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CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

AND

PROBUILD CONSTRUCTIONS (AUST) PTY LTD

SOUTH EAST WATER HEADQUARTERS

RE: DETERMINATION OF SITE ALLOWANCE

26 February 2014

038-2013

DECISION

DECISION OF THE PANEL

On the basis of the material presently before the Panel, the decision of the Panel is:

A. that, in respect to the construction work being performed by Probuild Constructions (Aust) Pty Ltd for the proposed South East Water Headquarters at the corners of Kananook Boulevard, Wells Street and Playne Street, Frankston, the project value for the purposes of calculating the appropriate site allowance pursuant to Appendix C of the Probuild Constructions (Aust) Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015 is less than $71.1 million, and

B. *that, as from 1 October 2012, the appropriate project allowance was $3.10 per hour and, as from 1 October 2013, the appropriate site allowance has been $3.15 per hour.*

Simon Williams
Chairperson
26 February 2014

REASONS FOR DECISION

[1] On 14 October 2013, the Construction Forestry Mining and Energy Union ("the CFMEU") notified a dispute between it and Probuild Constructions (Aust) Pty Ltd ("Probuild") regarding the calculation of the appropriate project allowance pursuant to Appendix C of the *Probuild Constructions (Aust) Pty Ltd and the CFMEU Building and Construction Industry Enterprise Agreement 2011-2015* ("the Agreement") [Agreement ID: AE888517; Print No:PR514964] in respect to the construction work being performed by Probuild for the proposed South East Water Headquarters at the corners of Kananook Boulevard, Wells Street and Playne Street, Frankston ("the site").

[2] The CFMEU and Probuild are parties to the Agreement. It is not disputed that the Agreement applies to the relevant construction work.

[3] Clause 25 of the Agreement provides that "[s]*ite allowances shall be paid in accordance with the formula which appears in Appendix C*". The relevant formula is set out in clause 7.2 of Appendix C of the Agreement and provides for a site allowance to be calculated in accordance with "*project value*". The formula (as adjusted in accordance with Clause 8 of Appendix C) provides that -

- as from 1 October 2012,

- where project value is between $35.6 million and $71.1 million, the site allowance would be $3.10 per hour; and
- where project value is between $71.1 million and $142.3 million, the site allowance would be $3.70 per hour; and

- as from 1 October 2013,
  - where project value is between $36.4 million and $72.7 million, the site allowance would be $3.15 per hour; and
  - where project value is between $72.7 million and $145.4 million, the site allowance would be $3.80 per hour.

[4] In respect to the resolution of disputes about a project site allowance, Appendix C of each Agreement relevantly provides –

> *11. In all cases where the parties fail to reach agreement on the Project Site Allowance to apply to a particular site or project, then such disagreement shall be referred to the Victorian Building Industry Disputes Panel for determination. Provided that any outcome so determined will not be inconsistent with the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, the Fair Work Act 2009 or the Building and Construction Industry Improvement Act 2005.*
>
> *12. In determining the rate, the Panel shall have regard to the Site Allowance Guidelines, and shall not deviate from these Guidelines unless there are special and exceptional circumstances.*

[5] At the direction of the Chairperson, a site visit was conducted by Panel Members Doyle and Hodges on 11 October 2013. A conference before the Panel was held on 18 October 2013 but the dispute was not settled. A hearing was then conducted by the Panel on 13 November 2013.

[6] In this matter, two questions arise for determination, namely:

- what is the "*project*" for the purposes of calculating the appropriate project value pursuant to Appendix C of the Agreement, and
- what is the "*project value*" for the purposes of calculating the appropriate project allowance pursuant to Appendix C of the Agreement.

[7] The meaning given to the word "*project*" in the context of the term "*project value*" as it appears in Appendix C of the Agreement was explained in a decision of the former Australian Industrial Relations Commission ("the former AIRC") in *CDK Commercial Construction Pty Ltd and Construction, Forestry, Mining and Energy Union* [PR974122] ("the *CDK* decision") and affirmed in another decision of the former AIRC in *Bovis Lend Lease Pty Ltd v Construction, Forestry, Mining and Energy Union* [PR975618] ("the *Bovis Lend Lease* decision"). The Panel has consistently applied that meaning. At the hearing before the Panel, it was not disputed that this was the appropriate meaning to be given to the word in to this matter.

[8] In each of these decisions of the AIRC, a "*project*" was defined as being "*an enterprise carefully planned to achieve a particular result, that has a clearly established entity or entities that exercise control over its development and that has a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*".

[9] As has been stated in previous decisions of the Panel, the definition contains a number of elements. Each element must be satisfied for a site or combination of sites to qualify as a "*project*". If one element is not satisfied, the site or combinations of sites does not qualify as a "*project*". The site or combination of sites -

- must constitute "*an enterprise carefully planned to achieve a particular result*"; and
- must have "*a clearly established entity or entities that exercise control over its development*"; and
- must have "*a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*".

[10] From the material submitted to the Panel at the hearing, it appears that the work being carried out by Probuild consists of the construction for South East Water of an 8 storey building comprising 11.707 m^2 of office space and 546 m^2 of retail space, 201 onsite car spaces, 130 off site car spaces and a useable rooftop garden and

terrace ("the South East Water building"). Probuild contends that it is this work which is the "*project*" for the purposes of calculating the appropriate project value pursuant to Appendix C of the Agreement.

[11] On the other hand, the CFMEU contends that the "*project*" for the purposes of calculating the appropriate project value pursuant to Appendix C of the Agreement consists of not only the construction of the South East Water building but also the landscaping of an area of public land between the South East Water building and Kananook Creek ("the Boulevard Public Reserve") and the rejuvenation of Kananook Creek itself. The landscaping is being carried out by the Frankston City Council ("the FCC") and the desilting is being carried out by the Victorian Government. In support of its contention, the CFMEU it relies essentially on various Ministerial and Mayoral press releases together with articles which appear on the South East Water website. It also refers to the fact that the area fenced off for the building site incorporates the Boulevard Public Reserve area.

[12] The Panel considers that, whilst South East Water has for some time been working in cooperation with the FCC and the Victorian Government to bring about a combined outcome, the construction works, the Boulevard Public Reserve site and the desilting works are separate and distinct projects in their own right. The planning and completion of each of them was never intended to and does not rely upon the planning and completion of any other. Whether or not the works relating to the Boulevard Public Reserve and/or the desilting of the creek were to proceed or in fact have proceeded does not affect the construction of the South East Water building. The latter was separately and distinctly planned and there is no evidence that it would not have proceeded if either of the other works did not.

[13] The material before the Panel demonstrates that the desilting works were never a part of any original masterplan. At the time that it was decided to proceed with the construction of the South East Water building, the desilting works were no more than a possibility dependent upon obtaining Victorian Government funding. So much is evident from FCC media statements. In one such media statement issued on 11 December 2012, the FCC Mayor stated that "*Council and South East Water will work with the Kananook Creek Association to continue our advocacy to the State*

Government to seek funding to de-silt and clean up the creek". In another such media statement issued on 5 April 2013, the FCC Mayor stated that "[w]*e will continue our advocacy to the State Government to seek much needed funding to de-silt and clean up Kananook Creek as our community deserves to see a resolution to this issue*".

[14] The July 2013 edition of the Frankston City News, at p.3, contains an article relating to the proposed construction of South East Water's headquarters. On the same page it refers to the proposed Boulevard Public Reserve. It describes this "*user-friendly public space overlooking Kananook Creek*" as being "*part of the South East Water development*". This description does not, in the Panel's view, lead to a conclusion that the work involved in this improvement of an area of public land that adjoins the property on which the South East Water building is being constructed renders that work part of a total project for the purpose of determining "*project value*".

[15] In the Panel's view, a combination of each of the works does not constitute "*an enterprise carefully planned to achieve a particular result*". Rather, they are designed to achieve a general result, namely the construction of a significant building and beautification works that will together transform an otherwise unpleasant area into one that can become a pleasant environment for public use.

[16] On the other hand, the construction of the South East Water building is clearly "*an enterprise carefully planned to achieve a particular result*". South East Water and Probuild are "*clearly established entities that exercise control over its development*".

[17] The next question is whether, the "*project*" has "*a scope sufficiently definable at any given point in time to enable its proper definition and costing for the purpose of determining the appropriate site allowance*". It is not unusual for the scope of a project to vary during its life, particularly when unforseen events arise and such events may affect the eventual cost of the project. However, in order to value a "*project*" and determine the appropriate site allowance, it must be possible to ascertain with a degree of certainty what works are included in the "*project*".

[18] Probuild contends that the scope of the project consists of the works it is required to perform, under its contract with South East Water, namely excavation, pilling and basement work, concrete works and erection of the structure, facade fit out and internal furnishings and fit out. As to the value of those works, Probuild asserts that reference should be had to the contract price and that the contract price is $66,203,846.00 exclusive of GST. During the course of the hearing and in material produced to the Panel subsequent to the hearing, Probuild contended that GST should not be included for the purpose determining the value of the project.

[19] The CFMEU, on the other hand, submits that Probuild's contention as to the scope of the project does not take into account works that preceded the commencement of the building and works now involved in removing asbestos that has been discovered on the site. It did not provide any specific information as to the cost involved in the former and, as the latter is still proceeding, the Panel has nothing before it to enable it to ascertain the cost that may be involved. Whilst it is open to the Panel to conclude that both should be included in the scope of the project, the absence of such information does not assist in calculating a proper costing for the purpose of determining the appropriate site allowance.

[20] The CFMEU, in any event, submits that media statements emanating from the Victorian Government and the FCC suggest that the value of the project is $84 million. There is, however, no clear evidence before the Panel which shows how this amount is calculated. It appears to take into account more than the construction works and the Panel cannot, therefore, be satisfied that this amount should be taken as the value of the project.

[21] Finally, there has been a question raised as to whether or not, if the contract price is to be taken as the value of the project, GST should be included for the purpose of determining the value of the project. The Chairperson of the Panel formed the view that this issue had not been adequately addressed by the parties at the hearing and, on 13 January 2014, caused a letter to be sent to the parties advising that a further hearing would be scheduled for 19 February 2014 to allow them to make submissions in respect to the issue. Each of the parties had subsequently responded that the dispute can be resolved without recourse to the issue of whether or not GST is to be

included. This decision is, therefore, made on the basis that there is no claim that GST should be included.

[22] Subsequently, however, correspondence was received from the CFMEU suggesting that further information was available to demonstrate that the value of the project exceeded $70 million with a provision for fit-out and that it had identified addition on-cost of $3 million to date for site remediation re asbestos. Probuild has disputes these claims stating that the original contract sum is inclusive of fit-out and that the actual cost to date of the asbestos variation is $1,811,300.00. Without further definitive material, the Panel is unable to conclude that project value in this case exceeds $71.1 million let alone $72.7 million.

[23] It appears to the Panel, therefore, that, on the basis of the material before it, for the purpose of the calculation of the appropriate project allowance on this project, the "*project value*" is less than $71.1 million. It may be that, if and /or when at some stage in the future further information becomes available particularly as to any further cost involved in respect to the removal of asbestos, that figure could be revised and it would then be open to the CFMEU to make another application. In the meantime, however, the Panel can only make a decision on the material that currently before it. It follows that, as from 1 October 2012, the appropriate site allowance would have been $3.10 per hour and, as from 1 October 2013, the appropriate site allowance has been $3.15 per hour.

Simon Williams	***Fergal Doyle***	***Lawrie Cross***
Chairperson	***Panel Member***	***Panel Member***

Date: 26 February 2014