


**Claimant:** Budget Quality Switchboards Pty Ltd

**Respondents:** Vulcan Energy Pty Ltd t/South Coast Electricity

**Adjudicator's Decision under the Building and Construction Industry Payments Act 2004**

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. The adjudicated amount of the adjudication application dated 24 November 2009 is \$12,622.00
2. The date on which the amount became payable is 27 November 2009.
3. The applicable rate of interest payable on the adjudicated amount is 10% simple interest.
4. The Claimant and Respondent are liable to pay the ANA's fees and the adjudicator's fees in equal proportions.

Signed: ..... 

Date:.....17/12/09

Chris Lenz Adjudicator

## Background

1. Budget Quality Switchboards Pty Ltd ("BQS") (referred to in this adjudication as the "Claimant") carried out the manufacture and supply of a Main Switch Board and some meter boards and a distribution board (the "electrical manufacture and supply") for Vulcan Energy Pty Ltd trading as South Coast Electricity (referred to in this adjudication as the "Respondents") for installation on a project known as H2O at Varsity Lakes in Queensland.
2. The Claimant's material included:
  - a. Invoice no. 1106 dated 13 November 2009 (the "payment claim") for \$12,622.00 which stated that it was an invoice made under the *Building and Construction Industry Payments Act 2004 (Qld)* (the "Act");
  - b. The payment schedule from the Respondent dated 19 November 2009;
  - c. The Claimant's quotation dated 11 May 2009 for \$49,960 + GST + Delivery (the "quote");
  - d. The Respondent's Order Number SCE050415 dated 12 May 2009;
  - e. The Claimant's tax invoice no. 1053 dated 23 July 2009 for \$50,149.00;
  - f. The Claimant's Ledger Report up to 31 October 2009 showing a closing balance of \$12,384.00;
  - g. The Claimant's receipt no. 83 dated 19 August 2009 for \$22,765.00;
  - h. The Claimant's receipt no. 87 dated 4 September 2009 for \$15,000.
3. After the payment schedule was faxed by the Respondent to the Claimant on 20 November 2009, the Claimant made an adjudication application to the Queensland Law Society ("QLS") on 24 November 2009 as an authorised nominating authority, with registration number N11064504. The application was in writing and on page 4 of the application it stated that a copy of the application and all supporting documents had been served on the Respondents by registered post on 24 November 2009. The Claimant provided brief submissions in its covering letter in support of its application.
4. The application was made within 2 business days after receiving the payment schedule.
5. On 25 November 2009 the QLS nominated me to adjudicate the dispute and on 1 December 2009 I faxed to the Claimant and Respondent my acceptance notice to both parties. I am registered as an adjudicator under the Act with registration number J622914.
6. On 3 December 2009 the Respondents faxed me the adjudication response which was followed with the original documents faxed to me on 4 December 2009.
7. In the adjudication response the Respondent provided the following documents:
  - a. Its submissions dated 3 December 2009;
  - b. Annexure A – the Claimant's quote;
  - c. Annexure B Part 1 – the Full Specification of 51 pages;
  - d. Annexure B Part 2 – 3 electrical drawings;
  - e. Annexure C – The Respondent's Order Number SCE050415;
  - f. Annexure D – The Respondent's email to the Claimant dated 10 August 2009;
  - g. Annexure E – The Respondent's email to the Claimant dated 17 August 2009;
  - h. Annexure F – A Report from Lighting and Electrical Design to Glenziel Pty Ltd dated 24 August 2009 (the "LED report");

- i. Annexure G – The Claimant’s letter to the Respondent dated 31 August 2009 responding to the LED report;
- j. Annexure H – An email from Brain Kelly to “Roy@ Aussie”;
- k. Annexure I – Extracts from AS3943.1:2002;
- l. Annexure J – An email from the Respondent to the Claimant dated 28 September 2009
- m. Annexure K – An email from the Claimant to the Respondent dated 28 September 2009;
- n. Annexure L – An email from the Respondent to the Claimant dated 28 September 2009
- o. Annexure M – An email from the Claimant to the Respondent dated 28 September 2009;
- p. Annexure 1 – Energex Electricity Customer Report no 175142 to Glenziel Pty Ltd apparently dated 17 November 2009.

### Appointment of Adjudicator

- 8. I find that the requirements of the adjudication application in s21(3) are satisfied in that the adjudication application was in writing to an ANA within 10 business days of receiving the payment schedule. It also identified the payment claim and the payment schedule by attaching those 2 documents.
- 9. I have no interest in the contract, nor I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have therefore been properly appointed under the Act as required by s23(2) of the Act.

### Construction contract

- 10. In order to consider the adjudication application I need to be satisfied that I have jurisdiction to decide the application and s3 of the Act requires that:
  - a.the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
  - b.the *construction work* that was carried out, or the related goods and services that were supplied for construction work, had to take place in Queensland.
- 11. I find that the quote for the electrical manufacture and supply (from BQS in Redcliffe in Queensland) and the acceptance of the quote by the Respondent’s Order Number SCE050415 within the definition of Schedule 2 of the Act, which defines a *construction contract* as an agreement or other arrangement as follows:

*“construction contract” means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”*

- 12. I find that the electrical manufacture and supply relates to the definition of *construction work* as defined in s10(1) of the Act which provides:
  - (c) “the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, airconditioning, ventilation, power supply, drainage, sanitation...”
  - ..(e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—
    - ...(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and...”

13. Alternatively, I find that the electrical manufacture and supply falls within the definition of supply of related goods and services under s11 of the Act which provides:  
“(1) **Related goods and services, in relation to construction work,**  
*means any of the following—*  
    (a) *goods of the following kind—*  
        (i) *materials and components to form part of any building, structure or work arising from construction work;.....*  
    (b) *services of the following kind—*  
        (i) *the provision of labour to carry out construction work;”*
14. The quote was dated 11 May 2009 and was accepted on 12 May 2009 so I find that the construction contract was entered into after 1 October 2004. I therefore find the construction contract for this payment claim was after 1 October 2004, and it related to *construction work* and the *supply of related goods and services* which I find was in Queensland, as BQS is in Redcliffe.
15. I find therefore that it is a matter which may be adjudicated.

### Service of the payment claim and its contents

16. I find that the payment claim was **served** on the Respondents on 13 November 2009 as the payment schedule referred to the payment claim.
17. I find that the **payment claim** was suitably **endorsed**, even though it referred to the word *invoice* rather than *payment claim*. S17(3)(c) requires that it states that it is made under the Act, and I find that the Respondent would have known that the invoice was a payment claim under the Act.
18. I find that the payment claim **identified** the work by reference to the electrical components and the Respondent's Order Number SCE050415 such that the Respondent knew what was being claimed and the **amount** being claimed, thereby satisfying s17(2) of the Act.

### The payment schedule and its contents

19. The payment schedule identified the payment claim that nil was payable and explained that:
  - a. The goods were not fit for purpose;
  - b. The Claimant had refused to carry out rectification work of the *latent defects*;
  - c. That the Respondent would withhold the amount outstanding on previous invoices as the costs of rectification may exceed the amount retained;
  - d. The Claimant was not entitled to claim interest;
  - e. That if the matter required the Respondent to defend its position it would refer the matter to the Office of Fair Trading as it was a product supply issue.
20. However, the payment schedule did not explain in what regard the goods were not fit for their purpose, nor did it identify the *latent defects* that existed with much particularity.

### Decision on the amount of the payment claim

21. The payment claim did identify the time for payment but I find that the reference to the *end of month* for payment in the payment claim is not in accordance with the contract. I find that the quote identified payment within 30 days from receipt of the switchboards, and the Respondent's Order Number SCE050415 referred to the quote and asked for the supply in accordance with the quote.
22. In Annexure E the Respondent referred to its purchase order indicating its payment terms, and that a request for a response from the Claimant, should that have not been satisfactory to the Claimant (the "invitation"). I do not find any invitation in the Respondent's Order Number SCE050415, and it has earlier requested a supply in accordance with the quote. Even if the Respondent's payment terms formed part of the contract, which I do not find, such terms would have fallen foul of s67W of the *Queensland Building Services Authority Act 1991*, as they exceeded the 15 business days limitation, thereby rendering such terms void.
23. I note that the Respondent's submissions identify that the switchboard was completed about 10 August 2009 (Annexure D reference to the Respondent positioning the main switchboard) and I find this the date of delivery of the final components. However, the contract does not identify when a claim may be made, so I find that Schedule 2 of the Act alternative definition of *reference date* applies as follows:
  - (b) if the contract does not provide for the matter—
    - (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
    - (ii) the last day of each later named month.
24. I have found that the delivery was completed on 10 August 2009, so the 31st of August 2009 was the first reference date, and the end of each month thereafter. This payment claim was on 13 November 2009, so I find that this was from the reference date of 31 October 2009, satisfying s12 of the Act.
25. As to the due date for payment for this payment claim, I refer to s15(1)(b) of the Act [which makes provision when the contract makes no provision about the date] and find that the due date for payment is 10 business days after service of the payment claim, which I have found to be the 13 November 2009. Therefore the **due date for payment is 27 November 2009.**
26. I have therefore found that the basic and essential requirements of the Act having regard to the case of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394 have been satisfied by my finding a construction contract, the service of a payment claim, the making of an adjudication application, and the reference to an eligible adjudicator and therefore I proceed to adjudicate the amount of the payment claim.
27. The Respondent's payment schedule, on its face did not provide detail of its reasons to refuse payment, but it did refer to previous communications. From the Institute of Arbitrators and Mediators Adjudication Guide (the "Guide") I understand that something substantially less than full particularity of the reasons can still satisfy the requirements of s18(3) of the Act according to the learned authors and their reference to McKenzie J in *Roadtek, Dep't Main Roads v Philip Davenport & Whitsunday Crushers Pty Ltd* [2006] QSC 047.

28. The Guide suggests that what is required is *the necessary particularity to sufficiently make the respondent's reasons for withholding payment of some of the claimed amount known to the claimant and to enable the claimant to make a decision about whether or not to pursue the claim and to understand the nature of the case it would have had to meet in an adjudication as held in Springs Golf Club Pty Ltd v Profile Golf Pty Ltd [2006] NSWSC 344 at [39]*.
29. I find that the Claimant could understand that the Respondent had problems with some alleged defects and that no monies would be paid because the cost of rectification of alleged defects could exceed the amount of money being withheld. However, it is not particularly clear what these defects are, even by reference to the previous communications.
30. Annexure D of 10 August 2009 refers to the need for segregation of essential services and the use of flexible cables and that they needed to be address as a matter of urgency, because *if Energex gets a sniff they will be all over it and we need to get it connected sooner rather than later*. There is no reference to a specification requirement or an Australian standard requirement in this email.
31. Annexure 1 is apparently a report by Energex on a switchboard. It is not addressed to the Respondent, but to Dalziel Pty Ltd, and is a Customer report. Taken at its highest, it merely reports that the switchboard is *Unsuitable as It appears that switchboard may not comply with "Safety Services" re segregation within s/board (of wiring) and main isolator and CT isolator may require to be lock "on" and "off"*. I do not find that this report is particularly definitive of defects as it refers to *may not comply*, and there is a box in the report that can identify that work is Defective, and this was not ticked, albeit that it fell within the Defective components section of the report.
32. Energex stated that there may be a requirement for a lock on and off, whatever that means, and there is no indication if this is a significant requirement or what it would cost to allow the switchboard to comply. I find that the Energex report is equivocal, and it does not appear to have been given to the Claimant, as it states in its submissions at paragraph 3 that it has not been supplied with any Energex defect notice.
33. It may be that Energex had not given the Claimant a notice, but the Claimant had been given the Energex report by the Respondent, and it is difficult to glean from the material whether or not that this has occurred. However, by inference I find that the Energex report was probably provided to the Claimant, otherwise there was no reason for it to refer to Energex in its adjudication submissions.
34. Nevertheless, I do not find that the Energex report points to a significant defect as it is too equivocal so I do not give it significant weight. However, I refer to it in certain circumstances to see if it aids the Respondent.
35. I turn then to Annexure E dated 17 August 2009 which refers to an engineer doing a report because the Respondent was not making any connection to the switchboard. The Respondent indicated its preference to return the board for credit, or for the Claimant to meet the engineer's requirement.
36. It is appropriate to pause and establish what it is that the Claimant was supposed to provide because the allegation of defects, without specific reference to the specification or the drawings makes it difficult to measure whether there are defects in accordance with the contract.

37. I find that the quote makes reference to 6 pages of the specification, and the Respondent has provided the full specification. In addition the Claimant refers to three drawings in the quote and the Respondent has provide three drawings in the adjudication response, although it has provide two copies of E26 and not one of E25, in the legible A3 copies provided to me. I find that the relevant parts of the specification relating to the switchboard and its accessories are found in clause 24, 25 and 26 of the specification, which are pages 11 to 16 of the specification, i.e. 6 pages.
38. I find that the specification was compiled by Lighting and Electrical Design, who provide the LED report.
39. I do not find in any of the Respondent’s material that it points to a particular specification provision that has not been met, despite its assertions of numerous defects. It is clear that the specification under clause 25 **Construction of switchboards** on page 13 states that the switchboard shall comply with the requirements of AS 3439.
40. It is pertinent to note that under clause 25 of the specification, at page 14 that the switchboard shall be inspected and tested at the manufacturing works to demonstrate satisfactory performance and full compliance with the Specification in the presence of the engineer (the “factory testing”). There is no evidence that this occurred and why it did not take place. It seems eminently sensible that factory testing takes place to eliminate the very issues that have now occurred.
41. I draw the inference that the fact that the switchboard was delivered in two parts, and that the Respondent was in a hurry for the switchboard (see comment on the Respondent’s Order Number SCE050415 *MSB is urgent...if we can get MSB by 30 May can go in this month’s claim*), suggests that the factory testing did not occur. Therefore, there is evidence of some deviation from the specification.
42. However, the Claimant in paragraph 3 of its submissions said that the switchboard was in good condition when it left the factory, and the Respondent did not dispute this in its adjudication response. Accordingly, it is open for me to find that the switchboard was in good condition when it left the Claimant’s premises.
43. The Respondent does, however, rely upon the LED report which identifies some defects to Dalziel Pty Ltd, whom I find was the person for whom the Respondent was carrying out electrical work. I am obliged to take into account that the LED report was to the person for whom the Respondent was doing the work, and that it was the Respondent that was responsible to Dalziel for the switchboard, not the Claimant.
44. I refer to each item of the LED report and the response by the Claimant in a table as well as the Respondent’s response. I then make my findings on each item point, with reasons identified thereafter.

Item #	LED report	Claimant’s response	Respondent’s response
1	Type test details required	Can be provided	Certificate bears no relationship to switchboard supplied – Annexure G
2	Switchboard Contractor (“SC”) to certify MSB approved by Energex	Certified	It can be demonstrated that

			the switchboard does not comply
3	Busbars to be insulated and connections taped	Colour coded to comply with AS3439.1	MSB rated at 800 amps requiring busbars to be fully insulated
4	Separation of functional units seems inadequate – SC to certify they are in accordance with Form 4 of AS3439.1	Consultant approved design and switchboard built to design	Design was forwarded to engineer precedes Respondent's dealings with Claimant. No separation details identified on the drawings. Cables noted Afflex are not those installed which are inferior non-fire rated
5	Interpanel apertures too large	Type X panel can be provided	Clear admission of defect
6	No nameplate provided	Blue sticker was installed	No name plate on delivery and none supplied since
7	External compartments to be labelled	Label list was provided and approved by consultant	No name plate on delivery and none supplied since
8	Community Services Main Switch not sufficiently rated for 25Ka	Rated at 24Ka and approved by consultant for construction – it is an isolator anyway	Switch not designed to withstand a 24Ka fault – see Annexure H
9	Circuit breakers to be provided with labelling	Label list was provided and approved by consultant	
10	SC to confirm and certify Afflex is appropriately fire retarded	No need to be fire rated as it is in fire rated enclosure	Refers to Afflex cables, which need to be isolated from non essential services, and this is not the case here
11	Afflex cables should not exceed 1 metre in length AS3439.1 - rectify	AS3439.1 does not require 1 metre	If not rated at incoming current then 1 metre limit applies – Annexure I
12	Flashover barriers required	Electrical Contractors can install heat shrink	Required in the specification and the standard– Respondent should not be building



			switchboard
13	Essential Services CB's not fitted	Electrical contractors can provide locking tabs and locks	Required in the specification and the standard
14	Neutral links and terminations to be compartmentalized from Main Switch	Neutral links and earth bar positions provided on the approved plans	Respondent had to install insulating barriers
15	SC to provide discrimination charts for 3Ka circuit breakers	Can be found in IPD catalogue - no 3Ka circuit breakers in switchboard	OK
16	SC to confirm meter panel material thickness is acceptable to Energex	Panel is 6mm and acceptable to Energex	

45. I have had to decide whether the switchboard is so defective from a review of the material to determine whether it has been supplied in accordance with the contract, and if it does not comply, then I could find that no payment is yet due.
46. However, if I don't make this finding, I need to decide what work or related goods and services is defective and then consider the value of the rectification of any defects that are found, in order to value the work already done or the goods and services supplied under s14(1)(b)(iv) and s14(2)(b)(iv) of the Act respectively.
47. As to item 1, I am unable to make an adverse finding against the Claimant about the certificate provided because it was not attached to Annexure G, as Annexure G is the Claimant's response to the LED report, and I could not find it anywhere else in the material. **Therefore I find no defect.**
48. As to item 2, this is a significant assertion of a defect, and the Claimant has certified that the switchboard complies. There is no evidence that this statement by the Claimant is insufficient to satisfy the requirement of certification, and the Respondent says that it can be demonstrated that the switchboard does not comply, but it does not go on to do so unequivocally. If the certification in Annexure G under Item 2 was inadequate because AS3439 or Energex required something else, the Respondent could easily have said so. However, there is nothing probative from the Respondent in that regard, and even if one had regard to the Energex report, it does not identify that the switchboard is defective, only that it *may* not comply and *may* require a lock "on" and "off". **Therefore I find no defect.**
49. As to item 3, I find nowhere in the material that the MSB was rated for 800A. There is reference in the quote to a 1000A load break switch and a 400A load break switch, but this does not definitively point in my mind to a rating of 800A for the switchboard. However, the LED points to the specification requiring busbars to be insulated, and I find that this is the case on page 13. The Claimant says that it colour coded the busbars but does not assert that it had insulated them. **Therefore I find that this is a defect.**
50. As to item 4, the LED is not particularly definitive that separation is inadequate, which is consistent with the Energex report, which I have already found is equivocal. The Claimant said that the consultant had approved the design and it was constructed in accordance with the design. I could find nothing in the specification that provided requirements for separation, so I infer that it is a matter for design. The Respondent did

not deny that the design had been approved by the consultant, but asserted that this occurred before it engaged the Claimant. I do not think that this matters because there is nothing in the contract that required the design of the switchboard to be approved after the contract was entered into. In fact it is evident that the contract needed to be completed in a hurry, and I infer that a preapproved design would have suited the Respondent's urgency with which the switchboard was to be completed. Without any controverting evidence I find that the design was approved by the consultant. I find on balance that the consultant referred to is Lighting and Electrical Design, and the LED is not sufficiently definite in suggesting this is a defect. I am unable to ascertain from the Respondent's submissions where on the drawings there should be reference to the separation details, or whether they are normally provided on such drawings. I cannot accept the Respondent's assertion that the engineer would only be able to assume that the switchboard complied because the very engineer who I find was involved with the design was Lighting and Electrical Design, and their report was not particularly definitive. **Therefore I find no defect.**

51. As to item 5, I find that **this is a defect** as there is an admission from the Claimant.
52. As to item 6, on balance, even if a nameplate had been provided there is no evidence from the Claimant that a replacement was provided. I find from the specification on page 14 relating to identification that labels need to be fixed with 2 screws to permit ready replacement, so that if it went missing a replacement could be provided. In the circumstances of an important switchboard, I find that the Claimant should have provided a replacement, as it was essential to have one in the switchboard. **Therefore I find that this is a defect.**
53. As to item 7, I make the same finding as item 6 above. **Therefore I find that this is a defect.**
54. As to item 8, I have already found that the consultant had approved the design. The consultant said the Community Services Main Switch was not rated to 25Ka, but I am prepared to accept that it only had to be rated to 24Ka according to the design. The Respondent submits that the switch could not withstand 24Ka and suggests that Annexure H proves that assertion. I cannot find reference to Rudolph in this email, nor that it was the manufacturer of the switch. Even if I was to find that this email was from the manufacturer of the switch, the email refers to a "*1 second withstand of 50Ka...the Rogy isolator will not withstand anything like that and is likely to explode and cause an arcing fault within the switchboard.*" It is not possible for me to find that a switch that cannot take 50Ka means that it cannot take 24Ka, and I have not been provided with sufficient evidence to suggest the switch is defective. **Therefore I find no defect.**
55. As to item 9, I find that the LED report and the Claimant's response balance one another, and that it is for the Respondent then to demonstrate the defect to tilt the balance in its favour, and it provides no submissions on the point. **Therefore I find no defect.**
56. As to item 10, the LED report required the Claimant to certify that the Afflex was suitably fire retarded. The Claimant merely asserted that cables did not need to be fire retarded as they were in a fire rated enclosure. Therefore I find that the cables are not suitably fire retarded. The issue then becomes whether or not there has been sufficient isolation from non essential services, and I do not find that the Respondent has demonstrated that there is no isolation. The LED report does not say there is no isolation, and the Energex report only refers to segregation may require and "on" and

- “off” lock, and does not refer to isolation. Accordingly, on balance and on the basis that the Respondent bears the onus of proof, **I find that there is no defect.**
57. As to item 11, there is a contest between the LED report and the Respondent’s submissions on the one hand and the Claimant’s assertions that AS 3439.1 does not limit the length of the cable to 1 metre. Having regard to Annexure 1 and clause 7.5.5.1.2, it is evident that there is a 1 metre limit and although it is not clear what length Afflex cables have been installed I am satisfied that they exceed 1 metre which is contrary to the standard. **Therefore I find that this is a defect.**
58. As to item 12, I find from the LED report that flashover barriers were required, but is evident from the Claimant that these could be installed after installation of the switchboard. The Respondent submitted that this requirement was in the specification and the standard, but I could find no reference to them having to be installed in the specification (and I was not directed to a particular provision of it) and I was not referred to, nor provided with the particular provision of the standard. Accordingly, on balance and in the circumstances of the urgency with which this switchboard was provided and that they were not required in the specification or the standard, **I find that there is no defect** as they could have been installed after installation.
59. As to item 13, I accept that these circuit breakers are required, but the Claimant says that they can be installed after installation of the switchboard. The Respondent submitted that this requirement was in the specification and the standard, but I could find no reference to them having to be installed in the specification (and I was not directed to a particular provision of it) and I was not referred to, nor provided with the particular provision of the standard. Accordingly, on balance and in the circumstances of the urgency with which this switchboard was provided and that they were not required in the specification or the standard, **I find that there is no defect** as they could have been installed after installation.
60. As to item 14, although I have found that the consultant approved the design, it is evident from the Respondent’s submissions that it had to install insulating barriers to satisfy Energex. **Therefore I find that this is a defect.**
61. As to item 15, **I find that there is no defect** as the Respondent accepts what the Claimant has said.
62. As to item 16, I am satisfied that the Respondent has confirmed the material thickness is acceptable and the Respondent makes no submissions on this item. **Therefore I find that there is no defect.**
63. Having regard to all the defects, I have found that items 3, 5, 6, 7, 11 and 14 are defects and that the balance of the items are not defective. Item 3 can be taped and heat shrunk after installation according to the LED report, so I do not find that this is a major defect disentitling the Claimant to any payment. As to item 5, the Claimant says that a type X panel can be installed and I do not find that this is a major defect disentitling payment. Items 6 and 7 are label defects and I find that they can be rectified by attaching new labels such that I do not find that this is a major defect disentitling payment. As to item 11, this is a defect that requires rectification. Item 14 has already been rectified by the Respondent in order to get approval from Energex.
64. On balance, and having regard to the items that are not defects, I cannot find that the defects considered cumulatively were such to disentitle payment entirely, which means I am obliged to have regard to value of the defects in valuing the work.

65. However, I am unable to value the defects because the Respondent has not provided me with any evidence of the value of the particular defects, or in fact for the defects overall, apart from saying that they estimated the costs would exceed the amount being withheld. Even if I could find that this amounted to \$12,662, this would be based on me finding that all of the defects are made out, and I have not done so, as there were only 6 out of 16 defects established.
66. Accordingly, even though I have found defects, I cannot put a value on the estimated costs of rectification. **I therefore find that the amount of \$12,622 is a reasonable amount for the work done or the related goods and services supplied by the Claimant.**

### **Due date for payment**

67. I have already found the **due date for payment to be 27 November 2009.**

### **Interest**

68. In the submissions the Claimant claims the 10% of interest it claims it is entitled to. I do not find that the contract provides for any interest.
69. Accordingly, s15(2)(a) of the Act applies because there is no rate of interest under the contract. The Supreme Court rate of 10% is prescribed under s48(1) of the *Supreme Court Act 1995* as regulated by Regulation 4 of the *Supreme Court Regulations*.
70. I therefore find interest at the **rate of 10% on the unpaid payment claim.**

### **Authorised Nominating Authority and Adjudicator's fees**

71. s34 and 35 of the Act refer to equal contributions from both parties for both these fees unless I decide otherwise. I have found that the Claimant has succeeded in the quantum of its claim. However, the Respondent provided a payment schedule in which it identified defects that required rectification. The Respondent did not quantify the cost to rectify the specific defects which I found existed which meant that I was unable to reduce the amount claimed for the cost of rectifying the defects, but it appeared to me there were legitimate complaints.
72. Accordingly, in my view the default provisions in ss34(3) and 35(3) of the Act are appropriate and I decide that the Claimant and Respondent should pay the ANA's fees and all my fees in equal proportions.

Chris Lenz  
Adjudicator



17 December 2009