ADJUDICATORS DECISION

In the matter of adjudication pursuant to the

Building and Construction Industry Payments Act 2004 (the Act)

BCIPA Adjudication No 30215 on Major Works Order No TW-078125

Between

Rob Carr Pty Ltd
The Claimant

And

Tenix Alliance Pty Ltd

The Respondent

The Decision

I, John Savage, as the Adjudicator pursuant to the Building and Construction Industry Payments Act 2004 (the Act) for the reasons set out in this Decision having perused all of the properly served submissions (whether referred to or not in the Decision) decide that:

- **The adjudicated amount to be paid by the Respondent to the Claimant in respect of the Adjudication Application lodged 27 October 2009 is Three Hundred and Eighteen Thousand, Two Hundred and Nineteen Dollars and Ninety Eight Cents ($318,219.98) exclusive of GST.**

- **The date on which the amount became payable is 5 November 2009.**

- **The applicable rate of interest payable on the adjudicated amount is the rate prescribed under the Supreme Court Act 1995 section 48(1) of 10% per annum simple interest.**

- **The Claimant is liable for 50% and the Respondent is liable for 50% of both the ANA application fee and the Adjudicator's fees and expenses.**

Adjudicator: John Savage **Reg No: J1057073**

ANA: Institute Of Arbitrators and Mediators **Reg No: N1057859**

Date: 16 November 2009

Index

Summary of Information

Claimant:	Rob Carr Pty Ltd ABN: 38 007 198 843 20 Airds Road Minto, NSW 2566 Fax: 02 9820 2744, 1300 883 605
Respondent:	Tenix Alliance Pty Ltd ABN: 65 075 194 857 Cnr Boowaggen Rd and Robina Parkway Merrimac, QLD 4226 Fax: 07 5559 3699
Project:	Beenleigh Merrimac Pimpama Alliance, Sewerage Reticulation TW-078125
Adjudicator:	John Savage Registration No: J1057073
Authorised Nominating Authority:	Institute of Arbitrators and Mediators Registration No: N1057859
Payment Claim:	$1,038,209.97 (Excluding GST) dated and served 29 September 2009
Payment Schedule:	$0.00 dated and served 13 October 2009
Adjudication Application:	27 October 2009
Adjudicator's acceptance:	3 November 2009
Adjudication Response:	5 November 2009
Decision date:	16 November 2009
Adjudicated Amount:	$318,219.98 (Excluding GST)
Due Date for Payment:	5 November 2009
Rate of Interest:	Supreme Court Act 1995 rate of 10%
Apportionment of Fees:	Claimant 50% Respondent 50%

Preliminary Matters

Background

1. This Adjudication Application ('the Application') arises from a periodic agreement between the parties executed 19 July 2005 for the provision of services to the Respondent as part of the scope of works within a contract the Respondent had with the Gold Coast City Council under a Program Alliance Agreement. The Respondent issued a Purchase Order on 17 June 2008 for rising main and gravity main tunneling civil works for sewerage reticulation. The Claimant served a payment claim claiming for works completed including a claim in relation to deletion of a major portion of the scope of works. The Respondent provided a payment schedule for a nil amount of payment rejecting the claim for the variation deletion and relying on a set-off claim for withholding all amounts due for payment. An adjudication application was subsequently lodged by the Claimant.

Appointment of Adjudicator

2. The Claimant lodged the Application with the Institute of Arbitrators and Mediators (IAMA) on 27 October 2009. The IAMA is an Authorised Nominating Authority under the Act. The application was referred to me and I issued a notice of acceptance on 3 November 2009 to the parties thereby establishing my appointment as the Adjudicator.

Scope of the Decision

3. Pursuant to Section 26(1) of the Act 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); and
   (b) The date on which any amount became or becomes payable; and
   (c) The rate of interest payable on any such amount."

4. The Act at s34(3)(b) and s35(3) allows me the discretion to determine the proportion of the contribution to be made by the Claimant and by the Respondent to the Authorised Nominating Authority fees and the Adjudicator's fees and expenses.

Matters Regarded in Making the Decision

5. Section 26(2) of the Act restricts the matters that I may consider in coming to my adjudication decision. In making my decision I have had regard for the following:
   (a) The provisions of the *Building and Construction Industry Payments Act 2004* and, the relevant provisions of Part 4A of the *Queensland Building Services Authority Act1991*.
   (b) The provisions of the contract entered into on or about 17 June 2008 between the parties from which the Application arose;
   (c) The Payment Claim dated 29 September 2009 and served same day to which the application relates;
   (d) The Payment Schedule served 13 October 2009;

(e) Submissions properly made in the Application lodged with IAMA 27 October 2009;
(f) Submissions properly made in the Adjudication Response ('the Response') lodged 5 November 2009;

6. In determining this adjudication I did not exercise the discretion empowered by Section 25(4) of the Act, to request submissions, a conference or inspections.

The Contract and Application of the Act

7. The documents provided by the Claimant in the Application describe the nature of the work as that of underground tunneling and installation of enveloper pipes to sewerage reticulation civil works. I find, that the works the subject of the Payment Claim is construction work captured within the definition provided in Section 10(1)(a) to (c) of the Act.

8. The Claimant in the Application has provided an copy of contract documents which the Respondent does not contest.

9. I am satisfied that a contract was in place between the parties and is captured by the definition of a construction contract at Schedule 2 of the Act. From this point on in the Decision I will refer to the agreement as the 'Contract'. I am satisfied from the documents provided that the Contract was entered into on or about 17 June 2008 and is after the commencement of Parts 2 and 3 of the Act that being 1 October 2004, therefore satisfying the criteria of Section 3(1) of the Act. Further, I find nothing in the submissions that would exclude this Contract from application of s3(2) or s3(3) of the Act.

10. The contract documents describe the site of the project works as Merimac in Queensland, therefore, I find that the works the subject of the Contract were carried out inside Queensland, satisfying s3(4) of the Act.

11. The parties have made no submissions in relation to the subject of a notice of claim of charge under the *Subcontractors' Charges Act 1974*, therefore I find no evidence in the submissions provided that would allow exclusion of the Payment Claim pursuant to s4 of the Act.

12. I find the Contract executed in or about 17 June 2008 to be within the jurisdiction of the Act.

Reference Date

13. The Contract at Clause 10.5 of the conditions of contract provides for a reference date being the 15th day of each month stated in the Appendix. The Payment Claim was served on 29 September 2009, however, no issue has been raised or contested by the parties in relation to reference dates, therefore, I do not find it necessary to make a finding of the reference date for this Payment Claim.

The Payment Claim

14. The Application contained a copy of the Payment Claim served via a web based document system "Project Centre" comprised of a two page correspondence document, attached spreadsheets for the three components of the scope of works and correspondence relating to the work completed. The Respondent in the Payment Schedule covering letter has confirmed receipt of the Payment Claim on 29 September 2009.

15. I find the Payment Claim has sufficient information to identify the contract and the construction work to which it relates. The amount of progress payment claimed to be payable is clearly stated and the attached letter from the Claimant carries the endorsement that it is made under the BCIPA Act.

16. I find the Payment Claim satisfies the requirements of section 17(2) of the Act.

17. The claim is for work completed on the project for the Rising mains carried a revised completion date of 9 December 2008, therefore, as the contract provides for a 52 week defects liability period, I find the Payment Claim served 29 September 2009 to be within the period of the construction contract and within 12 months of the last work carried out on the project and that s17(4) of the Act is satisfied.

18. The Respondent has not made any submissions in relation to more than one claim relating to a particular reference date and I find only one Payment Claim relating to that reference date therefore satisfying Section 17(5) of the Act.

19. I find the Payment Claim to be a valid Payment Claim under the Act.

Due Date for Payment

20. The Contract at Clause 1.8.1.3 of the Contract Appendix provides for payment to be made on the Thursday following 30 days after the end of the month of service of the payment claim.

21. The Claimant in the Application at paragraph 35 in relation to interest on late payments has submitted that Contract is not captured by the provisions of the Queensland Building Services Authority Act ('QBSA Act') and I concur with that submission, and find no effect on the time for payment under the QBSA Act.

22. The Respondent has not made any submissions in relation to the due date for payment. I find pursuant to Clause 1.8.1.3, the due date for payment to be Thursday 5 November 2009 as submitted by the Claimant being the Thursday following the 30 October 2009.

The Payment Schedule

23. The Contract at Clause 10.8.1.A provides for the issue of a Payment Schedule within 10 business days of receiving a Payment Claim which equates to the time for issue of

a Payment Schedule under s18(4)(b)(ii) of the Act, being 10 business days after the Payment Claim is served.

24. I have previously found that the Payment Claim was served on the 29 September 2009, and adding 10 business days as per the Act it would require a payment schedule to be served on or before 13 October 2009.

25. The Claimant has submitted that a payment schedule dated 12 October 2009 was posted to the Project Centre on 13 October 2009 being within the time provision in the Contract.

26. I have perused the content and I find it refers to the Payment Claim of 29 September 2009 and provides reasons for withholding payment, therefore, I find this document to be a payment schedule complying with s18 of the Act.

The Adjudication Application

27. The Application was lodged with the IAMA on 27 October 2009. The Application is in writing and has been lodged with a registered Authorised Nominating Authority under the Act.

28. The Claimant has provided confirmation that the date of service of the Application on the Respondent was 28 October 2009 and this is not contested by the Respondent. I am satisfied that the Claimant is in compliance with s21(5) of the Act.

29. Section 21(3)(c)(i) of the Act requires the Application to be lodged with the ANA within 10 business days after receipt of the Payment Schedule. The Payment Schedule was received on 13 October 2009 and adding 10 business days, the last date for lodging the application is 27 October 2009. I find the application was lodged within the time provisions of the Act.

30. The IAMA has not imposed an application fee. There has been no regulation that prescribes a fee amount issued under the Act. I find that the Claimant has complied with the requirements of s21(3) and (4) of the Act.

31. The IAMA referred the application to me on the fourth business day after receiving the documents satisfying the ‘as soon as practicable’ requirement of s21(6) the Act. I am a Registered Adjudicator under the Act. Registration Number J1057073. I am not a party to the contract and I have no conflict of interest with the parties to this adjudication therefore Section 22 of the Act is satisfied.

32. The Application comprised a lever arch folder of the documents listed below:
    1. Proforma Application Form details completed;
    2. Claimants submissions;
    3. Copy of the Payment Claim;
    4. Copy of the Payment Schedule;
    5. Copy of the Major Works Order TW- 078125 and the Periodic Agreement; and
    6. Other supporting documents.

The Adjudication Response

33. I have previously found in this Decision that the Respondent did provide a Payment Schedule and is therefore not restricted pursuant to s 24(3) of the Act in lodging an adjudication response.

34. I accepted the Application and advised the parties on 3 November 2009. Therefore, the time for an adjudication response is the later of 2 business days after receiving the letter of acceptance, that being 5 November 2009, or 5 business days after service of the application on 28 October 2009, that being 4 November 2009. The Adjudication Response was received 5 November 2009 within the time allowed under the Act. S24(5) of the Act requires service of the Response on the Respondent, however, no time frame is stated in the Act.

35. The Response comprised a lever arch folder of the documents listed below:
    1. Cover sheet and Respondents submissions;
    2. Report by Currie and Brown dated November 2009;
    3. Statutory Declaration of Colin David Bryce with attachments;
    4. Copy of *"Sunbird Plaza Pty Ltd v Maloney and Another (1988) 166 CLR 245;*
    5. Copy of *"JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 58";*
    6. Statutory Declaration of Yuen Wong with attachments; and
    7. Other supporting documents.

The Adjudicated Amount

36. Section 26(1)(a) of the Act requires that I decide the amount of the progress payment, if any, to be paid by the Respondent to the Claimant (the adjudicated amount). All amounts quoted are exclusive of GST as this is the manner in which the Payment Claim amounts have been claimed.

The Claimed Amount

37. The Payment Claim of $1,038,209.97 is comprised of a claim for works completed to each of the three components of the scope of work being SS75 Robina Parkway of $160,895.25, MU 12 Somerset Drive of $315,711.88 and a variation claim of $886, 669.73 against M1 Motorway less a previously paid amount of $325,066.89.

38. The Respondent in the Payment Schedule in its 'Calculation of amounts payable' has withheld the variation amount claimed against the MI Motorway and claimed a further set-off amount of $818,000.00 resulting in a Nil amount for payment.

SS75 Robina Parkway and MU12 Somerset Drive

39. The Claimant in the Payment Claim has claimed $160,895.25 for SS75 Robina Parkway (Attachment 1) and $315,711.88 for MU Somerset Drive (Attachment 2). The Claimant in the Application at paragraph 6 submits that the Respondent has

conceded these two claims by stating that it is only disputing the variation claim of $886,669.73 for the MI Motorway Omission.

40. The Respondent in the Payment Schedule has provided a reason for withholding payment stating inter alia:
"As to each item in Attachments 1, 2,and 3 to RCPL's payment claim, Tenix admits the amounts claimed, save for :
Attachment 3, Item "M1 Motorway Omission" - $886,669.73"

41. I concur with the Claimant that the Respondent has not contested the claimed amounts for SS75 Robina Parkway and MU Somerset Drive in the Payment Schedule and has conceded these amounts as due and payable.

42. I therefore decide the amount of $160,895.25 for SS75 Robina Parkway and $315,711.88 for MU Somerset Drive (Excluding GST) is due and payable by the Respondent and carried to the calculation of the Adjudicated Amount.

M1 Motorway Variation

43. The Claimant in the Payment Claim has claimed $886,669.73 for the varied scope of work to the MI Motorway component of the works.

44. The Respondent in the Payment Schedule has withheld the full amount of this claim stating that it disputes the value claimed by the Claimant for reason that no proper substantiation has been provided and any documentation in support was only submitted 24 September 2009 and the Respondent has not been put in a position where it can properly assess the claim. In addition the Respondent submits that the Claimant has failed to comply with Clause 10.2.1 of the Contract to provide measurements for calculating the variation within 10 days of being given a direction and this is a precondition to payment of any variation.

45. The Claimant in the Application at paragraph 8, 9 and 10 submits that the Respondent has not provided an alternative value for the variation in the Payment Schedule and is precluded by the operation of s24(4) of the Act from submitting such in the Response.

46. The Respondent in the Response at paragraph 2.20 in relation to provision of an expert report from Currie and Brown (Quantity Surveyors) ("the Report") has requested that I have regard to the entirety of the Report. The Report considers only the variation claim for the M1 Motorway Omission. I advise the parties that I will only have regard to those sections of the Report that provide further information in support of reasons provided in the Payment Schedule, specifically comments in relation to:
(a) The Claimants compliance with Clause 10.2.1 and Clause10.3.3 of the Contract;
(b) The effect of late submission of supporting documentation for the claim.
Pursuant to s24(4) of the Act, I will not be considering any alternative valuations of components of the claim or opinions as to market rates as the Claimant has had no opportunity to assess those parts of the submissions and natural justice would be

denied. I have not and do not propose to call for further submissions on alternative valuations.

47. The Claimant in the Application at paragraphs 11 to 13 sets out its case for justifying the claim submitting that the Respondents reliance on Clause 10.2.1 of the Contract is flawed as that clause does not bar payment for a variation , rather it acts to delay payment until the necessary information is provided or under Clause 10.2.2 of the Contract the Respondent arranges alternative measurements. The Respondent has not pursued that course of action.

48. The Respondent in the Response at paragraph 2.4 has submitted that the Claimant was notified of the variation on 21 May 2009 and did not reply within the 10 day period for a submission, therefore, has not complied with the Requirements of Clause 10.2.1 of the Contract and therefore the Claimant is not entitled to payment of this variation.

49. I concur with the Claimant that non-compliance with Clause 10.2.1 is not a complete bar to payment at a later date following submission of supporting material, and that where material is submitted and the Respondent is still not satisfied, the Respondent has the opportunity under Clause 10.2.2 to pursue its own measurements. I also note that Clause 10.2.1 is not listed at Clause 10.7 of the Contract 'Conditions Precedent to Payment'.

50. The Respondent's primary position as described at paragraph 2.9 in the Response is that the precondition requirement of providing sufficient measurement and supporting material to assess the claim, has not been fulfilled. The Respondent in the Response at paragraph 2.7, 2.10 and 2.11 has made submissions as to the nature of the claim, however, from the submissions of both parties I find them to be in agreement that the omission of the M1 Motorway work is a variation to the Contract, and the Claimant has not claimed a breach of contract has occurred or is the Claimant pursuing costs in the form of damages resulting from a breach.

51. Clause 10.2.1 of the Contract states inter alia:
"... , the Subcontractor must supply Tenix with measurements and estimated costs sufficient to allow Tenix to value a variation. ..."
In my view this states that the Respondent will always be the party to value the variation and in this case, as the whole section of the works is omitted, measurements (or quantities) are not fundamental to computation of a variation. Further the clause only refers to 'estimated costs' and not 'actual costs' and it is unlikely to receive invoices as evidentiary material. I do not concur with the Respondents submissions that the Claimant has failed to deliver sufficient material in its correspondence of 24 September 2009 to satisfy the requirements of Clause 10.2.1 of the Contract.

52. The Respondent has submitted that the appropriate clause of the Contract to value the variation is Clause 10.4.1 and I concur, however, where the are no applicable rates or breakdowns in a Bill of Quantities or Schedule of Rates that clause at part (3) requires the Respondent to determine a fair valuation and in so doing can utilise the authority vested in Clause 10.2.2 and use a third party. Therefore, I do not accept the Respondents submission at paragraph 2.17 that it is unable to assess or determine a

fair value for the variation. In the same manner as an adjudicator can step into the shoes of a superintendent (now well accepted by all courts), I will proceed to value the variation in accordance with Clause 10.4.1.

53. I have reviewed the comment provided in the Currie and Brown report to the extent I advised earlier in this Decision and this does not change my views noted above.

54. Part 1.1 of the Variation claim is for labour associated with supervision, engineering and management cost of $2,480.00 and I am satisfied the hours are reasonable for initial assessment and establishment of requirements to carry out the works. The rates however, vary from the Contract Appendix Clause 10.4.2(1) rates for a Supervisor ($85.00 in lieu of $80.00) and Project Manager ($115.00 in lieu of $120.00). No rate is provided for a Construction Manager, however, I find the rate of $140.00 per hour to be acceptable. The calculation for Part 1.1 is as follows:

Supervisor	4 hrs @ $85.00	$340.00
Project Engineer	4 hrs @ $100.00	$400.00
Project Manager	10 hrs @ $115.00	$1,150.00
Construction Manager	4 hrs @ $140.00	$560.00
Total carried to collection		$2,450.00

I therefore decide the amount of $2,450.00 for Part 1.1 carried to the calculation of the Adjudicated Amount.

55. Part 1.2 of the variation claim is for Rob Carr PL Construction Equipment with the only item claimed being the down time or idle time for the Tunnel Boring Machine of $720,000.00. The Claimant has claimed a stand down period of 90 days stated in the Claimants correspondence of 24 September 2009 to be from 5 February 2009, however, no end date is offered. Adding 90 days derives a date of 5 May 2009. I am unsure of the significance of this date as the direction to delete the work was issued on 21 May 2009.

56. This line item of the claim is described as 'idle time at stand down rate', however, Items 9 and 10 the Claimants correspondence of 24 September 2009 refer to the tunneling machine being *"..officially demobilised off site and transported back to the lay down yard.."* after the Somerset Drive work was completed and *"....The tunneling machine was ready and available to commence construction on the 3rd and final portion of the same contract (at M1 Motorway) from 5th February 2009."* The schedule breakdown for each of the three components of the contract contains a line item for mobilisation and demobilisation which indicates to me that a return to the yard for maintenance and refit of some description was needed between jobs. The Claimants submissions have not stated that mobilisation occurred at the Motorway site at all, in fact the contrary is indicated. I do not accept that a 'stand down' can occur without there being mobilisation first, and idle time standing in a yard is quite distinct from idle time caused by a delay once mobilised on site leaving me at a loss to understand how a 'stand by rate' can be applied in this case in any event. The Claimant has not provided any information as to the derivation or source of the rate of $10,000.00 per day used in the calculation and my perusal of the Contract has failed to unearth any rate at all for 'stand by' charges for plant and equipment. Further, no evidence has been adduced of any subsequent agreement between the parties as to an applicable 'stand by rate'. The Respondent in the Payment Schedule

has disputed the value claimed and, as I have stated earlier in this Decision, the Contract at Clause 10.4.1(3) requires a 'fair valuation' to be determined, and I do not accept that the Claimants methodology in applying a 'stand by' rate is a fair approach to recovery of costs when the equipment is sitting in the Claimants yard. In addition the Claimant has not taken me to any provision of the Contract to establish entitlement to make a claim of this nature on the basis claimed. The material provided by the Claimant explains the sequence of events leading to the deletion of the work and there is no doubt that the Claimant was left in limbo for a considerable time of some three months, however, I am amazed that the parties did not come to some agreement as to readiness of plant, costs of dedicating particular plant to the project and ensuring that each party was aware of any accumulating costs at a much earlier time as required by Clause 14.1 of the Contract. I have little doubt that the rate claimed is for idle and stand down time for an operational machine, and is not a fair rate applicable in this instance. **I am unable to find entitlement under the Contract or satisfactory quantification from the Claimant and, as I have stated earlier I will not consider the Respondents alternative pricing from the Currie and Brown Report, leaving me with no alternative but to decide a Nil amount for Part 1.2 to be carried to the calculation of the Adjudicated Amount.**

57. Part 1.3 of the variation claim is for subcontract survey work of $1,831.63 and I am satisfied the amounts are reasonable for initial survey and establishment of requirements to carry out the works. The Respondent in the Response at paragraph 2.8 submits that the contract does not provide for profit and attendance where work has been removed from the scope of work. I have perused the Contract and agree, however, I find the Contract is silent on margins applicable to subcontractor trade or consultant invoices such as surveying. **I therefore decide the amount of $1,831.63 for Part 1.3 is to be carried to the calculation of the Adjudicated Amount.**

58. Part 1.6 of the variation claim is for 50% Amortisation of TBM Head purchase of $162,358.11.The Claimant has not provided any information as to the derivation or source of the rate of $324,716.21 used in the calculation and my perusal of the Contract has failed to unearth any costings at all for plant and equipment components of this nature. The Respondent in the Payment Schedule has disputed the value claimed and, as I have stated earlier in this Decision, the Contract at Clause 10.4.1(3) requires a 'fair valuation' to be determined, and I do not accept that the Claimants submission that without an alternative estimate from the Respondent I must accept the rates used by the Claimant. To substantiate the claimed amount the Claimant in the correspondence of 24 September 2009 at Item 1 has stated that the TCS600 tunneling head was expressly purchased to undertake the works forming the WP7 Drills under Major Works Order No TW078125, that being the three components of this Contract. The Claimant did have an opportunity to provide further substantiation of the rates in the Application but has failed to provide such material leaving me with the line item claim of $162,358.11 as described above. I do consider the drilling head to be a consumerable item for plant of this nature and that purchase of such an item specifically to carry out works under this Contract is not an unreasonable approach by the Claimant, and I do not consider the amount paid to be excessive considering the nature of the equipment. Although I have not been provided with any information as to the life of this component or the extent of progressive maintenance required to maintain a reasonable performance, I would not be surprised to find it

limited to performing one project of this nature and in this case the deleted Motorway works comprise the greater part of the Contract scope of works. Amortisation of the cost of the drilling head is part of the tender considerations when tenders are prepared and I find it reasonable that the cost could have been fully included in this tender to be written off on this project. The 50% apportionment of costs to the deleted Motorway component also appears reasonable in this instance and it is the Claimant left with an unknown use for the equipment on future projects. The Claimant has not taken me to any specific provision of the Contract to establish entitlement to make a claim of this nature on the basis claimed, however, taking what I consider to be a fair approach to valuation, I find it the claim to be reasonable and justified in this situation where the Claimant has prepared itself to carry out the full scope of works only to find that scope halved. **I am satisfied in this instance that the claim is reasonable and justified and decide the amount of $162,358.11 for Part 1.6 to be carried to the calculation of the Adjudicated Amount.**

The Set-Off Claim

59. The Respondent in the Payment Schedule provides as the reason for withholding payment, a claim for set-off, in the amount of $818,000.00, pursuant to Clause 8.2 and Clause 10.8.4 of the Contract where another subcontractor has made a claim against the Respondent in relation to work undertaken by the Claimant.

60. The onus of proof and satisfying me that entitlement lies in the Contract clauses noted and the set-off is justified, lies with the Respondent for the set-off amount.

61. The Claimant in the Application at paragraphs 14 to 21 submits that in relation to the set-off amount the Respondent has:
    (a) not identified the legal and factual basis of the other subcontractors claim;
    (b) not provided any substantiation of the amount claimed and has acknowledged that information provided by the other subcontractor is inadequate to verify the claim and therefore the Respondent cannot hold a bona fide opinion;
    (c) made a mere assertion to being entitled but has not produced a copy of the claim for assessment by the Claimant;
    (d) made a claim to withhold an amount of $818,000.00 and not a lesser amount;
    (f) not demonstrated that it has any liability to the other subcontractor;
    (g) not considered the fact that the Claimant performed the work that the other subcontractor refused to perform;

    And at paragraphs 22 in relation to factual impediments submits:
    (h) the other subcontractors claim is alleged to be a delay claim, however, no information has been provided to substantiate the claim or its contractual entitlement.
    (i) it is not possible for the Respondent to establish a bona fide opinion as to its liability for the full amount of the claim without establishing the legal and factual basis of the claim, and no such evidence has been provided to the Claimant.
    (j) the Respondent has not identified any breach of the Contract by the Claimant or any non compliance with the terms of the Contract.

62. The Claimant in the Application at paragraph 23 submits that the Respondent has claimed the full amount as a set-off and has not identified a part of the claim for which the Claimant may be liable under this Contract, leaving the adjudicator unable to arrive at an arbitrary amount, and pursuant to s24(4) of the Act preventing the Respondent from now amending the amount of set-off claimed. Further at paragraph 24 submits that the Respondent has withheld the same amount of set-off from five other contracts between the parties and therefore cannot hold a bona fide opinion that it is likely to suffer any losses not accounted for under the other contracts.

63. The Claimant in the Application at paragraph 25 in relation to Clause 10.8.4 of the Periodic Agreement condition submits that the entitlement to withhold specific amounts of payment only exists when specific facts exist and that is not the case here. The Claimant maintains that the clause requires losses to be suffered for which the Claimant is liable under a term of the Contract and the Respondent has not established or contended that is the case here, and further, that losses suffered are as a result of a breach of the Contract and no such breach is asserted. The Claimant submits that the Respondent has simply advised that it has received a claim from another party but has not produced any reasons for drawing a conclusion that it has a bona fide opinion that it is likely to be liable to the other party for $818,000.00. Finally the Claimant submits that a right to withhold payment under this clause is reliant on the Claimant (or its personnel or visitors) performing a negligent act or omission and the Respondent has not identified any such occurrence.

64. The Claimant in the Application at paragraph 27 in relation to Clause 8.2 of the Periodic Agreement condition submits that the wording of the indemnity states that only it applies where the Respondent has suffered, incurred or is liable for losses, and the Respondent has not contended that it has suffered, incurred or is liable for the $818,000.00 being withheld.

65. The Respondent in the Response repeats its reliance on Clauses 8.2 and 10.8.4 of the Periodic Agreement and at paragraphs 4 sets out the nature of the claim received from the other subcontractor describing it as claim against the Respondent for loss and damage associated with delay and disruption suffered as a result of defective work carried out by the Claimant. At paragraph 5 the Respondent in relation to the indemnity states inter alia:
"The extent of the indemnity depends largely on the manner in which the written indemnity is worded. ..... The indemnity is not limited to judgments or amounts that have been proved. It clearly provides that the Claimant will indemnify the Respondent against all claims and demands. By reason of the operation of that clause, any claim, demand or loss is indemnified by the Claimant: Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR at 254."

66. The Respondent further submits that an indemnity does not require costs, loss or expense to first be incurred, or a finding of actual liability and therefore it is not relevant for the Claimant to assess the claim made by the third party and it is sufficient for the Respondent to merely establish that a claim or demand has been made upon it arising from an act or omission of the Claimant. At paragraph 6 in relation to a 'bona fide belief' required under Clause 10.8.4 of the Periodic Agreement, the Respondent submits that the third party claim is not without merit

and evidencing that is a part payment of $214,810.01 which has been made against that claim. The Respondent has also accepted labour allocation records from the other subcontractor submitting that these records create a prima facie inference that the other subcontractor did incur delay costs. At paragraph 7 in relation to the Claimants arguments the Respondent submits that it is not required by any provision of the Contract to provide a copy of the other contract or the actual claim made by the other party, but, it is sufficient to give notice of the general content of the claim as it has done evidenced by copies of correspondence provided. The Respondent maintains that arguments about actual liability are intended to be avoided when the parties reach an agreement that one indemnifies the other. In reply to the issue of alleged multiple set-offs the Respondent submits that due to the Claimants issuing all six payment claim simultaneously it has been necessary for the full amount of the set-off claim to be pursued in each case and the Claimant has not conceded the Respondents entitlement to withhold the amount under any of the other contracts.

Entitlement under Clause 8.2 of the Periodic Agreement

67. Clause 8.2 under title of Subcontractor's Liability states:
"The Subcontractor is liable for and indemnifies Tenix and the Client against all actions, claims, suits, damages, liabilities, costs, charges, expenses, penalties, fines, outgoings, payments, demands or losses ***which Tenix or the Client suffer, incur or are liable for*** *and which arise out of or are in any way connected with:*
(a) an act or omission of the Subcontractor, the Subcontractor's personnel or the personnel of any subcontractor, consultant, or agent of the Subcontractor or any invitee of the Subcontractor to any Site including any breach of this agreement, or of an Approval condition, or negligence, by any of them;
(b) the Client or the Subcontractor doing anything which the Subcontractor must do under this agreement but it has not done or which the Client or the Contractor considers the Subcontractor has not done properly;
(c) death of or injury to any personnel of the subcontractor or its subcontractors, consultants or agents or of any invitee of the Subcontractor to any Site;
(d) any injury, loss or damage whatsoever to any property, real or personal, where that injury, loss or damage arises due to the negligence or default of the Subcontractor or its subcontractors, consultants or agents or of any invitee of the subcontractor to any Site,
Except to the extent that they are caused by a breach of the subcontract by Tenix or the negligence of Tenix or the Client." **(NB: Emphasis added)**

68. In my view the clause 8.2 clearly states that for the Claimant to be liable and the Respondent entitled to invoke the clause, the Respondent or Client must ***"suffer, incur or are liable for"*** any of the matters listed arising or connected with Items (a) to (d). The Respondents asserts that the indemnity is not limited to judgments or amounts that have been proved, and refers me for authority to *Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR at 254.* I do not find this case to support the Respondents assertion as it is primarily concerned with a contract of guarantee rather than indemnity and simply provides a comparative definition of an indemnity with no reference to whether or not proof of loss is required to be shown. The Respondent goes on to state that an indemnity does not require cost, loss or expense to have actually occurred or any finding of actual liability to be made, however, it has

provided no authority to support this assertion and I am not convinced or satisfied that the Respondent has made its case on that point. The Respondents interpretation of the clause envisages that, in the event that any claim or demand is served on it, an open ended authority exists to claim a set-off of amounts due for payment prior to assessment and determination of liability for the claim. In fact to be held on account in case a liability arises. I do not concur and find Clause 8.2 does require the Respondent to demonstrate to the Claimant that it has suffered, incurred or is liable for costs and losses flowing from matters referred to in Items (a) to (d).

69. Referring now to the Respondent's case for demonstrating that it has 'suffered, incurred or is liable for' matters listed in Item (a) to (d) presented in its submissions.

70. The Respondent in the Payment Schedule has claimed the set-off amount of $818,000.00 and makes no mention at that time of a payment of $214,810.01 being actually made to the other subcontractor. The Respondent in the Response has not amended the amount it claims as a set-off, therefore, I will assess the Respondents case for a set-off amount of $818,000.00. In determining whether the Respondent has suffered or incurred any amount it has indicated payment of $214,810.01 was an interim payment against a claim for $865,633.46, however, it is not clear from the submissions what comprised this amount other than identifying it as delay costs. The Respondent has submitted that signed labour allocation records demonstrate that the other subcontractor incurred delay and associated costs and these records create a prima facie inference that delays actually occurred and for authority quotes *JDM Accord Ltd v Secretary of State for the Environment, Food and Rural Affairs [2004] EWHC 58.* I have not been taken to specific paragraphs of this case, however, my perusal of the judgment has not found the support asserted by the Respondent that time sheets demonstrate that delay occurred and who or what event was responsible for that delay. I concur with the Claimant that delay and delay cost assessments are complex and require analysis of critical activities and the effect of events affecting progress, therefore, I do not accept the Respondents submission that the time sheets are evidence of liability and incurred cost are sufficient to demonstrate its case for a set-off amount of $818,000.00.

Entitlement under Clause 10.8.4 of the Periodic Agreement

71. Clause 10.8.4 under title of Certification and Payment states:
"Tenix may make a demand on any security provided by the Subcontractor and/or deduct from or set off against any progress payment, retention or any other amounts payable to the Subcontractor or draw down from any banker's undertaking whether provided or payable in respect of this Subcontract or any other agreement (whether in relation to this Project or otherwise):
(1) the amount of losses for which the Subcontractor ***is made liable under a term of the Subcontract*** *or which Tenix in its bona fide opinion believes it has suffered or is likely to suffer* ***as a result of a breach of the Subcontract or negligent act or omission*** *by the Subcontractor's personnel or their visitors; and*
(2) other amounts which the Subcontractor is required to pay or in Tenix's bona fide opinion is likely to be required to pay to Tenix ***under or in connection with the Subcontract or any other agreement*** *(whether in relation to this Project or otherwise).*

The Subcontract Sum will be reduced by the aggregate of any such deduction, set off or draw down. **(NB: Emphasis added)**

72. In my view both components of this clause rely upon an entitlement being available under Clause 8.2 of the Contract by the references to the contract terms highlighted above, or, as a result of breach, negligent act or omission by the Claimant and are also listed in matters at Clause 8.2.

73. The Respondent in the Response at 4.2(3) refers to defective work and the rectification thereof as being the cause of the claim being made against it, however, the Respondent falls short of asserting a particular breach of contract has occurred and I do not consider the defective work and the rectification to be a breach of contract as the Contract provides for such occurrences. Therefore I do not consider that the Respondent has established any entitlement to withhold payment under Clause 10.8.4 of the Periodic Agreement other than an entitlement under Clause 8.2.

Pay when Paid Provision s16 of the Act

74. The Claimant also submits in the Application at paragraph 28 to 30 that the Respondents actions and view of how the provisions apply, contravene s16 of the Act, and constitutes a pay when paid provision in the Contract. The Respondent in its Response at paragraph 7.3 submits that a set-off as claimed in this case does not change the Respondent's position on its liability to the Claimant, but merely counters any amounts that may otherwise be owing to the Claimant. I am not convinced by the Claimants submissions that the Respondents interpretation of the Contract clauses constitutes a 'pay when paid' provision in the Contract and concur with the Respondent submission and find no pay when paid provision in existence.

75. For the reasons stated above I find the Respondent has not made its case for entitlement to a set-off of $818,000.00**,** and **I decide no set-off deduction is allowed against amounts I have earlier found to be due and payable and a Nil amount is to be carried to the calculation of the Adjudicated Amount.**

Previously Paid Amount

76. The Claimant in the Payment Claim has included an amount of $325,026.89 as being previously paid by the Respondent under this Contract. I am unable to find confirmation of this amount from the submissions, however, the Respondent has not contested this figure and in the Payment Schedule has used the net amount of $1,038,209.97 derived by using the Claimants previously paid figure. **Therefore, I find the amount of $325,026.89 to be the amount previously paid by the Respondent and is to be carried to the calculation of the Adjudicated Amount.**

Calculation of the Adjudicated Amount

77.

Item	Description		Amounts
1	SS75 Robina Parkway		$160,895.25
2	MU Somerset Drive		$315,711.88
3	M1 Motorway Omission Variation		
	(a) Part 1.1 Labour Charges	$2,450.00	
	(b) Part 1.2 Rob Carr Construction Equipment	$0.00	
	(c) Part 1.3 Survey Charges	$1,831.63	
	(d) Part 1.6 Amortisation of TBM Head	$162,358.11	$166,639.74
Sub-total			$643,246.87
Less	Set off amounts claimed by Respondent	$0.00	
	Amounts previously paid	-$325,026.89	-$325,026.89
Adjudicated Amount (Exclusive of GST)			**$318,219.98**

Rate of Interest

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

79. The Claimant in the Application at paragraph 35 has submitted that the Contract does not provide for interest on late payments and as the project works are not captured by provisions of the QBSA Act, the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order applies.

80. The Respondent has made no submissions in relation to the applicable interest rate.

81. From my perusal of the Contract I concur with the Claimant and find that the Contract does not provide for interest on overdue payments. I have previously found in this Decision that the project works are not captured by the provisions the QBSA Act. Therefore, I find s15(2)(a) of the BCIPA applies The penalty rate of interest payable is the rate prescribed under the Supreme Court Act 1995, section 48(1) for debts under a judgment or order which is currently 10% per annum to be applied on a simple interest basis to the outstanding payment amount.

Authorised Nominating Authority and Adjudicators Fees

82. The parties have made submissions in relation to costs involved in this adjudication.

83. The Claimant in the Application at paragraph 36 submits that should it be successful in the claim, costs should follow the event and the Respondent should bear the costs of the adjudicator and nominating authority.

84. The Respondent in the Response at paragraph 9 has made a similar submission to the Claimant, submitting that the Claimant should bear the costs of the adjudicator and nominating authority and also submitted that had the Claimant provided substantiation of its claims when requested by the Respondent the adjudication process could have been avoided.

85. Both the Claimant and the Respondent have participated in the process believing that their case was justified and submitted sophisticated and detailed applications and responses. Neither party has been substantially successful in its claims and I am not persuaded by the submissions to deviate from the default provisions of s34(3) and s35(3) the Act and find the Claimant liable for 50% and the Respondent liable for 50% of the ANA's and the Adjudicator's fees and expenses.

John Savage
Adjudicator