it has applied a rate of $125 per hour and in the Response asserts that on that basis $373,851.36 should not be allowed for this item.

99 From the Respondent's assertions, I conclude that the Respondent accepts the work was done / hours claimed, it has not disputed them. What is in contention is the rate to be applied. The Claim identifies the hours and the tasks on which each of the employees in the appendix D list have worked. Whilst I do not have the advantage of the databases that each of the parties clearly maintain it is apparent that the Respondent has been able to determine the rates applied in respect of those listed employees and to argue, as it has, that the amount of $373,851.36 should not be allowed for this item.

100 In circumstances where there is no controversy in respect to the hours claimed, I find no reason to divert from the normal course that the Claimant be paid on account the amount claimed subject to verification and audit.

101 It is my view that confirmation of the raw rates applicable to the additional staff can be readily confirmed by the CCA Auditor and that approach is contemplated by the Contract. I note that the audit has been suspended and is presently due to recommence, both of those occurrences following a decision of the CLT acting on a request of the Respondent. It is not my view that in the interim that the Claimant should be disadvantaged because of the Respondent's requested suspension of audits. I consider that in the interim it is reasonable that the raw rates applied be as claimed by the Claimant as the rate of $125 for which the Respondent contends is well below the average hourly rates established during the course of the project to date (inclusive of the agreed reduction in the overtime multiplier for hours in excess of 45), which are identified in the Claim as $152.56 for design services and $196.21 for construction engineering services respectively.

102 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's submission that $373,851.36 (ex GST) should not be allowed for this item must fail.

COMPONENT 1, LUMP SUM CONSULTANTS

103 In the Schedule, the Respondent asserts that the Claimant "*have claimed $128,882.50 for services provided by Lump Sum consultants for the period 9 January 2010 - 12 February 2010. No detailed supporting documentation in respect to these claims has been provided within Attachments 1 through 10*".

104 The Respondent goes on to note that the Claimant has claimed for two Lump Sum Consultants, namely CERTIS in the amount of $25,780 and QATS Management Pty Ltd in the amount of $4,200 but that neither of these consultants are Lump Sum Consultants accepted under the Contract.

105 The Respondent says that as no supporting documentation has been provided by the Claimant for the period in respect of these line items, the Respondent's Schedule Amount for these items for the period is $0.00 and that a further reduction of $29,980 for CERTIS and QATS was considered, however remains payment on account only.

106 The Claimant did not address this issue at all in the Application and the Respondent has pressed the issue in the Response, submitting that $128,882.50 should not be allowed for this item.

107 I have reviewed the claim and confirmed that the Claimant has claimed $128,882.50 for Lump Sum Sub-Consultants. I have also been able to determine that nothing was claimed in the relevant period in respect of QATS Management Pty Ltd, as the $4200 to which the Respondent refers is evident in Progress Claims 17 and 18. I make the observation that the relevant documentation included in Progress Claim 19 is merely a copy of that provided in Progress Claim 18 (in the Application copy at least) and does not align with the amount claimed in Progress Claim 19, being the Progress Claim immediately preceding the Claim. Notwithstanding that I observe, on the basis that amount has not been extended to the Claim, that the amount claimed in respect of this item in Progress Claim 19, $756,386.75, was paid.

108 I have been able to readily determine that the only sub-consultants in respect of which payment has been claimed for the relevant period are: Conics, Cottee, Tract, and, possibly, Certis (an amount $13,200.00). I have also been able to determine the amounts claimed in respect of each of them since Progress Claim 18. However, I have not been able to determine the individual amounts claimed in respect of each of them in the period the subject of the Claim.

109 I have also been unable to locate a factual (as opposed to contractual) basis for the claim; that is a percentage complete, milestones reached, hours worked or the like. I therefore find that I am not in a position to be able to value the claim for lump sum consultants.

110 Upon consideration of the various findings and reasons set out above, I decide that the Claimant's claim for $128,882.50 (ex GST) for Lump Sum Consultants must fail.

REASON FOR NON-PAYMENT, COMPONENT 2, PREVIOUS CLAIMS

111 The Claim identifies that "*the work the subject of this payment claim is made up of three components*" and in respect of component "2":

"*That part of the Work undertaken pursuant to the CCA and the subject of progress claims 15, 16, 17, 18 and 19, submitted under the CCA, for which no payment has been made.*

- *82,000 hours being professional engineering services in relation to the construction work undertaken and carried out in relation to Airport Link, Northern Busway & EWAG projects pursuant to the CCA during the period from 15 August 2009 to 8 January 2010 for which no payment has been made, as described in more detail in the table below; and*
- *set out in summary form below; and*
- *set out in detail form in the supporting documentation attached to this Payment Claim*".

112 The table of items in the Claim provides the following summary to an item claimed in each of the sections headed "Design Services" and "Construction Engineering Services": "*Service Hours based Fees – PB/Arup – part of work claimed in Progress Claims 15 to 19, submitted under the CCA, for which no payment has been made. Set out in the supporting documentation attached to this Payment Claim*". The amounts claimed are $4,303,347.39 and $339,737.95 respectively.

113 Attachment 6 to 10 of the Claim then the set out some detail of the short payments alleged. Attachment 6, the summary, identifies an amount of $4,640,638.43 arising from 81,961.12 hours approx (not 81,511.12 hours as stated by the Respondent) which are broken down to a total per progress claim for each of "design" and "CPS". Attachment 7 to 10 then identify the hours per week per employee per task (by code) for each of the progress claims. Those totals are:

- 5,611.70 hours for Progress Claim 15 (attachment 7);
- 67,915.20 hours for Progress Claims 16 & 17 (attachment 8);
- 3,665.00 hours for Progress Claim 18 (attachment 9);
- 4,730.65 hours for Progress Claim 19 (attachment 10).

[In passing, I note that the Respondent asserted that the Claimant claimed $13,867,986.55 in respect of these latter schedules. I could not locate such a claim, I only found that the schedules provided a total for "Hours". I did not find that the amounts against the various employees had been similarly totalled (I anticipate as those amounts may be used for a different purpose)].

114 In the Schedule, the Respondent asserts that from its assessment the hours identified in the attachments have been paid in previous progress claims. The Respondent goes on to contend "*that the difference is solely that of the multiplier applied to overtime*" (I anticipate a multiplier of 1.1 vs 2.8 for those hours between 37.5 and 45).

115 In the Application, the Claimant asserts that from Progress Claim 004 (which was the first Progress Claim in which multipliers were amended) to Progress Claim 020 there have been six (6) additional line items introduced to the Progress Claims to reflect the agreed reduction in the Element 1 Multiplier. The Claimant goes on to assert that the Respondent received and duly paid each of Progress Claims 003 to 014 on that basis. The Claimant asserts that it is only from Progress Claim 015 on that the Respondent has commenced withholding funds. Furthermore, the Claimant asserts that for each of those Progress Claims from which funds were withheld the Respondent failed to identify the line items or work in relation to which it refused to pay.

116 The Application, at attachment S57, includes e-mails dated 16 December 2008 which attach Payment Certificate 17. That certificate, from the Respondent, identifies as the only deduction an amount of $3,760,298.89 for "overtime adjustment to 1.1x", constituted by 66,174.9 hours at a rate of $144.64. It appears that the Claimant's complaint as to the Respondent's lack of specificity that it "*did not identify the line items or work in relation to which it refuse to pay*" is well-founded. The reason for the Respondent's previous deductions being apparent at summary level only.

117 In the Response, the Respondent clarifies that TJHJV "*has paid for all work*" in Progress Claims 15, 16, 17, 18 and 19 "*but at rates different to that claimed*" by PBAJV. Accordingly, I accept the Respondent's contention that it "*has paid for all work*", "*but at rates different to that claimed*".

118 From the Respondent's statements in the Schedule and the Response, I imply that the Respondent takes no issue with the claim in the respect that the work was done or in respect of the quantum of hours claimed (as it asserts it has paid for all work) but rather that the dispute relates to the multiplier/rate to be applied to the hours claimed.

119 Accordingly, in light of my decision at paragraph 64 above in respect of the application of an Element 1 Multiplier of 2.8, rather then 1.1, to those hours worked by the Consultants between 37.5 and 45 hours per week, and in view of the Respondent's confirmation that is the only difference between what has been claimed and what has been paid in the Progress Claims the subject of this component of the Claim, I find that it must follow that the Respondent's reason for non-payment of the amount claimed must also fail.

120 Upon consideration of the various findings and reasons set out above, I decide that the Respondent's submission that $4,643,085.34 (ex GST) should not be allowed for this item fails.

REASON FOR NON-PAYMENT, COMPONENT 3, INTEREST

121 I have reviewed the interest calculation included in the Claim and I have referred to the relevant provision, Clause 18.3(a), in the Contract. I am satisfied that the Contract provides for the payment of interest on overdue amounts. I am also satisfied from my review that the interest claimed only relates to the short payments associated with 'Component 2' of the Claim.

122 As I have found in the Claimant's favour when deciding the 'Component 2' claim, it follows that the amounts ought to have been paid and, as they have not been paid, interest flows in accordance with the Contract.

123 Accordingly, I find that the Claimant is entitled to the interest claimed and the Respondent's reason for the deduction of that amount of $86,007.15 fails.

THE ADJUDICATED AMOUNT

124 Section 26(1)(a) of the Act requires that I am to decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount).

125 Summarising the decisions I have made above, I have found the following deductions ought be made from the claimed amount (all ex GST):

Disputed Item	Deduction Sought	Decided
Claimed Amount (ex GST and Interest)		$15,198,302.96
Component 1 items:		
Full-time Staff O/T Multiplier	$4,990,661.71	$0.00
In-house Contract Staff Multiplier	$1,913,262.33	$0.00
Casual Staff Multiplier	$739,711.04	$0.00
Disbursements	$343,750.26	$343,750.26
Raw Rate	$373,851.36	$0.00
Lump Sum Consultants	$128,882.50	$128,882.50
Component 2, Previous Claims	$4,643,085.34	$0.00
Cap on deductions sought Component 1 and 2	$8,140,542.83	n.a.
Sub-total		$14,725,670.20
GST		$1,472,567.02
SUB-TOTAL	**(incl GST)**	$16,198,237.22
Component 3, Interest	$86,007.15	$86,007.15
TOTAL		$16,284,244.37

126 I note that although the Respondent has advised that it has made payment to the Claimant in the amount of $7,763,536.14 (including GST) on 22 March 2010, that amount is included in the adjudicated amount nonetheless as it arises out of the Payment Claim and is an amount due in respect of it. The Act makes provision, at s29 and s30, for such circumstances.

127 Accordingly, I decide that the adjudicated amount is $16,284,244.37 (including GST).

DUE DATE FOR PAYMENT

128 Section 26(1)(b) requires that I am to decide the date on which any amount became or becomes payable.

129 The Claimant submitted that the due date for payment was 22 March 2010. The Respondent concurred and advised that payment of the amount of $7,763,536.14 (including GST) was paid to PBAJV on 22 March 2010.

130 I have reviewed the Contract and I have observed Clause 18.1(f) which provides "*TJH will pay the Consultant the amounts specified in the Payment Certificates as payable by TJH within 15 business days of the receipt of the Payment Certificate*".

131 The Payment Claim was submitted on 1 March 2010. The date falling 15 business days thereafter was 22 March 2010.

132 Therefore, I decide that the due date for payment was 22 March 2010.

RATE OF INTEREST

133 Section 26(1)(c) of the Act requires that I am to decide the rate of interest payable on any amount.

134 The Claimant submitted that the *Queensland Building Services Authority Act 1991* does not apply to the Contract. The Respondent made no submission on that point. I accept the Claimant's uncontested submission.

135 Section 15(2) and Section 15(3) of the Act provide:

> *"(2) Subject to subsection (3), interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—*
>
> *(a) the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order;*
>
> *(b) the rate specified under the contract.*
>
> *(3) For a construction contract to which Queensland Building Services Authority Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section"*.

136 Accordingly, the applicable rate of interest payable on any amount decided to be due in this adjudication is that determined pursuant to s15(2) of the Act.

137 The Contract, at Clause 18.3(a) provides:

"A Participant who owes money to another Participant pursuant to this Agreement will pay the other Participant interest at the rate of 10% per annum calculated on monthly rests for any time the payment (including interest) remains overdue."

138 Section 48(1) of the *Supreme Court Act 1995* provides:

"48 Interest on debt under judgment or order

(1) Where judgment is given or an order is made by a court of record for the payment of money in a cause of action that arose after the commencement of the Common Law Practice Act Amendment Act 1972, interest shall, unless the court otherwise orders, be payable at the rate prescribed under a regulation from the date of the judgment or order on so much of the money as is from time to time unpaid.

139 Section 4 of the *Supreme Court Regulation 2008* (Reprint No 1) provides:

"4 Rate of interest on debt under judgment or order

For section 48(1) of the Act, the prescribed rate is 10% a year."

140 Of those provisions, I find the greater rate to be that provided by the Contract namely 10% per annum calculated on monthly rests.

141 I therefore decide that the rate of interest payable on any amount decided to be due in this adjudication is 10% per annum calculated on monthly rests.

AUTHORISED NOMINATING AUTHORITY'S FEES

142 Section 34(3)(b) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of any Authorised Nominating Authority fee in equal proportions or in the proportions the adjudicator to whom the Adjudication Application is referred may decide.

143 Neither party made a submission as to liability for the Authorised Nominating Authority fees.

144 In the circumstances of this adjudication I consider it appropriate that I exercise my discretion such that each party is equally liable for the Authorised Nominating Authority fees and I do so.

ADJUDICATOR'S FEES

145 Section 35(3) of the Act provides that the Claimant and Respondent are each liable to contribute to the payment of the adjudicator's fees and expenses in equal proportions or in the proportions the adjudicator decides.

146 Neither party made a submission as to liability for the adjudicator's fees and expenses.

147 Each party made substantial submissions in respect of its contentions. Ultimately, I found merit in elements of the submissions of each party and neither party has been fully successful in this adjudication.

148 In the circumstances of this adjudication I consider it appropriate that I exercise my discretion such that each party is equally liable for the adjudicator's fees and expenses and I do so.