

INTERNATIONAL COURT OF ARBITRATION OF THE  
INTERNATIONAL CHAMBER OF COMMERCE

ICC CASE NO. 26834/HTG  
IN THE MATTER OF AN ARBITRATION BETWEEN

SOJITZ- L&T CONSORTIUM

Claimant

-and-

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA  
LIMITED

Respondent

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STATEMENT OF CLAIM

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30 September 2022

BEFORE

JUSTICE INDU MALHOTRA

VINOD KUMAR TYAGI

RICHARD HARDING KC [PRESIDENT]

INTERNATIONAL COURT OF ARBITRATION OF THE  
INTERNATIONAL CHAMBER OF COMMERCE

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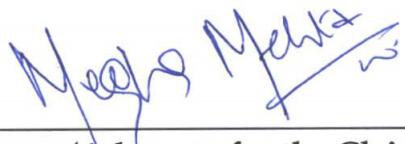
DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA

LIMITED

Respondent

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Dated 30 September 2022

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**ICC CASE NO. 26834/HTG**

**IN THE MATTER OF AN ARBITRATION BETWEEN**

SOJITZ- L&T CONSORTIUM ...CLAIMANT

-And-

DEDICATED FREIGHT CORRIDOR  
CORPORATION OF INDIA LIMITED ...RESPONDENT

**STATEMENT OF CLAIM**

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## A. INTRODUCTION

1. In accordance with the Procedural Time Table dated ~~14 September 2022~~ read with the Ld. Tribunal's email dated ~~14 and 24 September 2022~~ and Claimant's email dated ~~29 September 2022~~, this Claim is being submitted on behalf of the Claimant, Sojitz - L&T Consortium, against the Respondent, Dedicated Freight Corridor Corporation of India Limited ("Employer" or "DFCCIL"). It follows Requests for Arbitration filed by Claimant on 24 January 2022 ("RFA") and the Respondent's Answer to RFA along with Counterclaim on 29 March 2022 ("Answer"). On ~~28 April 2022~~, Claimant filed its Reply to Respondent's Counterclaim.
2. The capitalised terms, unless defined in the present Claim, will have the meaning set out in the Contract Agreement dated 6 August 2013 ("Contract").
3. The Contract is for the works of Design and Construction of Civil, Building and Track works for the double line Railway, involving formation, embankments/ cuttings, bridges, structures, buildings, ballast on formation, track works including testing and commissioning on 'design build lump sum price' basis for **Rewari - Iqbalgarh section of WDFC - Phase I.**
4. The present arbitration has been filed in respect of additional costs/ expenditure incurred/additional payments and compensation for losses suffered/damages sustained by the Claimant for INR 776,28,59,079/- in the extended period from **10 February 2017 to 30 June 2018** for completion of MileStone-3 ("MS-3") works from Bhagega to Iqbalgarh (less Technical Design) [hereinafter "**Relevant Works for Present Cost**

Claim”] along with interest computed at the rate of 8% per annum compounded monthly.

5. The present claim and terms of reference do not pertain to the Extension of Time (“EOT”) claims, assessed on 24 August 2017 by the Engineer and recommended on 30 October 2017 (“**EOT Determination**”). The Parties have accepted the said EOT assessment and agreed upon 608 days of extension of time for completion of MS-3.
6. Owing to the Delay Events (detailed in below), only 34.48% of the works envisaged in MS-3 could be completed by 9 February 2017 (date of completion of MS-3). Admittedly, the Claimant has been granted EOT for completion of MS-3 without imposition of Delay Damages and with the benefit of Adjustment for Changes in Cost.
7. Not only there were Delay Events which continued in the extended period but also additional requirements/instructions and breaches of the Respondent [in derogation to Contractual Construction Programme (“CCP”)] in the extended period which have been detailed in Section D. The Claimant was prevented from commencing and proceeding with MS-3 as per the CCP/Contract. The Claimant had no option but to work on “as is instructed basis” due to reasons set out in Section D.
8. The present cost claims is due to execution of works in the extended period for completion of MS-3. Claimant’s entitlement to the present claims have been set out in Section E. This execution of work for completion of MS-3 in the extended period was unforeseen and hence its impact is not catered for in the Contract Price.
9. In its claim for EOT to the Engineer, the Claimant had already notified its intention and reserved its rights to claim costs incurred due to the

execution of work in the extended period upon the extension of time being settled between the parties. Even as per the EOT Determination, the Claimant was allowed to submit details of the additional cost separately after the revised date of completion of MS-3, MS-4 and MS-5 was settled between the Parties.

10. On 30 October 2018, the Claimant submitted its claim for additional cost incurred and compensation for losses of an amount of INR 906,16,65,257/- for undertaking Relevant Works for Present Cost Claim from 10 February 2017 to 30 June 2018 only. The Claimant reserved its rights in respect of the further costs and compensation for losses sustained by it in the extended period beyond 30 June 2018.
11. The Claimant has now revised its claims to INR 788,24,62,868/. From the said claim amount, the Claimant has made deductions of an amount of INR 11,96,03,789, details whereof are set out in paragraph 419 and 420. The net claim amount in the present reference pursuant to the above deductions is for INR 776,28,59,079/-.
12. The Claimant reserves its rights in respect of further submissions for computation of present cost claims on any other or further or alternate basis.

## B. DESCRIPTION OF PARTIES

### (i) Claimant

13. The Claimant, Sojitz - L&T Consortium, is a consortium of Sojitz Corporation, incorporated under the laws of Japan (as the Lead Partner) and Larsen & Toubro Limited ("L&T Ltd."), a company incorporated under the laws of India ("Claimant Consortium" or "Contractor").

14. Clause 4.1 of the Instructions to Bidders defines a Bidder as "*a single entity or any combination of entities in the form of a joint venture, Association or Consortium (JVA) under an existing agreement...*"
15. Accordingly, the Claimant Consortium had submitted its bid as unincorporated consortium.
16. As per the Instructions to Bidders, it is the Claimant Consortium which was declared a successful bidder.
17. The Respondent had accepted the Claimant Consortium's technical and financial bid and awarded the Contract to the Consortium.
18. The Contract was signed by the representatives of the each of the Claimant Consortium.
19. The payments under the Contract are made by the Respondent<sup>1</sup> to the Consortium.
20. Further, as per Clause 1.14 of GCC<sup>2</sup>, the partners of the Claimant Consortium (being collectively referred to as "the Contractor") are jointly and severally liable to the Respondent/Employer.
21. The Claimant Consortium is akin to/in the nature of partnership of the constituent companies and competent to file the present claim.

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<sup>1</sup> Extension to Addendum No. 3 dated 22.10.2012 - Clause 14.7 PC

<sup>2</sup> "if the Contractor constitutes a joint venture, consortium or other unincorporated grouping of two or more persons: (a) these persons shall be deemed to be jointly and severally liable to the Employer for the performance of the Contract;.....".

- 22. In respect of the some of the claims, the costs incurred by each partner of the Claimant Consortium, when taken together constitute the costs of the consortium.
  
- 23. L&T Ltd. being the local partner for the Project is facilitating/providing required resources/support for execution of the work. Monthly Progress Reports contains details of the resources which are deployed for the Project.

**(ii) Respondent**

- 24. The Eleventh Five Year Plan of India (2007-2012) had recognized the need to augment additional capacity for the movement of freight through rail transportation by creating Freight Corridors. Ministry of Railways established Dedicated Freight Corridor Corporation of India Limited (DFCCIL)" under Indian Companies Act, 1956 as a special purpose vehicle for construction, operation and maintenance of the dedicated freight corridors on two long routes, namely the Eastern (1856 km) and Western (1504 km) freight corridors for Ministry of Railways.

**C. DETAILED FACTUAL BACKGROUND**

**(i) Dedicated Freight Corridor Project**

- 25. The demand for additional capacity of rail freight transportation led to the conception of dedicated freight corridors along the eastern and western routes.
  
- 26. The Western Dedicated Freight Corridor ("Western Corridor") covers a distance of 1504 km of double line electric (2 X 25 KV) track passing through 5 Indian states from JNPT (in Maharashtra) to Dadri (in Uttar

Pradesh). Alignment has been generally kept parallel to existing lines of the Indian Railways except provision of detour at certain length.

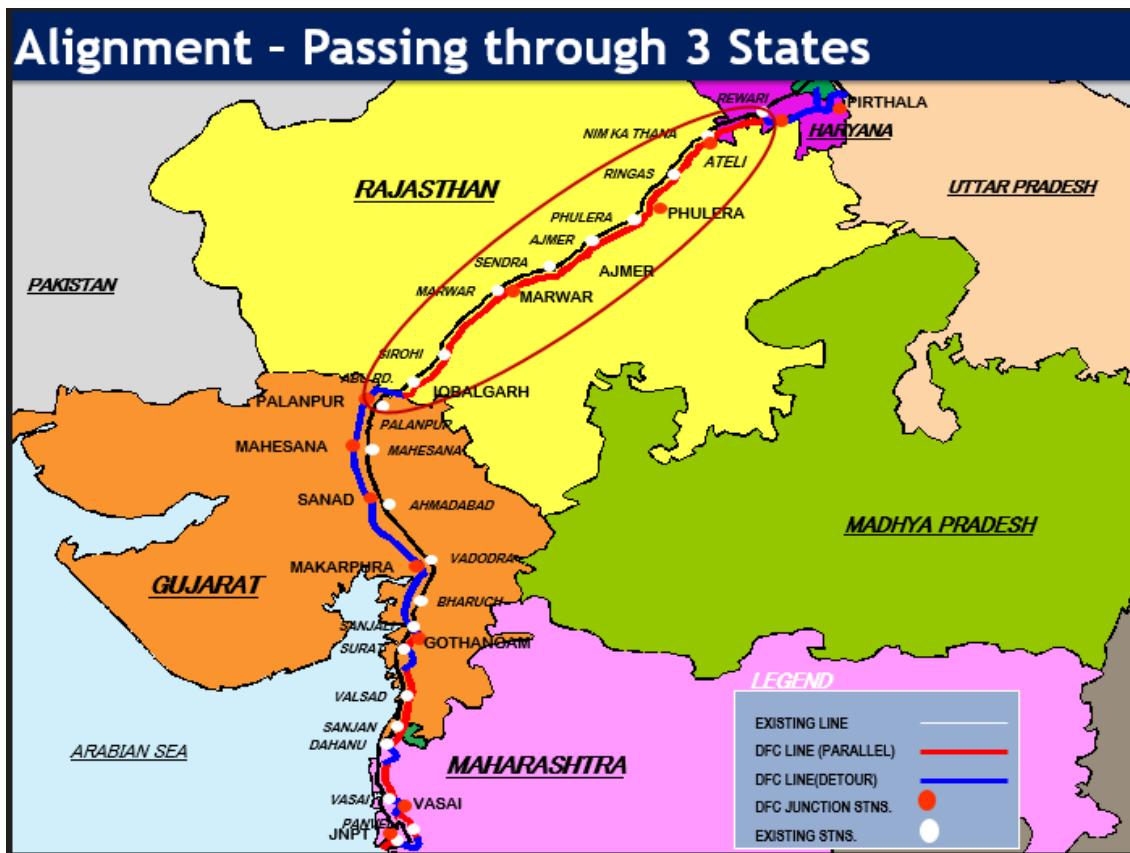
- (ii) **Tender Process and Notice Inviting Prequalification**
27. On 18 November 2011, DFCCIL/Employer issued Notice Inviting Prequalification (Notice No. 2011/WC/Ph.I/PQ). for Design and Construction of Civil, Building and Track works for the double line Railway, involving formation, embankments/ cuttings, bridges, structures, buildings, ballast on formation, track works including testing and commissioning on 'design build lump sum price' basis for Rewari - Iqbalgarh section of WDFC – Phase I "Works").
28. The work includes design and construction of 626 kms. of double line electrified track capable to withstand a speed of 100km/hr. The bidder's scope of work *inter alia* involved civil, building and track works, non-traction power supply and distribution work associated works relating to manufacturing, supply, installation, testing and commissioning for electrified double line Railway involving design and construction of embankments/ cuttings, blanket, , 121 Major structures, 1165 Minor structures, 20 stations, ballast on formation , track works, testing and commissioning.
29. In order to achieve the aforesaid, the Claimant was also required to coordinate with various other contractors such as EMP-4 and STP-5 to be appointed by the Respondent for electrical, signalling and telecom work etc. as per the dates set out in the Appendix to Bid.
30. The Works were required to be executed in terms of the Contract Agreement for which FIDIC Yellow book (ed. 1999) is the General Conditions of the Contract. The Works are part of Western Dedicated

Freight Corridor which is funded by Japan International Cooperation Agency (JICA).

31. Notice Inviting Tender and Instruction to Bidders was issued on 30 June 2012. A copy of Notice Inviting Tender and Instruction to Bidders dated 30 June 2012 is filed herewith and marked as **Exhibit C- 1**.

**(iii) Rewari - Iqbalgarh section of Western Dedicated Freight Corridor**

32. The present proceedings pertain to the Civil and Track package between Rewari-Iqbalgarh section of Western Dedicated Freight Corridor for a total length of **626 kms.** (hereinafter referred to as "**the Project**"). This is a combined package 1 & 2 numbered as CTP 1 & 2.
33. CTP-1 & 2 combined package for Rewari - Iqbalgarh [**CTP-1 (Bhagega to Madar) and CTP-2 (Madar - Iqbalgarh)**] required design and construction of civil, building and track works for double line Railway involving formation in embankments/ cuttings, bridges, structures, buildings ballast on formation and track works including testing and commissioning for Rewari - Iqbalgarh section of doubling DFCCIL.
34. The Project spans across a linear length of 626 kms. spread across 3 states of India. The linear length of the Project spanning across numerous states can be seen from the layout below.



35. The scope of work involved laying 1372.2 kms of track, upon completion of formation works of 648.6 kms (work segment length) which includes completion of 1289 structures (including Variation to scope of work as on 31 August 2016). The details of main construction items involved is given below

**Table No. 1**

S.No.	Activity	Unit	Rewari - Iqbalgarh
A	<b>Earthwork</b>	Km	648.6
B	<b>Structures</b>		1289
1	<u>Major Structures [IMB, MJB]</u>	Nos	109
2	<u>Viaduct</u>	Nos	1
3	<u>RFO</u>	Nos	6
4	<u>ROB</u>	Nos	6

<del>5</del>	<del>RUB</del>	<del>Nos</del>	<del>306</del>
<del>6</del>	<del>PS</del>	<del>Nos</del>	<del>60</del>
<del>7</del>	<del>MIB</del>	<del>Nos</del>	<del>801</del>
C	Track Work	TKm	1372.2

36. The execution of the aforesaid scope of Works involved time consuming and interlinked activities of immense quantities necessitating deployment of huge resources, details whereof are set out below:

**Table No. 2**

Sl.	Description	Unit	Scope (As on 31.08.2016)	Required resources
A	Earthwork			
1	Embankment	Cum	2,36,65,895	Excavator, Dumper, Loader, Grader, Dozer, Water Tanker, Roller/Compactor
2	Cutting	Cum	47,45,877	Excavator, Dumper, Dozer,
3	Subgrade	Cum	78,16,488	Excavator, Dumper, Loader, Grader, Dozer, Water Tanker, Roller/Compactor
4	Blanket	Cum	58,07,631	Excavator/ Loader , Excavator, Dumper, Crusher, Loader, WMM Plant / Pug mill, Grader, Roller/Compactor, Weigh Bridge

B	Concrete			
	Major Structures	Cum	4,81,002	Batching Plant, Cement Feeding Pump, Water Chilling Plant, Aggregate Feeding System, Crane, Loader, Weigh Bridge, Diesel Generator, Transit Mixer, Water Tanker, Cement Concrete Pump, Boom Placer, Trailer, Excavator, Dumper, Water tanker, Compactor, Grader, Crusher, Aggregate Processing Plant
2	Minor Structures	Cum	4,00,001	High Frequency Screening Unit, Loader, Dumper, Diesel Generator, Steam Boiler, Light Mast, Service Van, Tractor, Ready Made Steel (RMS) Plant, Bar Cutting/Bending Machine,
C	Track			
1	Rail Supply	MT	1,68,646	Cranes, Wagons, Welding Machines
2	Sleeper Supply	Nos	22,88,642	Cranes, Wagons, Batching Plants, Crusher Aggregate processing/ feeding system, dumper

(iv) **Nature of the Project - Linear and Track Centric using Mechanised Method for Track Laying**

37. One of the key and critical activities of the Project is track work. The Project required 632.87 TKms. and 739.36 TKms of track linking in CTP-

1 and CTP-2 respectively. Most of the Project alignment is running parallel to the existing Indian Railway's ("IR") track.

38. The bid documents required bidders to use mechanised method of track laying for its expeditious completion. The Claimant, therefore, proposed to use New Track Construction machinery ("NTC") for laying the track.
39. NTC, a first of its kind in India, is about one-kilometre-long automatic track laying machine which lays track using continuous action, mechanised operation and assembly line method providing high working speed, accuracy and efficiency. NTC ensured high rated productivity when compared with conventional track linking method followed in India. Below is the picture of the NTC deployed for the track work in CTP1&2



40. NTC operates in forward linear direction and can move only on developed formation. Hence, for NTC to lay track, completed formation

~~comprising Earthwork, Major and Minor structures completed to upto the formation level in contiguity is a pre requisite.~~ Therefore prior to laying the track using NTC the front had to be developed vertically up to the formation level in continuity. A sketch depicting the different components of formation works *inter alia* earthwork, minor and major structure upto required levels is set out hereinbelow:

		Rail Level →				
Formation Level	Rail	<b>Post track skeleton Works -Ballast Spreading, Final tamping Destressing Etc.</b>				
		Laying of <b>Track Skeleton</b> with NTC				
		Spreading and Rolling of Bottom <b>Ballast</b> after Completion of Earthwork and Structures in the Section				
Formation	↑	Construction of Blanket	Return wall and back filling	Blanket	Construction of Approach roads and earth fill	Blanket
			Construction of Superstructure-Girder, Deck slab etc,		Construction of retaining wall	
		Construction of Subgrade and backfilling	Construction of Substructure- Pier, Pier cap, Abutment etc	Subgrade	<b>Erection of RUB boxes</b>	Subgrade
		Construction of Embankment and backfilling	Construction of Foundation - Open / Pile foundation	Embankment	Transporting of boxes	Embankment
			Excavation / load testing etc		Casting of boxes of RUBs at yard	
		Clearing and Grubbing	Clearing and Grubbing	C&G	Clearing and Grubbing	C&G
		Earthwork	Major Structures	Earthwork	Minor Structures/RUBs	Earthwork

Activities including Earthwork, Minor and Major Structure finished upto the approved formation level is collectively referred to as "Formation".

41. For feeding NTC with the sleepers and welded rails, the Claimant was required to manufacture and store approximately 22.88 lakh sleepers and hence provide the requisite infrastructure at the appropriate place. The track laying works, therefore, also required establishment of casting yards and the depots.

**(v) Milestone Based Project**

42. This linear Project was Milestone based with track laying being the major activity.
43. Clause 1.1.3.3 of the GCC defines "Time for Completion" to mean time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4<sup>3</sup> [Extension of Time for Completion], calculated from the Commencement Date.
44. Time for Completion prescribed was 208 weeks (1456 days) from Commencement Date (Clause 8.2 of Appendix To Bid ("ATB") read with relevant addendums).
45. The Permanent Works were to be completed by achieving 05 (five) intermediate Milestones which has been defined *to include completion of a part of the Works, or the occurrence or an identified event.*
46. Clause 8.2 read with relevant addendums defines Time for Completion as follows:
- |                    |     |   |
|--------------------|-----|---|
| Time of Completion | 8.2 | The Completion period shall be 208 Weeks (1456 days). The permanent works shall be completed by achieving the following milestones: |
|--------------------|-----|---|

<sup>3</sup> Clause 8.4 of GCC/PC "Extension of Time for Completion" stipulates as follows:

"The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:

- (a) Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]),
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) Deleted
- (d) Unforeseeable shortages in the availability of Goods caused due to changes in laws in accordance with the provisions of Sub-Clause 13.7
- (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other Claimants on the Site.
- (f) A cause of delay in handing over possession of Site in accordance with the provisions of Sub-clause 2.1"

		<p>MS 1: Completion of Civil and Track Skelton works Dabla-Rewari: 120 weeks (840 days)</p> <p>MS 2: Completion of all Civil and Track works for Commencement of Prototype Loco- Dabla- Rewari: 135 weeks (945 days)</p> <p>MS 3: Completion of track skeleton for entire Package for temporary use by the Employer or by other Employer's Contractors for construction and/or for running of material trains, tower wagons, rail cum road vehicle etc.: 180 weeks (1260 days)</p> <p>MS 4: Completion of all Civil and Track Works for Commencement of Integrated Testing &amp; Commissioning: 196 weeks (1372 days)</p> <p>MS 5: Completion of all works by Contractor and Taking over of Works by Employer; 208 weeks (1456 days)</p>
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#### (vi) Bid Submission

47. Keeping in mind the Employers Requirements ("ER"), the layout of the Project spanning across three states, quantum of various activities, cycle time of activities, the timelines for completion of whole work including achievement of the intermediate Milestones (viz. MS-3) and the conditions prevalent on the Base date, the Claimant formulated and submitted its Bid on 19 February 2013.
48. It was envisaged that the Claimant could execute and complete the works within a period of 208 weeks including achieving the Milestones

as per its bid proposal formulated in accordance with the ER i.e. without any Variations to the Contract.

49. The Claimant's bid proposal was based on the premise that:
  - (a) The Respondent as well as Engineer would timely fulfil all their reciprocal obligations within the contractual timelines and in the sequence and manner to enable the Claimant to complete the Works within the contractual time frame.
  - (b) The Claimant understood that it could carry out work as per the time programme to be submitted in accordance with Clause 8.3 and to be approved by the Engineer as CCP.
  - (c) The Contractor could maintain the rate of progress as per the programme so that the monthly progress (interim) payments received from the Project would be sufficient to fund the Project. Accordingly, the Claimant had submitted Monthly Currency Cashflow (Schedule 6 - Anticipated Cashflow for the Works) as part of its Bid.
50. As part of its Bid, the Claimant also submitted its work methodology.
51. NTC was to be fed with the huge quantities of sleepers and welded rails, the Claimant was also required to produce and store the sleepers and welded rails and hence provide the infrastructure at the appropriate place. The track laying works, therefore, required establishment of depots.
52. Based on the representations of the Respondent on the status of the Right of Way and land available at the bidding stage, the Claimant estimated and proposed that depot- comprising sleeper plant, rail welding units and rail stacking units could be most optimally

established at Bhagega (for CTP -1 section) and Marwar (for CTP -2 section) locations along the alignment. Therefore, at the stage of its bid submission, the Claimant had in its Technical Proposal stated that two base depots have been planned at Baghega (CH 107) and the other at Marwar (CH 435 km) to feed the NTC.

53. ~~The NTC was to be assembled in Bhagega and the track laying was to commence from Bhagega.~~

**(vii) Award of the Contract to the Claimant**

54. The Respondent evaluated the Bid submitted by the Claimant. Claimant's bid was accepted. By way of Provisional Letter of Award dated 7 June 2013, the contract was awarded to the Claimant for a fixed lumpsum price of INR 6699.50 crores to be paid in four currencies.
55. The Parties entered into the Contract Agreement on 6 August 2013 (hereinafter referred to as "**Contract**"). Clause 2 of the Contract sets out the documents forming part of the contract, which include amongst others, the General Conditions of Contract [FIDIC - (Fédération Internationale des Ingénieurs-Conseils)] Yellow Book - for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Claimant (Edition 1999) (hereinafter referred to as "**GCC**"), the Particular Conditions (hereinafter referred to as "**PC**") and the Appendix to Bid along with ~~Addendum No. 4 dated 4 December 2012~~ (hereinafter referred to as "**ATB**"). A copy of Contract dated 6 August 2013 is filed herewith as **Exhibit C-2**.

**(viii) Notification of Commencement Date**

56. The Respondent/Employer *vide* letter dated 19 August 2013 notified the Commencement Date under the Contract as 30 August 2013. A copy of letter dated 19 August 2013 of the Respondent/Employer notifying the Commencement Date as 30 August 2013 is filed herewith as Exhibit C-3.

57. The scheduled date of completion of the whole works was 208 weeks from the Commencement Date i.e. 24 August 2017.

**(ix) Milestone-3**

58. The cost claims in the present proceedings pertain to Milestone-3 which is *Completion of the track skeleton for the entire Package for temporary use by the Employer or by any other Employer's Contracts for construction and/or for running of material trains, tower wagons, rails cum road vehicle etc.*

59. MS-3 was to be completed by 09 February 2017 i.e. within 180 weeks (1260 days) from Commencement Date. The laying of track is the prime activity for the achievement of MS-3.

60. Milestone 1 ("MS-1") was completion of Civil and Track Skelton works for the section Bhagega to Rewari. For completion of track skeleton from Bhagega to Rewari, NTC was to be mobilized and commissioned at Bhagega. Therefore, the track skeleton was to commence from Bhagega and progress towards Rewari to complete MS-1 and thus, any delay to the track skeleton from Bhagega-Rewari was to have a knock-on impact on completion of MS-3.

61. Earthwork, Major and Minor structures were to be completed upto the formation level in contiguity for the execution of track works with NTC. Therefore, these activities were to be carried out simultaneously in

various sections along the alignment. Any delay in the completion of the formation, in continuity, delays the track works.

(x) ~~Engineer not appointed even at the time of notification of Commencement Date~~

62. Under the Contract, the Engineer within the meaning of Contract was to be in place from inception. Under Clause 8.1 of PC, it is the Engineer who is required to notify the Commencement Date. Even though the Respondent/Employer notified the Commencement Date, there was no Engineer within the meaning of Clause 3 of GCC till **23 April 2014**, i.e. post 261 days after entering in to the Contract.

(xi) **Submission of time programme and its approval as Contractual Construction Programme**

63. Upon receipt of Notice to Proceed, the Claimant *vide* letter dated 26 September 2013 submitted a detailed time programme to the Respondent to complete the Works within the scheduled Time for Completion. Copy of letter dated 26 September 2013 of the Claimant along with the detailed time programme is filed herewith as **Exhibit C-4**.

64. Clause 8.3 of the GCC read with PC provides for submission of the Programme as follows:

*"The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:*

(a) *the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design, Contractor's Documents, procurement, manufacture, inspection, delivery to Site, construction, erection, testing, commissioning and trial operation,*

- (b) the periods for reviews under Sub-Clause 5.2 [Contractor's Documents] and for any other submissions, approvals and consents specified in the Employer's Requirements,
- (c) the sequence and timing of inspections and tests specified in the Contract, and
- (d) a supporting report which includes:
  - (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and
  - (ii) Details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage.

*Unless the Engineer, within 21 days after receiving a programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other obligations under the Contract. The Employer's Personnel shall be entitled to rely upon the programme when planning their activities."*

(Emphasis Supplied)

65. Furthermore, Appendix 5 of the ER sets out requirement for various programmes to be submitted by the Claimant. Paragraph 5 of Appendix 5, Volume II, ER deals with submission of Contractual Construction Programme. Relevant portion of Paragraph 5 of Appendix 5, Volume II, Employer's Requirements sets out as follows-

"5. Contractual Construction Programme:

- 5.1. *The Bid Programme submitted during the bidding process shall be further developed and submitted to the Engineer within 28 days after the Commencement Date. Upon consent by the Engineer, it shall be referred to as the Contractual Construction Programme which shall serve as the base against which the Contract progress shall be monitored; The Contractual Construction Programme shall supersede all other programmes submitted earlier and shall be deemed to be the programme on which the Claimant has based his Accepted Contract Amount and in accordance with which he shall execute the Works within the specified Time for Completion.*

- 5.2 *The Contractual Construction Programme shall be the highest priority programme. Other programmes in respect of structure/ priority, a particular time window taken from the Contractual Construction Programme and detailed in terms of their purposes.....*
66. As per the above provisions, CCP is the programme which supersedes all other programmes submitted earlier and shall be deemed to be the programme on which the Claimant has based his Accepted Contract Amount as well as in accordance with which the Claimant shall execute the Works within the specified Time for Completion.
67. This time programme specifically was formulated on the following basis:
- (a) Track linking is done with NTC and NTC can move in a forward linear direction and on laid track formation only. **Track skeleton to commence from Bhagega.**
  - (b) As NTC can only move on developed formation laying of track through NTC requires continuity of developed formation.
  - (c) The Contract being one based on performance of reciprocal promises by the Parties, the completion of Works including achievement of intermediate milestones as per time programme submitted by the Claimant was based on the assumption that the Engineer and Respondent/Employer would also fulfil all their reciprocal obligations in the manner and within the contractual time frame.
68. **The Respondent/Employer** *vide* letter dated 22 October 2013 directed certain modifications to the detailed time programme submitted on 26 September 2013. Copy of letter dated 22 October 2013 directing modifications to the detailed time programme submitted on 26 September 2013 is filed herewith as **Exhibit C-5**.

69. On 5 December 2013, the Claimant submitted revised time programme after incorporating the changes of the Respondent/Employer. Copy of letter dated 5 December 2013 of the Claimant along with the detailed time programme after incorporating the changes is filed herewith as Exhibit C-6.
70. By letter dated 23 May 2014, the time programme submitted by the Claimant was accepted by the Engineer (appointed only on 23 April 2014) as the CCP, i.e. the programme which supersedes all other programmes submitted earlier and shall be deemed to be the programme on which the Claimant has based his Accepted Contract Amount as well as in accordance with which the Claimant shall execute the Works within the specified Time for Completion. Copy of letter dated 23 May 2014 of the Engineer giving its approval to the detailed time programme submitted by the Claimant is filed herewith as Exhibit C-7.
71. The CCP sets out the planned sequence of construction and timing of activities for achieving various milestones within the Scheduled period of completion. Evidently, CCP is the bedrock, script and foundation of the Project - on the basis of which various activities for implementation of the Contract would take place and had to be adhered to by the Parties. It is, in accordance with CCP, that the Claimant is required to execute the works.
72. The detailed timeline programme was approved as CCP without any objection by the Respondent or the Engineer.

**(xii) Detailed planning by Claimant for execution of the Works**

73. A project of national importance and this magnitude (details of the activities and scope set out in paragraph 35 and 36 above) required meticulous planning and preparedness from the very inception. All stakeholders involved had to work in tandem i.e. in conjunction and cooperation with mutuality and full support for achieving the completion of Civil and Track Works.
74. Keeping in mind the aforesaid factors and obligations of stakeholders as well as to ensure completion of the Project within 208 weeks as stipulated in the Contract, the Claimant had undertaken a detailed planning while preparing detailed time programme which was accepted as CCP.
75. The Claimant had in its detailed time programmed which was approved as CCP divided the entire route length into the following four packages- ~~Package A, B, C and D~~. Each of the packages was further divided into sections. Each of the section was further sub-divided into a number of work segments. There are a total of ~~141 Work segments~~. The Claimant has tabulated the section wise details as set out in the CCP and the Contract (Attachment 1A) along with DFCCIL and IR chainages and the same is filed herewith and marked as Exhibit C-8. A line sketch depicting the location of all structures including RUBs and additions along the entire stretch of CTP 1&2 is filed herewith and marked as Exhibit C- 9. A chart giving detail of the structures as per the original scope of work in each of the packages is filed herewith and marked as Exhibit C-10.
76. In the detailed time programme which was approved as Contractual Construction Programme, the following were considered:

- a) ~~Only one NTC is envisaged in CCP for track work;~~
- b) CTP-1 Package: Claimant had planned all the facilities related to track work at Bhagega including connection with Indian Railways. Accordingly for achievement of MS-3, the track laying was planned from Bhagega to Rewari and after completing Bhagega to Rewari, the track work was planned from Bhagega to Madar;
- c) CTP-2: Claimant had planned all the facilities related to track work for CTP-2 at Marwar including connection with Indian Railways to commence after completing the track skeleton for CTP-1,. Accordingly, for achievement of MS-3, the track laying from Marwar to Iqbalgargh was planned from the depot at Marwar
- d) Track skeleton of a section will commence only after the formation of that section comprising Earth work, Major and Minor structures of that section is completed;
- e) Major and Minor structures are to be completed ahead of completion of Earth work ;
- f) Earth work, Major and Minor structures of sections will be progressed concurrently;
- g) No splitting of work (Major Bridges , RUB etc.) is envisaged in the programme/Contract;
- h) Completion of ROB in a section will be after completion of the track skeleton of that section;
- i) Post Track Installation and Additional Track Surfacing has been considered in MS-4; and
- j) The interface contractor will commence and complete the work as per Coordination Event and Key Milestones ( ATB 8.2).

77. Thus, as set out in the CCP, for MS-3, the Claimant had planned the execution of track works section wise in following sequence:

- 1) Bhagega to Rewari,
- 2) Bhagega to Madar,
- 3) Marwar to Madar, and
- 4) Marwar to Iqbalgarh.

Planned sequence of track works as per CCP is filed herewith as **Exhibit C-11**. As set out hereinbefore, any delay to completion of Track Skelton works in the first section i.e. Bhagega to Rewari will have a knock-on impact on completion of MS-3.

#### **(xiii) Mobilisation of resources for execution**

78. In accordance with CCP, the Claimant (after obtaining the consent/approval of the Respondent and/or Engineer and/or IR, wherever required) established temporary rail connectivity at Bhagega, mobilized NTC at Bhagega, imported rail from Japan to Bhagega through rail from Mundra port, established rail welding yard and sleeper plant at Bhagega and submitted design and drawings relevant to section Bhagega-Dabla on priority seeking the consent of the Engineer / Engineer designate to commence the work in the said section. This was as per the planned sequence of work which had to be followed by the Parties to ensure smooth completion of works within the CCP timelines.
79. To complete huge quantum of activities involved in the Project across the length of 648.6 Kms (detailed in paragraph 36) as per the CCP, the Claimant had to set up and mobilise resources at various locations spread across the length. The location wise details of such temporary works were also identified in the detailed time programme submission.

80. The Claimant commenced all preparatory activities in right earnest for timely execution and completion of works under the Contract. The Claimant mobilised its resources to carry out the work as per the timeline and sequence envisaged in the CCP. The Claimant set up temporary works on the site such as Employer Facilities (Employers Temporary Office, Site Huts, Permanent Office, Supply of Survey Equipments), Casting Yards, Base Depot and Contractors Offices. Apart from the temporary works, the Claimant also established Crushers; Batching Plants; Sleeper Plant; etc. at the identified locations. In summary, the Claimant was ready, willing and capable to undertake and complete the work as per the timeline and sequence envisaged in the CCP at all the times. A chart showing package wise fixed infrastructure established by the Claimant for the Project is filed herewith as **Exhibit C-12**.

**(xiv) Delay Event and Breaches by the Respondent:**

81. Despite mobilization of requisite resources and Claimant's best efforts, execution of work under the Contract could neither commence nor progress as per CCP due to various delay events/breaches by the Respondent ("Delay Events") set out in paragraphs below.
82. Following are the major Clause 8.4 Delay Events which delayed the completion of MS-3, when status as on 31 August 2016 was considered:
- a) The Engineer's consent/ Notice of No Objection ("NONO") to Contractor's design documents was delayed beyond the review periods stated in the Contract.<sup>4</sup>
  - b) Change in Law event in the State of Rajasthan requiring prior environmental clearance ("EC") for issuance of lease for mining

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<sup>4</sup> Clause 5.2 of GCC

- of minor minerals having an area less than 5 ha<sup>5</sup> and stay on the process of EC (as per Office Memorandum dated 24 December 2013<sup>6</sup>) by Hon'ble National Green Tribunal ("NGT").
- c) Delay caused to construction of Road Under Bridge ("RUB") due to variations in the ER and reasons attributable to the Respondent.<sup>7</sup>
  - d) Non handing over of unencumbered possession of land/Right of Way within such periods stated in the Contract.<sup>8</sup>
  - e) Delay in shifting of Chartered utilities due to Authority delays which are beyond the control of Claimant.
  - f) Delay caused to the work due to paucity of cash Flow.
  - g) Delay in completion of track skeleton work due to the delayed completion of MS-1 and discontinuity of the developed sections of MS-3 due to various Cl. 8.4 delay events.
83. Owing to aforesaid Delay Events, only 34.48% of the works envisaged in MS-3 could be completed by 9 February 2017.
84. Each of the aforesaid Delay Events along with correspondences have been set out in the Claimant's claim for EOT. The same has been set out in brief hereinbelow:
- a) **Engineer's consent/ Notice of No Objection to Contractor's design documents was delayed beyond the review periods stated in the Contract**
85. As per the Contract, an Engineer within the meaning of Clause 3 of GCC was mandated to be appointed by the Respondent/Employer prior to the Commencement Date. However, the Employer appointed

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<sup>5</sup> Clause 13.7 and Clause 8.4 of GCC and PC

<sup>6</sup> Clause 13.7 and 8.4 of GCC and PC

<sup>7</sup> Attachment 2.1.5 and 2.2.5 of ER and Clause 7.1 (iv) of ER

<sup>8</sup> Clause 2.1 of GCC and PC, Clause 2.1 of ATB and Para (1) of Clause 2.2.3 of Appendix 1 of ER

the Engineer (in terms of Clause 3 of the GCC) only on 23 April 2014 i.e. when about 90% of time envisaged for Technical Design<sup>9</sup> had already elapsed. Completion of Technical Design within such periods was inevitable to attain the intermediate milestones / whole work on or before the Time for Completion envisaged in the CCP.

- 86. ~~Till the time the Engineer envisaged in Contract was appointed, the Respondent/Employer unilaterally decided to function as Engineer. However, the Respondent/Employer did not have the suitably qualified personnel and resources to the extent required for performance of the duties of the Engineer as per the provisions of the Contract including for time bound review of the Claimant's Documents which delayed the approval of Technical Design.~~
- 87. In terms of Clause 5.2 of GCC, *inter alia* the review period in respect of Claimant's Documents was not to exceed 21 days from the date of submission thereof. The Claimant had formulated the CCP keeping in mind that the Engineer's review/ consent/ NONO will be issued within the review period stated in the Contract.
- 88. Not only was there delay of over 8 months in appointment of the Engineer, but also the following events occurred which led to further delay:
  - (a) The Engineer's review/ consent / Notice of No Objection ("NONO") to Claimant's design documents was delayed much beyond the contractual review period of 21 days.
  - (b) The Engineer's comments following the review was also issued piecemeal and spread over a very long period of time.

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<sup>9</sup> As per item no. CT – 4A of Coordination Events and Key milestones (ATB-8.2), **Technical Design of this Contract shall be completed within 38 weeks of Commencement Date.** The Claimant, however, reckoned completion of Technical design within **34 weeks** of Commencement Date and the CCP was formulated accordingly.

- (c) ~~Several additions to the ER were made necessitating additional compliances/modifications to the original design formulated as per ER. Details of the said additions were set out in the Claimant's claim for Extension of Time.~~
- (d) Enormous delay by Indian Railways ("IR")/other relevant authorities in approving Claimant's design documents/ General Arrangement Design ("GAD") as recommended by the Engineer (after its review). Further, IR and State authorities have also ordered additions/variations to the GAD submitted as per Contract/ ER and as recommended by the Engineer, after its review.
89. Claimant notified the Engineer/ Respondent of these delay events at the relevant time and sought for their appropriate and reasonable actions to arrest such delay events. However, these delay events continued for a very long period, delaying the planned execution of works as per CCP requiring the Claimant to seek Extension of Time for Completion of whole work/Intermediate Milestones. The aforesaid delay events impacted the Time for Completion of Intermediate Milestone and whole work and attracted provisions of Clause 8.4 (e) of GCC.
- b) *Change in Law (in the State of Rajasthan) requiring prior environmental clearance by the State to issue lease for mining of minor minerals having an area less than 5 ha and delay in granting EC due to various Authority delays:*
90. Project *inter alia* requires procurement and consumption of large quantum of minor minerals such as:
- (a) Earth for the construction of embankment, sub grade, blanketing and other miscellaneous works.

- (b) Coarse and fine aggregates required for production of *inter alia* concrete, ballast, and blanketing.
91. Claimant was required to bid duly reckoning the rates and prices of inputs as per the law in force on the Base Date<sup>10</sup> i.e. 28 days prior to the last date for submission of the tender. Almost 84.92% of the entire works (gross) fell within the State of Rajasthan with 5.37% and 79.55% of stretch for MS-1 and MS-3 respectively being within the state of Rajasthan respectively.
92. On 19 June 2012, State of Rajasthan had amended the Rajasthan Minor Mineral Concession Rules, 1986 which provided that the environmental clearance ("EC") for mining would be fulfilled by the approval of Environmental Management Plan of cluster of mines by the District level appraisal committee. The said legislation was in force in the State of Rajasthan on the Base Date of the Contract i.e. 21 January 2013.
93. As per the Law in force in the State of Rajasthan on Base Date, approval for extraction of the minor minerals from mines having an area less than 5 ha was to be obtained from the State Government within a reasonable time. Accordingly, Claimant had calculated and submitted its Bid on 19 February 2013. The Respondent unconditionally accepted Claimant's bid and Contract was entered in to accordingly.
94. However, subsequent to the Base Date, the following events occurred:
- (i) Change in Legislation requiring EC prior to the State issuing lease for mining of minor minerals<sup>11</sup> Vide Gazette notification dated 9 September 2013, the Ministry of Environment and Forest ("MOEF") amended Environment Impact Assessment notification

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<sup>10</sup> Cl 1.3 of Schedule 2 of Price Schedule

<sup>11</sup> Cl. 13.7, 8.4 of GCC and PC

2006. The said amendment mandated *inter alia* prior EC as a pre-requisite for the State to issue lease for mining of minor minerals from mines having an area less than 5 ha as well. The State of Rajasthan decided to implement MOEF's gazette notification dated 9 September 2013 only in November 2013.

- (ii) Further, on 24 December 2013, MOEF issued guidelines by way of Office Memorandum ("OM") for categorizing projects under category B in to B1 and B2 (a requisite for issuing EC). Mining of ordinary earth and stone/aggregate for which EC was sought by Claimant was under Category B2. On 8 January 2014, the State of Rajasthan implemented OM dated 24 December 2013 and State Environment Impact Assessment Authority ("SEIAA") was directed accordingly.
- (iii) Additional time beyond what was envisaged in the Contract was required for the submission of application for EC to SEIAA as per the OMs. Appraisal of Claimant's application for EC was delayed by SEIAA/ SEAC and the same was pending consideration of SEIAA in the month of June 2014 when the process was stayed by NGT.
- (iv) Stay by the Hon'ble National Green Tribunal on the process of grant of EC also as per OM dated 24 December 2013<sup>12</sup>. By order dated 28 March 2014 and 6 June 2014, the Hon'ble National Green Tribunal passed in OA No. 123 of 2014 (Himmat Singh Shekhawat and Ors. Vs. State of Rajasthan & Ors.), staying the process of grant of EC in the State of Rajasthan even as per OM dated 24 December 2013. This in turn delayed commencement and progress of the work of various sections. As directed by the Engineer /Employer, Claimant approached the Hon'ble NGT for *inter alia* vacation of stay. It was on 13 January 2015, the Hon'ble NGT vacated the stay

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<sup>12</sup> Cl.13.7, 8.4 and 8.5 of GCC and PC

and pronounced that SEIAA shall consider the applications filed by Claimant seeking EC, in accordance with law and other observations made in the Judgment expeditiously and in any case within a period of three months from 13 January 2015.

- (v) In the meantime, on 26 November 2014, the State of Rajasthan amended mining rules, as per which excavation of earth up to 1.5 m for filling did not fall under mining. As per amended rule, no EC was required for the extraction of earth from borrow pit up to a depth of 1.5 m for use in embankment. Since 15 December 2014, Claimant commenced embankment after obtaining approvals from the State as per the amended mining rules.
  
- 95. Due to *inter alia*, the aforesaid events which attracted Clause 13.7, 8.4 and 8.5 of GCC and PC<sup>13</sup>, the Claimant could not commence work till the approval for the mining of earth and stones is obtained.
  
- 96. Consequently, there was delay in commencement of time-consuming activities of embankment, sub grade, blanket, ballast and Structures etc. with resultant time and cost overrun of MS-3.
  
- 97. The delay on this count having affected the Shriamirgarh - Dabla section in the State of Rajasthan (84.92 % of the total section), consequently delayed the track work in Rewari - Iqbalgarh section.
  
- 98. The Engineer considered this delay event as the dominant event led to delay in completion of MS-3 when status as on 31.08.2016 and accordingly made its determination.

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<sup>13</sup> Clause 13.7 of GCC read with PC – “Adjustment for Changes in Legislation”

c) **Delay caused to construction of Road Under Bridge ("RUB") due to reasons beyond Claimant's control and responsibility<sup>14</sup>**

99. The Claimant is required to design and construct RUB on DFCC's track<sup>15</sup>. A total of 304 RUBs are envisaged in this Contract, out of which 42 number of RUBs are in detour. Balance 262 RUBs were to be constructed conjoint with similar RUB on IR track (to be constructed by IR). The Bidding documents set out details of RUB to be constructed<sup>16</sup>.
100. RUB on IR track [which is conjoint with that on the DFCC's track] were to be constructed by IR<sup>17</sup>. Topography, formation levels and positioning of RUBs at Level Crossing ("LC") with heavy traffic through it etc. required that RUB on IR track shall be constructed ahead of the RUB on DFCC's track.
101. While preparing the CCP, no delay by IR and consequent unhindered execution of RUB on DFCC track was envisaged. It was reckoned that RUB on IR track will be completed by IR ahead of the commencement date of RUBs on DFCC track (as envisaged in CCP). Claimant could thus progress RUBs on DFCC track without delay.
102. On 5 November 2014, a Variation was issued whereby, the Claimant was instructed as follows:
- i) *The construction of RUBs/LHS requires connection with existing/proposed RUB/LHS of IR. Moreover these RUBs/LHS must have proper road approaches and connections with adjoining roads.*
  - ii) *As such with reference to MOM held on 14.10.2014 between NWR and DFCCIL and DFCCIL letter No. JP/EN/SLT/LC-ROB-RUB/6 Dt. 04.11.2014, the GADs for proposed RUBs/LHS under DFCCIL alignment requires approval of NWR. It is therefore requested that*

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<sup>14</sup>Attachment 2.1.5 and Attachment 2.2.5 of ER and Clause 7.1 (iv) of ER

<sup>15</sup>Para 7.1 (i) of ER Functional

<sup>16</sup>Attachment 2.1.5 and Attachment 2.2.5 of ER

<sup>17</sup>Para 7.1 (iv) of ER Functional

*GADs indicating integrated arrangements (giving details of both NWR & DFCCIL Boxes) should be submitted to CMT office for approval of DFCCIL & NWR.*

- iii) *The GADs should have format similar to Major bridges drawing for getting signature of DFCCIL & NWR authorities.*
103. The Claimant could not commence and progress the work of RUBs as per CCP due to:
- (i) The Variation requiring IR's approval to the IGAD prior to commencement of construction of RUB dated 5 November 2014 led to immense delay in Engineer's consent/NONO to Claimant's design documents. The Claimant's design submissions for the RUBs prior to November 2014 required resubmissions from the start due to the aforesaid requirements leading to delay.
  - (ii) Construction of RUB on DFCC track was withheld due to non-completion by IR of conjoint RUB on IR track and non-finalisation of location of RUB.
  - (iii) Encumbrances preventing 100% completion of RUB
  - (iv) Varied works of part completion of RUB undertaken as a consequence of above events attributable to Respondent
  - (v) Addition/Variations to the work of RUB originally envisaged
104. The position as on 31 August 2016 was as follows:
- (a) IR had not constructed 114 RUBs in MS-3 section.
  - (b) Commencement of 114 RUBs on DFCCIL's track was improbable due to non-completion of interfacing RUBs.
  - (c) Commencement of construction of 125 RUBs on DFCCIL's track was improbable due to delay in the Engineer's consent/NONO to Contractor's design. IGAD of 121 RUBs were pending approval of the Engineer/ Respondent / IR.
  - (d) In respect of 82 RUBs, land handed over for the construction of

approach road to RUBs was inadequate. Approach road to each of the RUBs was to be constructed as per the specifications of Indian Road Congress ("IRC") for which minimum required land was to be provided by the Respondent and the land acquired by the Respondent and handed over to Claimant for construction of approach road was inadequate.

- (e) 11 [7(under DFCC track) and 4 (under IR track)] number of RUBs were added to Contract from commencement up to 31 August 2016 and approved GAD of 41 RUBs were in variance with that provided in the Contract.

Due to the aforesaid events, the Time for Completion of MS-3 required extension.

*d) Non-hand over of unencumbered possession of land and Right of way within the contractual period:*

105. Under the Contract<sup>18</sup>, the Respondent is required to hand over possession of unencumbered Right of Way ("ROW"), within such dates indicated in Appendix to Bid. Schedule of handing over<sup>19</sup> mandates that

<sup>18</sup> Cl. 2.1 of GCC and PC read with 2.1 of ATB and Para (1) of Cl. 2.2.3 of Appendix 01 of ER

<sup>19</sup> Cl. 2.1 of Appendix to Bid stipulates the following:

*The Employer shall give Right of Access to Site Contractor as per the following schedule Subject to the Contractor providing Performance Security in terms of Sub-Clause 4.2 of General Conditions of Contract. Initially possession of site for work will be handed-over to the Contractor in continuous stretches of at least 10kms. Thereafter Employer shall make efforts to handover access in chunks of at least 5 kms length in isolated locations or minimum 1.0 km in stretches in continuation to the previously possessed stretch*

<i>S N</i>	<i>Period after Commencement Date in days</i>	<i>Cumulative percentage of land to be handed over for</i>
1	28	80%
2	91	90%
3	182	100%

100% Right of Way will be handed over to the Claimant within 28 days of Commencement Date. i.e., on or before 27 September 2013.

106. However, the Respondent could not fulfil the obligation of handing over the ROW in MS-3 as per the contractual Schedule.
107. As per the sequence and priority of works planned by the Claimant in the detailed time programme which was approved as CCP, unencumbered ROW from Bhagega to Rewari and Bhagega to Biroliya was to be handed over to the Claimant within 28 days of Commencement Date. i.e., on or before 27 September 2013. The section from Biroliya to Banas was to be handed over within 91 days of commencement (i.e. on 29 November 2013) and balance section within 182 days of commencement. (i.e. on 28 February 2014).
108. In view of *inter alia* the above, execution of work of MS-3 as per the CCP schedule and sequence could not be ensured. In terms of Clause 2.1 of GCC/ PC, Claimant was entitled to EOT pursuant to this delay event.
109. To this effect, *inter alia* the following is relevant:
  - (a) Handing over of unencumbered ROW was done piecemeal and over a period time.
  - (b) Even the ROW handed over in MS-3 till 31 August 2016 was not encumbrance free and was hindered by trees, buildings, OFC cables, electric poles, water pipelines etc. The removal of these hindrances was the Respondent's obligation.
  - (c) Execution of work at some locations was also hindered by locals alleging non-payment of compensation by the Respondent.
110. As on 31 August 2016, the Claimant had completed/was progressing Earthwork in 515.096 km length in the total alignment. As per

Claimant's EOT application dated 28 November 2016, status of unavailability of land as on 31 August 2016, 40.435 kms of section [36.035Km of obstruction and 4.4Km non handing over of land in Madar-Saradhana] in 414 patches was unavailable for construction. Further, the Respondent did not handed over approximately 4.40 kms of site even as on 31 August 2016.

111. In view of *inter alia* the above, execution of work of MS-3 as per the CCP schedule and sequence could not be ensured. Accordingly, the Claimant was entitled to EOT pursuant to this delay event.

e) *Delay to shifting of charted and unchartered utilities due to reasons beyond the control of Claimant:*

112. Shifting/diverting of charted electrical utilities of capacity less than 33 KV is within the scope of the Claimant. Claimant was also under the obligation to shift/divert uncharted utilities (if any) confronted during the execution of work, as a variation to the Contract.
113. Shifting/diverting of Charted Utilities could not be commenced and progressed as per the CCP due to reasons not attributable to Claimant. Events which delayed shifting/ diversion of Charted utilities inter alia includes (a) delay in the Engineer's consent/NONO to utilities to be shifted (b) Authority delay in consenting the utilities to be shifted (c) delay by the relevant Authority in raising debit note for shifting the Chartered utility etc.
114. Shifting of 6 Overhead and 23 Underground Chartered utilities in MS-3 could not be commenced even on 31 August 2016, due to this delay event. work in 1.45 kms length in MS-3 in 29 patches from Rewari to

Kishangarh (excluding Pacharmalikpur to Phulera) sections was held up due to above delay event.

115. During actual execution of work, the Claimant was confronted with some utilities which were not under the scope of the Contract (Uncharted utilities). The Claimant was instructed to shift/divert the uncharted utilities as a Variation to the Contract.
116. This varied work, however, could not be commenced due to the delay in finalization of Variation order by the Respondent/Engineer.
117. Shifting/diverting of 16 OH and 10 UG Uncharted utilities was under hold on 31 August 2016 due to this reason. This in turn, delayed the work of section totaling to 1.35 km in MS3.

*f) Delay caused to the work due to paucity of cash Flow*

118. The execution of Works in the available fronts in MS-3 (and MS-1) was adversely affected by paucity of cash flow due to non-payment/withholding of payments due for the Works actually undertaken in the IPC.
119. The Contract provides that the Interim payment (monthly bill) for each stage for various items of work shall be made on the basis actual progress of work executed up to the end of the billing month. The Engineer/Employer admitted Interim Payment only after the completion of work to the extent stated under "stage payment" in the price schedule, that too when completed work met the Engineer's interpretation of payment procedure. The resultant effect of above delay event was that substantial payment due for the work remained unpaid in the relevant IPC.

120. In respect of the above, the Claimant had raised a dispute and filed its claim in ICC Case No. 23923/HTG. An award was given in favour of the Claimant on 15 November 2019. It was awarded that the Respondent is liable to make Interim Payments for each Stage for various items on a monthly basis on the basis of the actual progress of work executed during the month, irrespective of whether the Stage has been completed or not. The Respondent has not implemented the said award.
121. Execution of work in the available fronts of MS-3 was adversely affected due to the deficit in cash flow due to non-payment/withholding of Interim payments for the works undertaken.
122. The Engineer/Employer has admitted that the work in MS-3 was delayed due to this event. However, the time impact of this delay event accrued up to 31 August 2016 was not considered by the Engineer while determining EOT.
  - g) *Delay in completion of track work in MS-3 due to delay in formation of MS-3 and delay to the track skeleton work of MS1 from that planned in CCP:*
    123. Completion of Civil and Track Skelton works for the section Bhagega to Rewari to be completed by 5 August 2015. Completion of track skeleton for entire Package was to be completed within 9 February 2017.
    124. For laying track skeleton, mobilisation of NTC was planned at Bhagega. As per CCP, track Skelton work from Bhagega to Iqbalgarh was to progress after completing Bhagega to Rewari. Therefore, any delay to the section Bhagega-Rewari will have a knock on impact on completion of MS-3.

125. Despite the mobilisation of resources and being ready and willing to undertake works, Claimant was prevented from commencing track skeleton work from Bhagega towards Rewari as planned in the CCP. To prevent the resources from being idle, the Claimant commenced track Skelton work from Bhagega towards Srimadhopur. The Claimant could not commence the track work from Srimadhopur to Iqbalgarh till 31 August 2016
126. Sections in MS-3 also could not be developed in continuity due to various Clause 8.4 Delay Events. This in turn delayed the track work of MS-3.
127. Pursuant to the aforesaid, revised date of completion of track Skelton work of MS-3 depended on following factors:
  - (a) Time taken for completion of formation of various sections in contiguity after concluding all delay events.
  - (b) Date of recommencement of track Skelton of sections in MS-3 (in sequence), after completing track Skelton of conjoint section.
  - (c) Date of completion of track skeleton of Bhagega to Rewari.
128. Even though the Claimant had mobilised resources as per the CCP, because of the Delay Events as well as numerous breaches by the Respondent, the Claimant could not:
  - (a) finalise the design and commence RUBs;
  - (b) commence Major Structures across numerous sections as there was delay by IR in approval of the GAD;
  - (c) complete earthwork due to the Change in law, NGT stay, non-handing over of land, hindrances, non-completion of structures, issues pertaining to RUBs and due to the modifications to the Scope of Work;
  - (d) commence the track work from Bhagega towards Rewari till 13 August 2016 due to unavailability of sections in continuity which

delayed commencement and completion of track skeleton in other sections of MS-3.

129. Claimant had been notifying the Engineer /Respondent about various Delay Events leading to delay in completion of the Work and its entitlement to extension of time, cost and compensation due to such Delay events. Copies of notices issued by the Claimant for each of the Delay Events upto 31 August 2016 is filed as Exhibit C-13 (Colly).

**(xv) Claimant's Extension of Time submissions**

130. Since various events resulting to delay in completion of MS-3 had a continuing effect, Claimant quantified the impact of such Delay Events to the Time for Completion at intervals and submitted its claim for EOT of *inter alia* MS-3 to the Engineer for its Determination.
131. *Vide* letter dated 28 November 2016, Claimant submitted claim for Extension of Time for completion of MS-3, MS-4 and MS-5 (excluding sections under MS-1) considering impact of Delay Events accrued up to 31 August 2016. In the said submission, the Claimant sought extension up to 28 June 2019 for completion of MS-3. The delay of MS-3 had a knock-on effect on MS-4 and MS-5. A copy of letter dated 28 November 2016 is along with annexures thereto is filed as Exhibit C-14.
132. At the time of seeking EOT for completion of MS-3, MS-4 and MS-5, Claimant notified its intention to and reserved its right to claim costs which depended upon the actual time for completion to be settled between the Parties to the Contract.
133. *Vide* letter dated 2 March 2017, Claimant revised its claim of interim EOT to include delay accrued up to 31 August 2016 under MS-1 as well.

A copy of letter dated 2 March 2017 along with annexures thereto is filed as **Exhibit C-15**.

**(xvi) Engineer's Determination of Claimant's claims for Extension of Time**

134. *Vide* letter dated 24 August 2017, the Engineer after considering the impact of Delay Events accrued up to 31 August 2016 determined the revised date of completion of MS-3 till 11 October 2018. Comparative Statement on Claimant's claim for interim EOT for completion of MS-3 vis-à-vis the Engineer's Determination thereto is set out below:

**Table No. 3**

<b>Delay occurred Up to</b>	<b>Claimant's Claim for EOT</b>		<b>Engineer's Determination</b>		<b>Date Engineer's notification of Determination/ Notice of Agreement between the Parties (Clause 3.5)</b>
	<b>Days</b>	<b>Revised Date</b>	<b>Days</b>	<b>Revised Date</b>	
31 August 2016	869	28 June 2019	608	11 October 2018	10 August 2018

A copy of letter dated 24 August 2017 along with attachment is annexed herewith as **Exhibit C-16**.

135. The Engineer assessed the Time for completion of *inter alia* MS-3 be extended by 608 days from 9 February 2017 till 11 October 2018 without imposition of Delay Damages and with adjustment for Change in Cost.

**Methodology and assumptions formulated by the Engineer for assessment of Delay Events:**

136. The Engineer has carried out the analysis of Delay Events accrued upto 31 August 2016 for completion of MS-3, MS-4 and MS-5 basis the methodology and assumptions set out below:

- a) The Engineer has assessed EOT' by critical path method analysis considering the impact of only dominant Delay Events to arrive at the revised date of completion of MS-3.
  - b) No assessment of impact of other Delay events has been carried out. One such instance is that despite the contractual breach of non-handing over of unencumbered ROW by the Respondent, no EOT was assessed by the Engineer in respect thereof. The Engineer has concluded that the delay on such count will be absorbed by other concurrent dominant delay during the extended period resulting from the Engineer's analysis. It is reiterated that Claimant's entitlement to EOT on such counts have not been rejected. The Engineer has not quantified the effect of the said delay event in the EOT Determination considering the same as concurrent with the impact of other delay events.
  - c) From the EOT assessment, it is evident that the track skeleton work was the critical activity and the same decided the Extension of Time for completion of MS3 as on 31 August 2016.
137. The Engineer EOT assessment is basis numerous considerations which do not reflect either the actual site conditions/as constructed conditions or as per the Contract. One such considerations made by the Engineer in respect of the RUBs is detailed in the paragraph 209 hereinbelow.

**Consent by the Parties to the EOT Determination and Notice of Agreement:**

138. By letter dated 10 October 2017, while setting out the factors not considered in the Engineer's assessment, the Claimant consented to *only* the number of days of extension namely 608 days assessed by the Engineer in its assessment of interim EOT dated 24 August 2017. A

copy of letter dated 10 October 2017 along with annexures thereto is filed herewith as **Exhibit C-17.**

139. *Vide* letter dated 30 October 2017, the Engineer sought Respondent's approval on *inter alia* the following recommendations: -
  - a) Considering the Delay Events accrued up to 31 August 2016, the Engineer sought Respondent's consent to the assessment of EOT of MS-3, MS- 4 and MS- 5 by a period of 608 days (09 February 2017 to 11 October 2018), 589 days (1 June 2017 to 12 January 2019) and 577 days (24 August 2017 to 25 March 2019) respectively.
  - b) The Claimant was not liable to pay Delay Damages in respect of *inter alia* extended date of MS-3 being 11 October 2018.
  - c) Claimant shall be entitled to Adjustment for Changes in Cost up to the extended period as per the formula applicable for the originally envisaged Contract period.
  - d) Claimant can be allowed to submit its claim for additional cost due to EOT for completion of MS-3, MS-4 and MS-5 separately as per Clause 20.1.

A copy of letter dated 30 October 2017 is annexed herewith as **Exhibit C-18.**

140. *Vide* letter dated 10 August 2018, the Engineer issued a Notice of Agreement in respect of EOT of *inter alia* MS-3 as per the Engineer's determination dated 30 October 2017. The said notice provided that the Respondent had on 8 August 2018 given his consent to the Engineer's assessment of EOT recommended on 30 October 2017. The Parties are therefore in agreement with respect to extension of 608 days for

completion of MS-3. A copy of letter dated 10 August 2018 is annexed herewith as **Exhibit C-19.**

141. The issues in the present proceedings pertain to claim for additional costs/expenditure incurred/ additional payments and compensation for losses suffered/damages due to execution of work in the extended period of 506 days from 10 February 2017 to 30 June 2018 for the completion of MS-3 works from Bhagega to Iqbalgarh (less TD) consequent to the said EOT Determination. The Claimant reserves its right for claiming similar reliefs for completion of MS-3 in the period from 1 July 2018 to 11 October 2018.
- (xvii) **Claimant's cost claims dated 30 October 2018 for additional costs/payments incurred and compensation for losses suffered due to execution of work of Milestone-3 from 10 February 2017 up to 30 June 2018**
142. The Respondent had a duty to fulfil its contractual reciprocal obligations, which it had to do as per the sequence and timelines in the approved programme/CCP. The Respondent failed to fulfil its obligations. The Respondent's prior breaches had a cascading effect and a direct bearing on the sequence and timing of activities leading to the CCP being vitiated. In summary, the Claimant was effectively prevented from commencing and completing the works of MS-3 and hence, could not achieve MS-3 within the period envisaged in the CCP.
143. The execution of work for completion of MS-3 in the period beyond 9 February 2017 was not envisaged, and hence time related cost whereof could not be catered for in the Contract Price.

144. Further, even in the extended period, planned execution of work was affected due to the continuance of the delay events, occurrence of new events and requirements *inter alia* Variations of the Contract, addition of a number of structures and change in the order / sequence of construction etc. Therefore, the Claimant incurred cost in the extended period which is neither catered for in the Contract Price nor covered by the progress payments received.
145. In the instant case, the delays attributable to the Respondent prevented the Claimant from not only utilising the resources deployed during the scheduled Time for Completion of MS-3 i.e. up 9 February 2017, but the Claimant was compelled to retain such resources on account of facts set out in Section D for completion of MS-3 in the extended period from 10 February 2017 up to 11 October 2018.
146. The costs incurred and losses sustained by the Claimant due to execution of works in the extended period for completion of MS-3 is a direct effect of the Delay Events under *inter alia* Clause 8.4 of GCC read with PC, Respondent's contractual breaches and additional requirements/facts set out in Section D.
147. The Claimant is entitled to time related costs incurred and reasonable compensation for the losses (economic value of resources) sustained due to the execution of work of MS-3 beyond the dates envisaged in CCP and/ or in the extended period. The EOT granted extension of MS-3 up to 11 October 2018 and allowed the Claimant to submit details of the additional cost separately after the revised date of completion of MS-3, MS-4 and MS-5 was settled between the Parties.

148. Therefore, under the provisions of the Contract and the Law applicable to it, the Claimant is entitled to the costs incurred and losses suffered in relation to the execution of works of MS-3 in the extended period.
149. On 30 October 2018, the Claimant submitted its Claim for additional cost incurred and compensation for losses totaling to INR 906,16,65,257 for undertaking works of MS-3 in the extended period from 10 February 2017 to 30 June 2018, seeking the Engineer's Determination. While the EOT granted extension of MS-3 up to 11 October 2018, the Claimant had collated the data of the cost incurred up to 30 June 2018. Therefore, the Claimant submitted its cost claims upto 30 June 2018 and reserved its rights to claim cost incurred in further period. A copy of letter dated 30 October 2018 is annexed herewith as **Exhibit C-20**.

**(xviii) Engineer's Erroneous Determination dated 25 January 2019**

150. The Engineer on 25 January 2019, rejected claim for additional Cost incurred/damages sustained by the Claimant due to execution of work of MS-3 in the extended period up to 30 June 2018. A copy of letter dated 25 January 2019 is annexed herewith as **Exhibit C-21**.

**(xix) Proceedings before Dispute Adjudication Board**

151. In view of Engineer's erroneous determination dated 25 January 2019 of the Claimant's cost claims, the Claimant *vide* letter dated 8 February 2019 notified the Respondent that disputes have arisen between the Parties. The Claimant further notified its intention to refer the said disputes to Dispute Adjudication Board for resolution. A copy of letter dated 8 February 2019 is annexed herewith as **Exhibit C- 22**.
152. The Claimant submitted its request for decision dated 31 August 2019 before the DAB. The Respondent filed its Statement of Defence dated 7

October 2019 to which, the Claimant submitted its Rejoinder dated 17 October 2019.

153. After hearing the Parties, the DAB gave its decision on 31 December 2019. The DAB held that Claimant is entitled to cost on account of delays to the extent of 608 days minus concurrent delays, if any. The DAB further recommended that the Engineer in consultation with the Claimant to determine concurrent delays attributable to Claimant and deduct the same from 608 days for assessing compensation. A copy of DAB decision dated 31 December 2019 is annexed herewith as **Exhibit C-23.**
154. On 16 January 2020, the Claimant issued Notice of Dissatisfaction to the DAB decision dated 31 December 2019. A copy of Notice of Dissatisfaction dated 16 January 2020 is annexed herewith as **Exhibit C-24.**

**(xx) Failure of Amicable Settlement**

155. Pursuant to Clause 20.5 of GCC, Claimant sought amicable settlement of the dispute
156. The meeting for amicable settlement was held on 12 February 2020 and the Minutes thereof was circulated on 24 February 2020. A copy of Minutes of Meeting held on 12 February 2020 is annexed herewith as **Exhibit C-25.** As per the minutes of meeting (a) the Engineer was required to provide impact analysis of alleged Claimant's delays, which is concurrent with granted EOT of 608 days on or before 11 March 2020 and (b) upon receipt of this analysis, the Claimant was required to provide its comments to the Engineer/Employer on or before 25 March 2020.

157. However, no such analysis was provided by the Engineer on or before 11 March 2020. On 16 March 2020, the Claimant reminded that the Engineer's analysis was awaited. A copy of Claimant's letter dated 16 March 2020 is annexed herewith as **Exhibit C-26**.
158. It was only *vide* letter dated 5 May 2020, the Respondent (a) provided Engineer's impact analysis (b) declared that as per the impact analysis by the Engineer, the Claimant is not entitled to cost and compensation (c) requested Claimant to furnish comments on the same. A copy of letter dated 5 May 2020 is annexed herewith as **Exhibit C- 27**.
159. *Vide* letter dated 17 September 2021 i.e. after a gap of 17 months, the Respondent asked the Claimant to submit further documents. A copy of letter dated 17 September 2021 is annexed herewith as **Exhibit C-28**.

**(xxi) Engineer's incorrect analysis of Claimant's alleged concurrent delays**

160. As per the Engineer's analysis of Contractor's alleged concurrent delays provided by the Respondent *vide* letter dated 5 May 2020, total concurrent delay by the Claimant was evaluated as 911 days for MS-3 for the delay events accrued upto 31 August 2016. Relevant extract is reproduced below:

*.....,the total concurrent delay by the Contractor has been evaluated as 911 days for MS-3 for the delay events accrued upto 31-08-2016, vis-à-vis notified EOT for 608 days for excusable delays (not attributable to the Contractor) under GC/PC Cl. 8.4 & 8.5 for completion of MS-3.*

*Accordingly, as the Contractor's delays (911 days) are more than the excusable delays (608 days), the Contractor is not entitled for cost compensation for the extended duration of MS-3. ....*

161. The Engineer's analysis of alleged concurrent delays by the Claimant was incorrect, inherently unreliable and is denied *in toto* on account of *inter alia* the following:
- a) The Respondent alleged delay on part of the Claimant by making a crude analysis based on actual progress as against Critical Path method of dominant delays used by the Engineer for determining the EOT.
  - b) The Respondent assigned delay to all activities (critical and non-critical) by comparing the actual progress with the revised dates allowed in the EOT (which was interim and based on dominant delays). Such a comparison was notwithstanding that some of the activities the Engineer has upheld Claimant's entitlement but not assessed the same since the Engineer has used the dominant delay principle. Therefore, the comparison is inappropriate.
  - c) The Respondent's attempt to compare the as-built status with the revised dates in the EOT, arrived at by the Engineer on the above principle, is an inappropriate comparison of unequals.
  - d) The attempt of the Respondent in mapping the alleged Claimant's delay of 911 with the EOT assessed of 608 days, basis the different principle, will not reflect the correct picture.
  - e) EOT determined was basis the delay caused to track skeleton being the critical activity for completion of MS-3, which admittedly was delayed due to events attributable to the Respondent.
162. The Claimant asserts that there is no delay attributable to the Claimant which led to delay in completion of the Milestones including MS-3. In any event, the Respondent failed to raise the issue of purported Claimant's concurrent delays at the time of EOT assessment.

163. As the impact analysis prepared by the Engineer was fundamentally flawed, on 06 November 2021, the Claimant replied to the letter dated 17 October 2021 duly (a) rejecting in entirety the Engineer's analysis (b) stating the Engineer's flawed analysis could not form the basis of any *bona fide* attempt to amicably resolve the dispute between the Parties (c) the documents sought for from the Claimant were going to be of no avail in arriving at amicable settlement. The Claimant reiterated its intention to commence Arbitration pursuant to Clause 20.6 of the GCC in respect thereof. A copy of letter dated 06 November 2021 is annexed herewith as **Exhibit C-29.**

**(xxii) Invocation of arbitration:**

164. The Claimant *vide* letter dated 6 November 2021 rejected the Engineer's assessment in entirety. The same cannot form basis of any *bona fide* attempt to amicably resolve the dispute between the Parties. The amicable settlement had failed to amicably resolve the dispute between the Parties. Accordingly, post complying with all steps and pursuant to Clause 20.6 of the GCC, the Claimant filed RFA on 24 January 2022.

**D. RESPONDENT'S CONTINUING DELAY EVENTS/BREACHES AND REQUIREMENTS IN THE EXTENDED PERIOD WHICH LED TO RETENTION OF RESOURCES FOR COMPLETING MS-3 WORKS IN THE EXTENDED PERIOD**

184. Consequent to the EOT granted, the Claimant stepped into the extended period for completion of MS-3.

185. Even in the extended period, not only the Respondent has failed to comply with its contractual obligations but also instructed the Claimant to meet its several requirements which were not in accordance with the Contract. Some of such breaches / requirements are as under:

- a) The Respondent's requirement to complete several RUBs in parts as opposed to its 100% completion (as required under the Contract/CCP) to facilitate laying track skeleton. The Respondent was unable to handover land for approach road to RUBs as well as the IR was unable to construct conjoint RUBs on the IR tracks to ensure 100% completion of the RUBs as per CCP/ Contract.
- b) Non-handing over of ROW and obstructions/encumbrances existing in handed over ROW.
- c) Instructions for Variations ordered by the Engineer in the extended period.
- d) The Engineer unilaterally fixed date for commissioning as per the target given by the Respondent based on the requirement set by the Ministry of Railways thereby, requiring the Claimant to complete the works by such target dates. Such revised dates were neither in accordance with the Contract nor as per the sequence of construction of track skeleton in CCP. The Claimant was instructed to complete works of certain sections ahead of Time for Completion of Milestones as well as the whole Works by the revised date despite the continuance of various delays attributable to the Respondent. The Engineer's instructions led to changes in the planned requirements as well as planned execution of works.
- e) Continuation of delay events

The aforesaid events, instructions and several requirements have been collectively referred to as "**Requirements and Breaches in the Extended Period**".

186. The cumulative impact of the Requirements and Breaches in the Extended Period was that the Claimant was prevented from executing

and completing MS-3 even in the extended period as per the timelines and sequence in the CCP. The resources mobilised for completion of MS-3 (by 9 February 2017) had to be retained in the extended period for executing not only MS-3 works but also to meet the additional requirements of the Respondent as instructed by the Engineer from time to time. The Requirements and Breaches in the Extended Period, detailed hereinbelow, had time and cost impact:

- a) *Execution of part RUBs (the portion remaining due to the Requirements and Breaches in the Extended Period) in the period beyond revised date of completion of RUBs as determined by the Engineer*
187. Attachment 2 to the ER sets out a list of structures for the Project. Table 6 (Summary of Structures included in the Project), Sections 2.1.5 and 2.2.5 of Attachment 2 provide lists of the RUBs to be completed. Section 2.1.5 states that, as at the Commencement Date, 171 RUBs were to be constructed on the Rewari-Ajmer section of the Works. Section 2.2.5 states that 133 RUBs were to be constructed on the Ajmer-Iqbalgarh section of the Works. i.e., 304 RUBs were to be constructed for the Project.
188. Clause 3 of the ER [Design]- *Requirements During Design Phase* and Sub-Clause 3.1(2) sets out the requirements in respect of *Span Arrangement of Important / Major / Minor Bridges, ROBs, RUBs, Rail Flyovers etc..* The said sub-clause states that the approval of IR to the Span arrangement is required for Major and Important Bridges before the NONO to Claimant's design document is issued by the Engineer and that the approval from IR will be arranged by the Respondent.
189. This is further confirmed in Sub-Clause 6.3 of the ER [Design] *Coordination with Indian Railways* which is set out below:

*Span arrangement, type of structure and their Technical Design proposed by the Claimant in respect of all the Major/ Important Bridges of DFC in parallel / vicinity of the existing structures of Indian Railways shall also require approval from Indian Railways through the Employer in addition to the consent by the Engineer.*

(Emphasis supplied).

190. It is evident from the aforesaid provisions that for other categories of bridges, including RUBs, approval by IR of the design and drawings of is not required.
191. As per Clause 7.1 (v) and (vi) of ER [General]<sup>20</sup>, IR is fully responsible to undertake and construct the RUB on the IR Track.
192. In respect of the RUBs, Clause 7.1 (ii) of ER [General] <sup>21</sup> provides that the construction of RUBs on the DFCC track is within the scope of works of the CTP 1&2 Package.
193. Sections 2.1.5 and 2.2.5 provide the details of RUBs which are to be constructed corresponding to IR RUBs. From these sections it is evident that 262 RUBs will run across DFCC alignment joining IR RUBs on the IR track and 42 RUBs can be constructed independently. The Sections

<sup>20</sup> Clause 7.1 (v) and (vi) of ER General:

(v) The design and construction of RUB across IR tracks including its approach road to the existing road(s) on IR side shall be undertaken by IR separately and is not in the Scope of Works of the Contractor.

(vi) Right of Way as required for construction of the portion of the approach ramps beyond the DFC ROW shall also be made available by the Employer.

<sup>21</sup> Clause 7.1 (ii) of ER General:

i. *In case of parallel sections:*

a) *RUBs has been proposed across the Alignment (DFC tracks) at the locations where RUBs already exists across IR tracks. Design and construction of the said RUBs across DFC tracks is in the Scope of Works of this Package. List of such RUBs has been included in the List of Structures in Attachment 2 and List of RUBs in Attachment 2.1.5 & 2.2.5 herein.*

b) *IR has also proposed the construction of RUBs replacing majority of the existing Level Crossings. The list of such works already sanctioned for construction of RUBs across IR tracks is included in the List of Structures in Attachment 2 and List of RUBs in Attachment 2.1.5 & 2.2.5 herein. Accordingly similar facility has to be constructed across the Alignment (DFC tracks) and has been included in the List of Structures / List of RUBs. Design and construction of RUBs across DFC tracks at such locations is in the Scope of Works of this Package.*

also set out details of the span configuration for each RUB both for the IR and DFC tracks.

194. As per Clause 7.1 (ii) of ER [General], it was a requirement that RUBs on the DFCC track be constructed conjoint with similar RUB on the IR track.
195. It was also a construction requirement that several RUBs on the IR track to be constructed ahead or simultaneously with RUB on the DFCC track to ensure unhindered execution of the RUB on the DFCC track.
196. Clause 7.1 (iv) of ER General<sup>22</sup> provides that construction of RUBs on the DFCC track includes RUB boxes, retaining wall to retain the earth fill of the main carriageway and approach road to the RUB etc.
197. To ensure unhindered laying of track skeleton work in MS-1 and MS-3, the Claimant had planned commencement of track skeleton for each of the sections after completion of developed Formation of the relevant

<sup>22</sup> Clause 7.1 (iv) of ER General:

(iv) *The Scope of work for RUBs across DFC tracks shall also include but not limited to design & construction of the following:*

- a) *Concrete approach ramp including earth retaining structures, as required on both sides of the approach road to connect RUB across DFC tracks with the existing road(s) on DFC side (in case of parallel section);*
- b) *The distance between the RUB across DFC tracks and existing or proposed RUB across IR tracks (if any) shall be provided with concrete approach road including earth retaining structures, as required on both sides of the approach road and roofing on the approach road (in case of parallel section)*
- c) *Concrete approach road including earth retaining structures, as required on both sides of the approach road to connect RUB across DFC tracks with the existing road(s) on both side (in case of detour section);*
- d) *drainage of the RUBs across DFC tracks and approach ramps including drainage hump at the start of the approach ramp,*
- e) *Height Gauges at the start of the approach road on DFC side, in case of parallel section*
- f) *Height Gauges on both sides of the RUB across DFC tracks, in case of detour section*
- g) *signages etc. as required*

section. For developing Formation of any section, the Claimant was required to complete earthwork, Major and Minor structures therein to the formation level. In other words, completion of RUBs was a pre-requisite for completion of Formation. Accordingly, the Claimant had, in its time programme, considered that the RUBs in each section shall be completed ahead of completion of the earthwork and within such times in the time programme so that the Formation of sections is developed in continuity.

198. Keeping in mind the stipulations of ER as well as to achieve the Milestones, the Claimant had, in the CCP, planned the sequence and timelines for completion of the RUBs. The detailed timeline programme was accepted as CCP after review by the Respondent and the Engineer. Completion of RUBs on the IR track by IR ahead of or simultaneously with RUBs on the DFCC track was a pre-requisite to ensure execution of the RUBs by the Claimant as per the CCP.
199. After a period of approximately 14 months since the Commencement Date, on 5 November 2014, a Variation order dated 4 November 2014 was instructed whereby:
  - i) GADs of the proposed RUB/LHS under DFCC line required approval of IR.; and
  - ii) Claimant had to submit GADs indicating integrated arrangements of RUB on both IR and DFCC track for approval of IR, prior to commencement of construction of the RUBs under DFCC's track.

Thus, the Claimant had to revise and resubmit all designs including those already submitted up to November 2014, to meet the requirement of Variation instructed on 4 November 2014.

200. To be able to execute the RUBs on the DFCC track, it was Respondent's obligation to ensure completion by IR of the RUB on the IR track ahead or simultaneously with RUBs on the DFCC track. This was not ensured by the Respondent
201. As explained above, several RUBs on the DFCC track could be constructed only after/along with the IR RUB. Furthermore, embankments adjacent to RUBs could be undertaken only after the RUB boxes on the IR and DFCC tracks are placed and retaining walls are completed.
202. It is a matter of record that neither the Respondent nor the IR had any preparedness to deal with the aforesaid Variation instructed in November 2014 and to meet the requirement of constructed RUB on IR track. IR was not having resources for reviewing Integrated GADs. Admittedly, even in 2015, the IR did not have funds to construct the RUBs on IR tracks. The IR had not even floated tenders for construction of RUBs on IR track in 2015. In fact, the IR had not even finalized the location of RUBs. The span configuration of many RUBs on DFCC track set out in the ER underwent numerous changes as per the requirement of IR and State authorities/National Highway Authorities of India ("NHAI"). It was the Respondent who was coordinating with the IR for obtaining approvals for RUBs. Letters exchanged between the IR and Respondent evidencing immense delays by the Respondent in obtaining IR approval of Integrated GADs as well as delay in finalization and commencement of construction of RUBs on IR track is filed herewith as **Exhibit C-30(Colly)**.
203. There were immense delays by the Respondent/IR in finalisation of span configuration, location and design requirements of RUBs which could not be finalised by such dates to meet the timelines as per CCP

and even on the revised dates for the completion of RUBs as set out in the Engineer's EOT Determination.

204. The delays by the Respondent/IR in approving IGAD led to delay in commencement of the work of RUBs. Further, the construction of RUBs on the IR track (which was to be undertaken by IR) was also delayed substantially which resulted in further delay in commencement of construction of RUBs on the DFCC's track.
205. Meetings were held with the Respondent for finalization of plan for commencement of construction of various RUBs, the completion whereof was prevented due to various delay events attributable to the Respondent such as (a) Respondent's failure to hand over ROW, (b) non- construction of conjoint RUBs by IR, on IR tracks and (c) delays in approval of IGAD, which was a pre-requisite to facilitate uninterrupted track work. The Claimant has filed herewith as Exhibit C-31(Colly) copies of documents including minutes of meetings and numerous correspondences evidencing delay by the Respondent/IR in finalisation of designs, Claimant's notice(s) to the Engineer/Respondent of the delays being caused due to approval of design documents, Respondent's failure to hand over ROW and non- construction of conjoint RUBs by IR on IR tracks.
206. In view of the Respondent's delays which it was unable to arrest, the following decision (as recorded in Claimant's letter dated 07 January 2016) was taken in the meeting held on 26 December 2015:
  - i) *In the case of RUB at LC locations, where the conjoint RUB is NOT constructed by IR till date, the road traffic shall be continued through existing LC itself. Therefore Contractor shall place the RUB boxes on the DFCC track and the RUB boxes placed on the DFCC track shall be covered at the barrel ends.*

- ii) *In the above cases temporary LC on DFC side shall be provided to ensure safety and unhindered movement of the Road traffic.*

The Claimant on 07 January 2016 notified its intention to claim Variation in respect of the above decision. Copy of letter dated 07 January 2016 is filed herewith as **Exhibit C-32**.

207. Since the Respondent was unable to arrest the aforesaid delays attributable to it, on 17 March 2016, the Claimant was instructed that *in case of delay in joint construction of RUBs by IR, DFC RUB box should be buried if possible, else the same shall be constructed later on.* Copy of letter dated 17 March 2016 by the Engineer to Claimant is filed herewith as **Exhibit C-33**.
208. As per the CCP, construction of RUBs on the DFCC track including the approach road and retaining wall had to be completed in one go. No splitting of work was envisaged in the CCP/Contract. But the requirement of completion of RUBs in part was necessitated only due to delay events attributable to the Respondent (set out in paragraphs 202 to 205) and the instructions by the Engineer (in paragraphs 206 and 207) which led to 100% planned construction of RUBs envisaged in the CCP/Contract being given a complete go by. The Claimant was prevented from completing RUBs as planned in the CCP. Therefore, the Claimant was constrained to complete RUBs in part to the extent available (box completion/burial) etc. at the relevant time and to undertake the remaining work (delayed due to Respondent/Employer delay events) on a later date, when the same is available. Such unplanned execution of RUBs had impact in terms of time and associated cost. Compilation of letters 27 July 2016, 21 September 2016 and 21 September 2016 in respect of part completion RUBs to the extent available (box completion/burial) by the Claimant is filed herewith as **Exhibit C-34 (Colly)**.

209. The aforesaid requirements and delay events led to unplanned construction of RUBs in part which is at variance with the Claimant's execution planned in CCP having time and cost impact. Notwithstanding the same, the Engineer formulated the following considerations in EOT Determination for assessing revised time due to the delay caused to commencement and construction of the RUBs namely:

*The delay in construction of IR RUBs by IR in locations where either the center to center distance between IR and DFC RUBs is less or level difference between IR & DFC track is more. In such locations the construction of some of the DFC RUBs are required to be undertaken simultaneously or after the construction of IR RUBs. Such requirement delayed the construction of DFC RUBs. The requirement has also been listed in the notes recorded in the Integrated GADs approved by IR. In this context, one letter from the Employer (letter no. JP/EN/SLT/NWR/ Corres./12 dated 31-03-2016) is also relevant.*

*In consideration of the above, there has been delays in commencement of construction of some of the DFC RUBs due to delay in taking up the construction of co-joint RUB by IR, as the DFC RUB can be taken up either simultaneously or after the construction of the co-joint RUB by IR.*

*The delay in construction of DFCC RUB box (to the extent required for laying of track skelton by NTC as the scope of MS-3) at locations wherever it is necessary to construct the same along with IR RUB/after IR RUB and IR RUB has not been constructed has only been considered eligible for EOT*

*In all the other cases wherever either IR RUB is not constructed or delay in completion of DFC RUB due to requirement of additional land to construct the road approaches of RUB but DFCC RUB box has been constructed/buried to the extent required for track skelton, the same has not been considered eligible for EOT.*

*Accordingly, for the part completed RUBs where Track Skelton has been laid i.e. NTC has passed or could be passed*

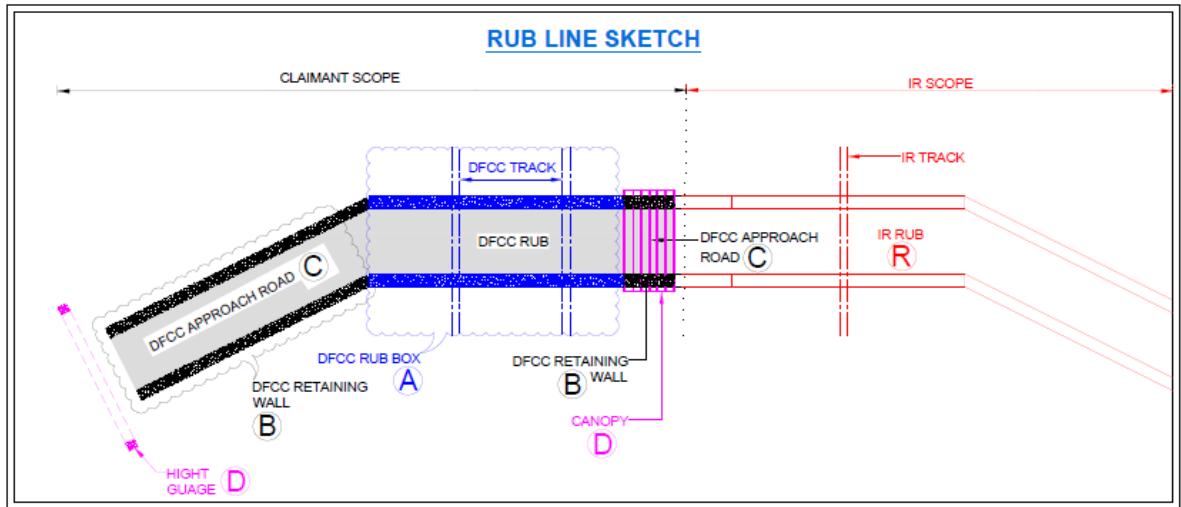
*through without the full completion of DFC RUB, no delay has been considered eligible to achieve MS-3.*

(Emphasis Supplied)

210. The Engineer confirmed that DFCC RUBs can be taken up either simultaneously or after the construction of conjoint RUBs by IR. Further, the aforesaid consideration (in paragraph 209) of the Engineer had the following impact:

- (a) In the case where IR RUB is not constructed, however, placement of RUB boxes/ burial of RUB boxes can be done to facilitate track skeleton work, MS-3 requirement will be fulfilled.
- (b) Even though CCP envisaged 100% completion of all RUBs in the sections prior to commencement of the track skeleton of that section, the Engineer did not consider time required for 100% completion of the delayed RUBs.
- (c) The Engineer accordingly has not estimated time required for 100% completion all delayed RUBs (required as per the CCP) in the EOT. The works remaining in such RUBs are to be undertaken in the periods beyond the revised dates computed in the EOT for the completion of RUBs, that too after all such hindrances are cleared.

211. To illustrate the impact of the aforesaid directions and considerations by the Engineer for EOT assessment, the Claimant has hereinbelow set out a pictorial depiction of the components of RUB:



212. From the above diagram, it is evident that for the purposes of EOT assessment, the Engineer has considered the following:
- If completion of boxes on the DFCC track (marked as A in figure above) can be ensured notwithstanding the delay by IR in constructing the conjoint RUB (Marked as R in the figure), the RUB under the DFC track is deemed to be completed and hence, no EOT to be granted to the Claimant.
  - Time required for completion of other remaining component of DFCC RUBs [(marked B (Retaining Wall), C (Approach Road) and D (Miscellaneous works such as height gauge, instruction ladder, canopy etc. in the figure above)] has not been considered in the EOT assessment, even if delayed due to *inter alia* non-construction by IR RUB on IR track, unavailability of land for approach road or other reasons not attributable to Claimant etc.
  - In other words, the Engineer determined all such work marked B, C and D in the above sketch can be completed in the period beyond the revised date of completion of the RUBs as considered in the approved EOT.

213. The requirements in paragraph 209, which is neither in accordance with the CCP/Contract, and considered by the Engineer for assessing the EOT, has led to execution of majority works for large number of RUBs in the period beyond the dates approved in the EOT for the completion of RUBs. The Claimant reiterates that Parties have agreed upon the number of days of extension determined *vide* Engineer's EOT Determination for the completion of MS-3. But the completion of remaining works of the DFCC RUBs which was not considered in the EOT Determination had cost impact due to its execution in the extended period.
214. Earthwork adjacent to RUBs is part of Formation can be completed only after completion of each RUBs by way of (a) backfilling of the completed RUB and (b) covering the completed RUB (in the case of covered RUB). The completion of Earthwork for the formation therefore required 100% completion of each RUBs including completion of RUB boxes, retaining walls, approach road etc.
215. In this regard, it is pertinent to note the following:
- (i) As on 31 August 2016 and even thereafter, there was no visibility as to when the IR would construct 114 number of conjoint RUBs and/or when land required for construction of approach road would be provided by DFCCIL for 82 number of RUBs.
  - (ii) As is evident from the records, the actual construction of 35 number of conjoint RUBs by IR was inordinately delayed even as on 30 June 2018.
  - (iii) The land required for construction of approach road of RUBs at LC No. 138 and LC No. 121 in the section Swarupganj Shriamirgarh was also provided by DFCCIL as late as on 27 October 2020 and 15 January 2021 respectively by way of

instruction for Field Change Notice for the construction of approach road. Copies of approval of the Field Change Notices are filed herewith as **Exhibit C-35(Colly)**.

- (iv) Land required for construction of approach road for RUB at LC No. 01 in the section Madar Saradhana was not handed over by Respondent till July 2022. It was only on 18 July 2022 that approach road for RUB at LC No. 01 was descoped. Copy of letter dated 18 July 2022 is filed herewith as **Exhibit C-36**.
- (v) Location of RUB at LC No. 118 in the section Swarupganj-Shriamirgarh was required to be revised by the Claimant as late as on 07 March 2020 due to revision in location of conjoint IR RUB. The Claimant had to lay track skeleton at this location by completely filling earth (without placing any box) instead of laying track over completed RUBs as required in the Contract. Copy of Field Change Notice issued by the Claimant dated 7 March 2020 is filed herewith as **Exhibit C-37**.
- (vi) Due to non-handing over of land as per the approved GAD and agitation by locals, layout and orientation of RUB box and approach road for RUB at LC No. 96 was required to be revised on 23 February 2019 and 07 August 2019. Copies of Engineer's approvals dated 23 February 2019 and 07 August 2019 of the Field Change Notices are filed herewith as **Exhibit C -38(Colly)**.
- (vii) Time required for the completion of the remaining portion of the RUBs delayed due to events not attributable to Claimant was not considered even in MS-4 or MS-5 by the Engineer in its EOT Determination.

216. Tabular data regarding the status of RUBs, completion whereof was prevented (prepared basis Claimant's EOT submission dated 28 November 2016) and the status as on 30 June 2018 prepared basis

correspondences in respect thereof is filed herewith as Exhibit C-39. The relevant correspondences evidencing the status and continuation of the delay events as on 30 June 2018 are filed herewith as Exhibit C-40(Colly).

217. In summary, 100% completion of RUBs and associated earth work were to be completed in MS-3 itself. The Claimant thus had no option but to continue construction of RUBs in periods beyond the revised dates for the completion of RUBs assessed in the EOT Determination based on part completion of RUBs. In this process, the Claimant had to retain the resources for the Concrete production (like batching plant, Cranes, loaders), placement of Concrete (such as Transit mixers, Concrete pump, Cranes etc.) miscellaneous equipment (like Dumpers, crusher, rebar cutting bending machine etc.) and earth moving equipment ( like Excavators, graders, compactors etc. for approach road etc.) in the extended periods to complete the remaining part of the RUB ( delayed due to Respondent delays). A list of broad categories of equipment required for completion of RUBs is filed herewith as Exhibit C-41.
218. As part of Engineer's/Respondent's attempt to narrow down the impact of delay events which arose on account of Respondent's aforesaid breaches and requirements, instructions for completion of RUBs in part was issued from time to time.
219. As explained hereinbefore, the EOT Determination did not consider the time required for execution of remaining works for part completed RUBs. As such, the EOT Determination does not reflect resources which the Claimant had to continue retaining for balance work beyond the revised dates for completion of RUBs in the EOT Determination.

220. These breaches/delays were of a fundamental nature which prevented the Claimant from executing RUBs as per Contract/CCP. Claimant is entitled to under *inter alia* Clauses 8, 13 and 20.1 of GCC under and/or in connection with the Contract together with Indian law for additional costs/expenditure incurred/additional payments and compensation for losses suffered/damages sustained by the Claimant.

**b) Execution of part of earthwork (portion delayed due to encumbrances in the handed over section) in the period beyond the revised date for the completion of earthwork as determined by the Engineer**

221. Sub-Clause 2.1<sup>23</sup> of the GCC provides that the Respondent is to give possession of the Site in accordance with times stated in the Appendix to Bid. The Appendix to Bid states that the Site is to be handed over to the Contractor by the following dates

SNo	Period after Commencement Date in days	Cumulative percentage of land to be handed over for
1	28 (i.e. 27 September 2013)	80%
2	91 (i.e. 29 November 2013)	90%
3	182 (i.e. 28 February 2014)	100%

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<sup>23</sup> The Employer shall give Right of Access to Site to the Contractor as per the following schedule subject to the Contractor providing Performance Security in terms of Sub- Clause 4.2 of General Conditions of Contract. Initially possession of site for work will be handed-over to the Contractor in continuous stretches of at least 10kms. Thereafter Employer shall make efforts to handover access in chunks of at least 5 kms length in isolated locations or minimum 1.0 km in stretches in continuation to the previously possessed stretch.

SNo	Period after Commencement Date in days	Cumulative percentage of land to be handed over for
1	28	80%
2	91	90%
3	182	100%

222. Sub-Clause 2.2.3 (1) of Appendix 1 to the ER '*Conditions of Possession of the Site*' provides that *The actual land as required for the execution of Permanent Works within the ROW shall be handed over to the Contractor free from all encumbrances.....*'. Sub-Clause 1.1(2) of Appendix 15 [Requirements for Construction] to the ER provides: "...*The Employer shall handover the Site to the Contractor free from encumbrances as per the agreed schedule*". Therefore, the Respondent had an express contractual obligation to handover unencumbered possession of Site.
223. Handing over of encumbrance free land is a fundamental contractual obligation of the Respondent. Pursuant to above express provisions of the Contract and requirement of completion of whole Work adhering to the Milestones, Claimant envisaged that the Respondent will handover encumbrance free land in the manner and at the relevant time as provided in the CCP.
224. The key activity relevant to MS-3 is the track skeleton which was to be done using NTC. Continuous developed Formation is a pre-requisite for track laying. NTC cannot jump over discontinuity in the Formation, therefore Track laying will have to stop wherever there is a gap in the Formation. Laying of track skeleton required continuity of the developed Formation to avoid delay to the work progress.
225. Accordingly, the Claimant had, in its time programme, considered that Formation of each section shall be completed prior to commencement of track laying in the relevant section. The activities related to Earthwork (component of Formation) is developed in layers. Hence, the activity has high time requirement for its completion.
226. The Respondent had an express contractual obligation to hand over unencumbered possession of ROW within such time stated in the

Contract. Claimant planned commencement and progressing of Earthwork of various sections independently to complete the Formation within such time stated in the CCP. The consideration was that the Formation will be developed in continuity as per the sequence of track skeleton envisaged in the CCP so that laying of track skeleton is not delayed due to the lack of continuity.

227. A perusal of the CCP would reveal that unencumbered possession of land for MS-3 section should have handed over from 27 September 2013 to 28 February 2014 to complete the Formation from Bhagega to Iqbalgarh in continuity.
228. There was immense delay by the Respondent in handing over of land. Even the land handed over was not unencumbered. While non-handing over of land led to delay in commencement of the work, handing over of unencumbered ROW led to holding up of the works in part of the sections for substantial period.
229. Even as on 31 August 2016, 40.435 kms was not available. Out of the said length, 36.035 kms (in 414 patches) was obstructed and 4.40 kms was not handed over. This obstructed length does not include the unavailable length/gaps on account of the RUBs, the completion of which was delayed due to various Delay Events. A table of obstructions (section wise) existing as on 31 August 2016 is filed herewith as Exhibit C-42. A compilation of joint statements from Rewari to Iqbalgarh evidencing the obstructed length together with non-handed over ROW as on 31 August 2016 are filed herewith as Exhibit C- 43(Colly).
230. Further, as per joint statements prepared by the Parties, even as on 31 January 2017, cumulative obstructed length of 31.54 kms in 239 patches continued to exist from Bhagega to Iqbalgarh. These obstructions,

within the formation, were not cleared even in the extended period. A table of obstructions (section wise) existing as on 31 January 2017 is filed herewith as **Exhibit C-44**. Compilation of joint statement from Bhagega to Iqbalgarh evidencing the obstructed length as on 31 January 2017 is filed herewith as **Exhibit C-45(Colly)**.

231. The Respondent failed to hand over the unencumbered possession of land as per the schedule in the CCP. A table setting out details of the CCP handing over, the actual handing over of the by the Respondent and the details of obstructions existing in the extended period and beyond 30 June 2018 together with relevant documents are filed herewith as **Exhibit C- 46(Colly)**.
232. It is reiterated that handing over of land free from all encumbrances is a pre-requisite for timely completion of earthwork. The Claimant could develop sections upto Formation level only if full encumbrance free lengths was made available. As per the CCP, the formation of a section (including Earthwork) has to be completed up to the Formation level prior to commencement of the track skeleton work of that section.
233. In the present case, the Claimant could carry out earthwork only in the available unencumbered portions. No earthwork could be carried out in the obstructed portions spread across numerous patches intermittently across the length. The Claimant was thus prevented from completing the earthwork in MS-3 within the revised dates for completion of earthwork while being constrained to retain resources.
234. Despite the above, the EOT Determination concludes *inter alia* that ... *as seen from the critical path analysis, the delay due to encumbered site conditions (if any) should be absorbed by other concurrent (dominant) delay during the extended period as the result of this analysis*. As such, the encumbrances at

site were not considered for assessment of EOT, hence, no quantification in respect thereof was made. The revised time for completion of the Earthwork as assessed in the EOT does not assess the impact of obstructions.

235. From Exhibit C- 42 to C-46, it has been established above that even as on 31 August 2016 and 31 January 2017, there were obstructions which prevented the Claimant from completing the earthwork and developing Formation within such time allowed in the EOT (impact whereof was not considered). Therefore, earthwork in the obstructed portion had to be completed in the periods beyond the extended period allowed for the earthwork.
236. The unavailable and/or obstructed length required the Claimant to continue retaining resources for the completion of Earthwork upto 30 June 2018 with resultant additional cost/additional payments/expenses and losses. The equipment required for the completion of the earthwork in the said period *inter alia* include those required for embankment, subgrade and blanket as detailed in **Exhibit C-47**.
237. Sub-Clause 8.4 of the GCC provides that the Contractor is entitled to an extension of the Time for Completion in the event of the occurrence of certain specified causes. One of these clauses, Sub-Clause 8.4(e) states that '*any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site*'.
238. Claimant had been notifying the Engineer/ Respondent of the delay being caused to the execution of the work due to the encumbrances in the handed over sections. Claimant also notified the Engineer/ Respondent of its intention to claim Extension of time, cost and

compensation for the losses sustained due to this delay event. Copy of some of the notices by the Claimant regarding delay being caused due to execution of the work in encumbered site are filed herewith as **Exhibit C-48(Colly)**.

*c) Execution of Variation ordered in the extended period for which separate time for completion is not agreed upon*

239. The CCP being the approved detailed time programme does not factor in Variations. Variations, if instructed, entitle the Claimant to time as well as cost. The cost under Clause 13 of the Contract does not cover the time related cost due to Variations.
240. In the present case, the Engineer directed numerous Variations (as required by the Respondent) to the Claimant's scope of Work. Such Variations were ordered not only up to 31 August 2016 but also during the extended period. A table containing major Variations ordered up to 31 August 2016, thereafter from 1 September 2016 to 9 February 2017 and 10 February 2017 to 30 June 2018 is filed herewith as **Exhibit C-49**, **Exhibit C-50** and **Exhibit C-51** respectively.
241. The Engineer assessed that Variations can be undertaken simultaneously with other activities to complete the same within the extended time for completion. The time impact of all Variations to the RUB, RFO, ROB and other Major structures was not separately considered in the Engineer's assessment of EOT.
242. Few instances of the Variations for which assessment of time was not done by the Engineer / the Respondent is as under:
  - (a) Some RUBs were deleted from the scope and some RUBs were also added to the scope of works, up to as late as on 28 July 2016. However, the Engineer considered that since there was no change

in the total number of RUBs, the addition of RUBs did not affect the time for completion of MS-3. In this regard, the Table 11 of EOT Determination (Exhibit C- 18) is relevant.

- (b) In the case of Variations ordered from 10 February 2017 to 30 June 2018, no separate time for completion was agreed by the Engineer/ Respondent prior to its commencement. These varied works were required to be undertaken in the extended period simultaneously with other activities which were delayed due to various delay events attributable to Respondent.
243. In summary, the Engineer required Claimant to complete all ordered Variations in the allowed extended period considering delay events as on 31 August 2016. The Engineer, in the EOT assessment, did not consider the holding up of works on account of the Variations and its impact to the time for completion.
244. The Variations prevented the Claimant from executing the Formation works and completing track skeleton work as per CCP and within the extended period. As no separate time for Variations has been assessed by the Engineer in the EOT Determination, , the Claimant had to retain resources intended for the completion of MS-3 by the scheduled date in the extended period for the completion of the varied works. The Claimant incurred time related associated cost for such retention, which is over and above those paid for under Clause 13.3 of the Contract.

**d) *Instruction for Change in Sequence and Priority of Construction and Completion, Fixing revised target dates for commissioning dates and Pre-Fixing Dates Prior To EOT Completion Dates***

245. In the meeting held on 8 February 2017 and pending determination of EOT for completion of MS-3 as on 31 August 2016, the Claimant was informed that Ministry of Railway (“MOR”) has fixed commissioning

targets for whole works as June 2018. Solely based on such revised commissioning targets fixed by MOR, Respondent took a unilateral decision and re-fixed the date for completion of Civil works for Package A and B [CTP-1] and Package C and D [CTP-2] as January 2018 and March 2018 respectively. The Claimant was directed to complete the Works by the said date. Copy of letter dated 16 February 2017 enclosing Minutes of Meeting held on 8 February 2017 is filed herewith as **Exhibit C-52.**

246. Thereafter, on 11 August 2017, the Claimant was directed to plan its activities in accordance with the revised commissioning dates of numerous sections as follows:

Section		RKM	Milestones dates as per Contract	Revised Targets for Commissioning
CTP1&2	Rewari-Ateli	28	MS-1: Dec-15	Nov-18
	Ateli-Phulera	192	MS-2: Mar-16	Mar-18
	Phulera-Bangurgram	116	MS-3: Feb-17	Feb-19
	Bangurgram-Marwar	98	MS-4: Jun-17	Feb-19
	Marwar-Iqbalgarh	192	MS-5: Aug-17	Feb-19

Copy of letter dated 11 August 2017 is filed herewith as **Exhibit C-53.**

247. The Engineer had in the letter dated 11 August 2017 directed as follows:

*“...Stipulated time of completion of MS-1 to MS-5 has already been delayed and Contractor’s claim of EOT for MS-5 (Completion of all works and taking over) is under review of the Engineer. Although the above dates are the target for commissioning of WDFC Phase 1 section wise and do not link with any dates of Milestones as per Contract Agreement and the Engineer’s pending determination for EOT of various milestones. It is advised to plan your work activities in accordance with the above target date of commissioning and organize your resources to achieve the project completion in line with the requirements.*

248. To comply with the directions of the Respondent, the Claimant had no option but to retain its resources for prioritizing and completing Ateli - Phulera section on March 2018 i.e. ahead of MS-1. The section of Ateli-Phulera falls partly in MS-1 [From Ateli-Bhagega] and partly in MS-3 [Bhagega-Phulera]
249. On 05 March 2018, the Claimant was again directed as follows:
- (a) The revised target date for commissioning of Madar - Marwar section had been fixed as February 2019.
  - (b) To ensure that all structure, stations and service buildings as well as track skeleton were to be ready by November 2018 to enable the STP-5 and EMP-4 contractor to conclude their activities by February 2019.
  - (c) To submit revised programme for completion of Madar-Marwar section to meet the revised target date of November 2018 for completion.
  - (d) To set out the additional resource (labour, equipment, material, etc) and/or the Revised Construction Method/Sequence to its current works programme.

Copy of letter dated 5 March 2018 is filed herewith as Exhibit C-54.

250. Further, *vide* letter dated 21 May 2018, the Engineer informed that the Madar - Durai and Durai - Marwar section was planned to be commissioned by November 2018 and March 2019 respectively. The Claimant was directed to give major attention to the work left incomplete in the entire section to complete the same within the targeted period and formulate revised plan accordingly. Copy of letter dated 21 May 2018 is filed herewith as Exhibit C-55.

251. Respondent's aforesaid *suo moto* decisions as to the change in priority of completion of sections and target commissioning date was not in accordance with either CCP or Milestones or the earlier EOT granted to the Claimant.
252. Though the revised target date for commissioning of Madar - Marwar section had been unilaterally fixed as February 2019, the Respondent handed over encumbrance free patch of 1.3 kms. on 2 February 2019 and Garhimaliyan cabin only on 8 October 2020 both in the Madar - Durai section.
253. From the facts stated above, it is evident that contrary to the sequence of construction envisaged in the CCP, the Respondent was revising the target dates and changing the sequence of construction. The Respondent required Claimant to complete various sections as per the priority being fixed by the Ministry of Railways/Respondent unilaterally. Claimant was thus required to undertake the work as per the requirement of the Respondent and was prevented from undertaking and completing the work as per the planned / approved sequence and timing in the CCP.
254. The Respondent was already in prior breach of its contractual obligations. Instead of taking action to conclude delay events attributable to it and allow extension of time for completion to enable Claimant to complete the work within such times as per the planned sequence and timing envisaged in the CCP, the Respondent implemented the aforesaid decisions thereby, preventing the Claimant from progressing work in a planned and orderly manner.

255. The resultant effect of the aforesaid is as under:

- (a) As the Claimant was instructed to work in accordance with the revised target dates and on as is instructed basis, the construction plan as per CCP was vitiated by the Respondent.
- (b) The Claimant was required to retain all resources mobilized to complete MS-3 by 09 February 2017 and mobilize additional resources in the extended period to complete the various sections/ whole work as per the revised dates prefixed by the Respondent.

256. Alternatively, since February 2017 the Respondent has interfered with Claimant's planned sequence and timing of construction. Claimant was made to undertake work remaining on February 2017 as per the Respondent's priority and requirement of completion, leaving the actual works undertaken in variance with the Contract/ CCP. Thus, the works undertaken in the extended period had additional cost impact. Having rendered it impossible and impracticable for the Claimant to complete the work as envisaged in the CCP, the Respondent is liable to compensate the Claimant for all aforesaid delays and imposition of unilateral decisions on the Claimant.

257. Claimant complied with these unilateral directions of the Respondent and completed sections as per the details set out in Exhibit C-56. Following is the summary:

- a) Trial run for track skeleton from Ateli to Phulera was conducted on 27 March 2018
- b) Track skeleton of the section Rewari Madar was completed on 15 December 2018 and trial run was conducted on 27 and 29 December 2018.

- c) Track skeleton of the entire unobstructed sections from Madar to Iqbalgargh (except for obstructed and non-handed over section of Garhimalyan Cabin area and Keshavganj and Banas private factory siding crossing) was completed on 23 February 2020.
  - d) Track skeleton of the section Rewari to Iqbalgargh was completed on 10 August 2021.
258. The above are few instances/events which amounted to prevention and required the Claimant to continue retaining resources in the extended period for the completion of MS-3 reckoning the impact of delay event as on 31August 2016.
- e. *Continuing delay events*
259. Claimant could not progress the work even in the extended period as per CCP due to continuance of the delay events. The following are some of such events which were prevalent in the periods beyond 31 August 2016 up to 30 June 2018:
- a) Actual time expended by the Engineer for the review / consent/ NONO to Contractor's design document exceeded the review period stated in the Contract.
  - b) Commencement of construction of Major structures (MJBs) was delayed due to the delay in Engineer's consent/NONO to GAD.
  - c) Delay caused to commencement and construction of RUBs due to variations in the ER and reasons not attributable to Claimant
  - d) Non-handing over of unencumbered possession of land/ROW.
  - e) Suspension of part of the work since 30 November 2017 following the Hon'ble Supreme Court's order dated 16 November 2017, restraining mining of river sand in the State of Rajasthan.
  - f) Delay due to paucity of cash flow pursuant to non-admission of Interim payment as per Contract.

- g) Variations to the Contract.
  - h) Delay to track skeleton of MS-1 and MS-3 due to delayed completion of Formation pursuant to Clause 8.4 delay events and MS-3 due to delayed completion of MS-1.
260. Contract stipulates consent by IR to GAD/span arrangement of MJBs. Immense delay was caused by IR in review of GADs of MJBs even after recommendation by the Engineer. Construction of structures can commence post approval of GAD for the structures. The EOT Determination has considered the revised date of completion of structures prior to the approval date of GAD of the structures. However, the Claimant had to continue retaining resources for construction of MJBs, which could commence only post IR approval of GADs. The Claimant has filed herewith as Exhibit-C-57(Colly) a table along with relevant correspondences evidencing the delay by the Respondent/IR in approval of GAD of MJBs.
261. The hindrances due to the unchartered utilities continued as late as on 05 September 2020. Copy of Request for Inspection evidencing obstruction of utility for 100 % completion of RUBs upto 05 September 2020 in section Madar - Saradhana is filed herewith as Exhibit-C-58.
262. *Vide* letters Claimant notified the Engineer/Respondent of the above delay events and Claimant's intention to claim extension of time, Cost, payments and compensation due to such delay events. Copies of few notices issued by the Claimant in respect of some of the above continuing delay events in the period from 01 September 2016 to 30 June 2018 is filed herewith as Exhibit-C-59(Colly).

263. As is evident from Exhibit C-46(Colly), the last section in MS-3 was handed over only on 22 February 2020 (with encumbrances) and clearance of obstructions in MS-3 was done only on 29 July 2021.
264. On 10 October 2018, Claimant sought further interim Extensions of Time for Completion of MS-3 and other milestones considering delay events as on 30 November 2017. On 12 September 2019, the Engineer assessed impact of delay events continuing in the period beyond 31 August 2016 and recommended further interim EOT. The Respondent has given its approval to the same. Copy of the Engineer's assessment of EOT dated 12 September 2019 is filed herewith as Exhibit-C-60.
265. In view of the continuing delay events, completion of works were affected in the extended period. Claimant had to retain the resources in the extended period up to 30 June 2018. Contractor incurred additional cost/payments/expenditure due to such prolonged retention of resources. Claimant is entitled to all such additional cost/payments/expenditure and compensation for the losses sustained due to the retention of such resources in the extended period as per the terms of the Contract and Law applicable to it.

**E. CLAIMANT'S ENTITLEMENT TO COST INCURRED DUE TO THE EXECUTION OF WORK IN THE EXTENDED PERIOD FOR THE COMPLETION OF MS-3 WORKS FROM BHAGEGA TO IQBALGARH**

266. The critical delays to MS-3 have their origin and impact in MS-1, the first and precedent Milestone to the later Milestones 2, 3, 4 and 5. The events of delay in MS-1 have impacted each of the subsequent Milestones, both through their 'knock-on' consequential effect to the later Milestones but also due to their continuing and prevailing impact to the Works. This indicates that the critical causes of delay to MS-1 (for

which the Respondent has awarded various interim extensions of time) have prevailed unbroken and ceaseless through the subsequent Milestones.

267. It is evident that the interim award of extension of time for MS-1 had an identical knock-on effect to MS-3. MS-3 was subject to the same causes and extents of critical delay as had first impacted MS-1. The original Employer critical causes of delay have been a consistent and unbroken chain of critical delay through MS-1, MS-2 and MS-3. Logically, this indicates that as at 31 August 2016, the cut-off date of the Engineer's determination of interim extension of time of 608 days for MS-3, there were no other delays, either the Employer's or the Contractor's, that broke, or could have broken, the chain of causation for entitlement to extension of time. Other than the delays that had their origin and first impact in MS-1 and which continued to pervade unbroken through MS-2 and MS-3, no other delays could have caused any critical delay.
268. Therefore, the alleged Claimant's delays that the Engineer has identified in relation to MS-3 are non-critical causes of delay to reflect the progress of the Works. Any such delays have no consequence on the determination of extension of time for MS-3 or with respect to the compensable period.
269. The Parties' mutual agreements of the Engineer's determinations of interim awards of extension of time have rendered conclusive all matters relating to the evaluation and determination of time, rendering the Employer's later allegation of concurrent delay *void ab initio*. It is this common cause that the awarded interim periods of extension of time for MS-1 has been held to be fully compensable periods. As the Parties have likewise mutually agreed the Engineer's determination of an interim award of extension of time of 608 days as at 31 August 2016 for MS-3, it

must follow that the same principle is to apply to MS-3 as it did for MS-1. In summary, the period of 608 days of awarded interim extension of time to MS-3 is fully compensable. Any argument of the Employer regarding concurrent delay is therefore not sustainable.

270. The determined interim period of extension of time awarded by the Engineer as at 31 August 2016 is 608 days, and is the compensable period, as conclusively agreed between the Parties.
271. The EOT granted to the Claimant for MS-3 is also without imposition of Delay Damages and with the benefit of Adjustment for Changes in Cost. This shows that the events lead to delay in completion were not attributable to the Claimant.
272. Execution of work related to MS-3 in the extended period was not within the contemplation of the Parties at the bid stage. The Contract Price does not include cost due to extension of time for completion of MS-3. In terms of the Contract and the Law applicable to it i.e. Indian Law<sup>24</sup>, the Claimant is entitled to all Cost incurred and compensation for the losses sustained by it due to the extension of time for completion.
273. At the time of seeking Extension of Time for completion of MS-3, Claimant notified its intention to and reserved its right to claim additional costs and compensation for losses sustained by it during the extended period for completion to be settled between the parties as per the Contract.
274. The Cost incurred and losses sustained by the Claimant due to extension of Time for Completion of MS-3 up to 11 October 2018 is a

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<sup>24</sup> Clause 1.4 of GCC read with ATB

direct effect of the Delay Events and further, on account of breach of various obligations by the Respondent as well as its additional requirements (as set out in Section D).

- 275. Clause 20.1 of the GCC specifically provides that "*If the Contractor considers himself to be entitled to any extension of Time for Completion and/or any additional payment, under any Clauses of these Conditions or otherwise in connection with the Contract*".
- 276. The expression *Cost*<sup>25</sup> under the Contract means *all expenditure reasonably incurred (or to be incurred) by the Claimant, whether on or off the Site, including overhead and similar charges*.
- 277. Hence, the contractual mechanism for payments of time related costs (which are direct result of the delay events not attributable to the Claimant), is triggered and thus, Claimant invoked Clause 20 of GCC.
- 278. Keeping in mind the numerous factors involved, the Claimant had at the time of submission of its detailed time programme (which was approved as CCP) formulated a plan for execution of the works. CCP bound the Parties contractually. Significantly, any deviation from CCP not only causes delay to the planned sequence of work but also warrants addition of associated cost to accepted contract amount. The CCP had to be followed by the Parties to ensure smooth completion of works related to each of MileStones.
- 279. The Respondent had a duty to fulfil its contractual reciprocal obligations such as handing over unencumbered possession of ROW, which it had to do first. The Respondent failed to fulfil its obligations. The Respondent's prior breaches had a domino effect and a direct

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<sup>25</sup> Clause 1.1.4.3 of GCC

bearing on the sequence and timing of activities leading to the CCP being bypassed and given a 'go by'.

280. In addition thereto, the Respondent/Engineer directed numerous Variations/ requirements which prevented the Claimant from executing work as per the approved programme.
281. In accordance with CCP, the Claimant had mobilized resources to timely execute the Works. The Claimant was, however, prevented from commencing and completing the activities for MS-3 including Formation/earthworks and consequently, the track laying, within the period envisaged in the CCP.
282. Various Delay Events under Clause 8 of GCC read with PC and numerous contractual breaches as well as Respondent's additional requirements in derogation to CCP led to delay in completion of MS-3 .
283. Considering the delays accrued up to 31 August 2016, the Claimant has been granted EOT of 608 days from 9 February 2017 till 11 October 2018 for completion of MS-3 without imposition of Delay Damages and with the benefit of Adjustment for changes in Cost. Further, the EOT granted for completion of MS-3 had a knock on impact on and resulted in all other Milestones including MS-5 getting further extended. The Parties have agreed to revise date for completion of MS-3 being 11 October 2018.
284. The stepping into the extended period for completion of MS-3 i.e. beyond 9 February 2017 is the resultant effect of the delay events (not attributable to the Claimant) and on account of breaches/non-compliances of various obligation by as well as additional requirements of the Respondent.

285. Further, even in the extended period, execution of work was affected due to *inter alia* non-handing over of the unencumbered land, Variations of the Contract, addition of a number of structures and change in the order/sequence of construction detailed in Section D.
286. The Delay Events, Respondent's failure to comply with its obligations/reciprocal obligations and numerous Variations as well as additional requirements of the Respondent prevented the Claimant from executing the works including laying down the track as per timelines considered in CCP. The Respondent showed utter disregard for the CCP.
- (i) The delay events attributable to the Respondent disrupted the sequence of construction and had an ongoing, cascading and ripple effect in terms of time and cost overrun.
  - (ii) Despite this, the Claimant also undertook numerous steps/measures to mitigate the impact of delay including proceeding to work in the patches where work fronts was being made available to it, undertook track laying as and when substantial length of a section was developed, commenced the track work from Bhagega towards Shrimadhopur instead of Dabla etc.
  - (iii) As instructed, the Claimant carried out placing of pre-cast of RUB boxes on DFC track pending approval of Integrated GAD by IR.
287. The cumulative effect of Respondent's numerous breaches and delay events (detailed in Section C and D above) had a drastic impact on completion of MS-3 as per the original Milestone date. As on 09 February 2017, the Claimant could complete only 34.48 % of total work required for achievement of MS-3. The track linking with NTC required continuity upto Formation level in sections. The track skeleton and associated work from Bhagega to Iqbalgarh contribute 39.44% of the

Contract price of MS-3. Even as on 9 February 2017, the Claimant could achieve only 5.56% of track skeleton work from Bhagega to Iqbalgarh of MS-3 due to discontinuity of the developed sections.

288. Claimant was prevented from completing MS-3 by 9 February 2017. Further, the Claimant was not allowed to work in the extended period as per its planned sequence of construction. Claimant had to continue retaining all resources mobilized for completion of the activities like Earthwork, structures and track skeleton by 09 February 2017, in the extended period irrespective of whether impact of such delay events and/or breaches thereof was accounted for or not in the EOT assessment.
289. The Engineer has impacted the effect of only the dominant Delay Events to the CCP and recommended at the EOT for MS-3 till 11 October 2018. The Engineer's EOT Determination does not reflect impact of all delayed work required for completion of MS-3. Some of such delayed work (not considered by the Engineer in assessment of EOT) for completion of MS-3 for which Claimant had to retain resources (Plant and Equipment and Labour) and On-site, Off-site Overhead, are *inter alia*:
  - (a) The works which were outstanding as on 09 February 2017 (being delayed due to various Employer/Respondent delays) as stated in the Engineers assessment of EOT as on 31 August 2016.
  - (b) Time required for completion of remaining part of RUB and the associated earthwork following the assessment of the Engineer as the time for completion of same was not considered in MS-3 or MS-4 or MS-5, notwithstanding that such works are part of MS-3 as per CCP / Contract and hence to be completed in MS-3

- (c) Earth work/structures which were delayed due to encumbrances in the handed over section, and the clearance of which was delayed due to reasons not attributable to Claimant.
  - (d) The works related to MS-3 in various sections were to be completed ahead of revised dates as per EOT as the whole work was ordered to be completed by February 2019 (commissioning) as per the target date fixed by Respondent.
  - (e) Variations ordered in the period from 09 February 2017 to 30 June 2018.
  - (f) Continuing delay events
290. The resources committed/expended to a Project have a direct relationship and nexus with the timelines, size, scale, and magnitude of the Project. In construction projects, wherein EOT is granted as a result of delays attributable to the Respondent (as in the present case) and there is an extended stay/extended period for completion of contract works, the resources (manpower, machinery, overheads) which are continued to be mobilised/ deployed for completion in the extended period, entitles a contractor to all time related costs along with all other additional cost /additional payments/expenditure incurred in the extended periods.
291. The Claimant was prevented not only from utilising the resources deployed but also was compelled to retain such resources for execution of MS-3 in the extended period. The Claimant had to continue retaining its resources in the extended period (from 10 February upto 30 June 2018 namely, the cut-off date considered for the present claim) for completion of all balance works required for completion of MS-3 including in the said extended period. Claimant also had to retain

mobilised resources and mobilise additional resources in the extended period to complete the Contract ahead of the revised dates.

292. Claimant accordingly incurred additional time related cost by retaining resources in the extended period from 10 February 2017 to 30 June 2018. Claimant also incurred additional cost/expenses by carrying out work in the said extended period.
293. The Contract is one based on the performance of reciprocal promises. In the present case and as set out in this Section, there are prior fundamental breaches of the contractual obligations by the Respondent which prevented the Claimant from performing its contractual obligations within the timelines considered in CCP.
294. It is settled law that when a contract contains reciprocal promises, and one party prevents the other from performing his promise, the party so prevented is entitled to *inter alia* compensation from the other party for breach for any loss which it may sustain in consequence of the non-performance of the reciprocal promises in the contract.
295. Further, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, resulting from such breach of the contract itself. The Claimant is entitled to be put in the position it would have been in, had the contract been performed as per original timelines.
296. Therefore, in terms of the Contract and Law applicable to it i.e. Indian Law<sup>26</sup>, Claimant is entitled to additional cost/payments incurred and

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<sup>26</sup> Clause 1.4 of GCC read with ATB

compensation for losses/damages sustained due to the execution of Relevant Works for Present Cost Claim beyond the dates envisaged in CCP i.e. in the extended period. Some of the legal authorities relied upon by the Claimant is filed herewith as **CL-1** to **CL-10**. Extracts of few relevant provisions of the Indian Contract Act relied upon by the Claimant is filed herewith as **CL-11**. The Claimant reserves its rights to supplement and to file further authorities.

297. The Claimant had, even at the time of making its EOT claim reserved right to quantify the cost and compensation to which it would be entitled pursuant to delay and same can be submitted after settlement of *inter alia* EOT for MS-3 between the Parties.
298. The Engineer had, in its letter dated 30 October 2017 assessed and recommended to the Respondent that details of the additional cost would be submitted after the revised date for completion of *inter alia* MS-3 is settled between the Parties. The proposal for submission of cost claim separately has been duly accepted by both the Respondent and its Engineer.
299. Even though MS-3 has been extended till 11 October 2018, the Claimant has submitted its claim for cost incurred and losses suffered due to works for completion of MS-3 works from Bhagega to Iqbalgarh in the extended period upto 30 June 2018 only. The Claimant reserves its rights in respect of further costs and compensation for losses sustained by it in the extended period beyond 30 June 2018.

## F. COST CLAIMS

300. The present contract is a Design Build Lumpsum contract [FIDIC Yellow (1999 Edition)] for completion of whole Works basis achievement of five intermediate Milestones. The contract was awarded to the Claimant for a lumpsum price of INR 6699.50 crores for the whole Works.
301. The present claims pertain to additional cost/payments incurred and compensation for losses suffered for completion of, MS-3 works for the stretch Bhagega to Iqbalgargh (less Technical Design) from 10 February 2017 to 30 June 2018.
302. Therefore, in order to compute the present cost claims, the Claimant has computed the value of Relevant Works for Present Cost Claim as follows:
- a) From the component of the Contract Price, the Claimant has derived the value of works of MS-3 for the stretch from Bhagega to Iqbalgargh.
  - b) As the Claimant has notified a separate claim for Technical Design ("TD"), the Claimant has excluded TD for the portion of Bhagega to Iqbalgargh from the above value of works.

The aforesaid methodology for value of MS-3 works has been detailed in the paragraphs below:

### Value of MS-3 works of the stretch Bhagega to Iqbalgargh [less TD]

303. As set out in paragraph 58, MS-3 is completion of track skeleton for entire Package i.e., from Iqbalgargh to Rewari to be completed within 09 February 2017. MS-1 is completion of Civil and track skeleton from Bhagega to Rewari to be completed by 5 August 2015.

304. Since the present claim pertains to track skeleton work from Bhagega to Iqbalgargh, value of MS-3 work for the stretch Bhagega to Iqbalgargh is arrived at based on the quantum of items of work settled as on 31 July 2015 in the Interim Payment Certificate ("IPC") No. 21 and relevant Price Schedule.
305. The gross value of work from Bhagega to Iqbalgargh includes value of work relevant to MS-4 and MS-5. Therefore, from the gross value of work from Bhagega to Iqbalgargh, contract value of MS-4 and MS-5 relevant to section Bhagega to Iqbalgargh is deducted to arrive at the contract value of MS-3 of the section Bhagega to Iqbalgarh i.e. Contract Value of MS-3 less MS-1.
306. As per CCP, TD of this Contract was scheduled to be completed on 30 April 2014. Contractor could not complete the TD on the planned date due to reasons not attributable to it. Claimant's cost claims does not include TD of the section Bhagega to Iqbalgargh as cost incurred for TD during the extended period from 1 May 2014 have been notified to the Engineer and not covered in this reference.
307. Therefore, from the value of MS-3 works from Bhagega to Iqbalgargh, the value of TD of the said section is deducted to arrive at the value relevant to the present claim.
308. As per the computation set out below, value of MS-3 works for the stretch from Bhagega to Iqbalgargh less TD is INR 5004,81,91,105/-.

**Table No. 4**

01	Gross Value of work from Rewari to Iqbalgargh	Contract Value	INR 6699,50,00,000
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02	Gross value of work from Bhagega - Iqbalgargh.	Computed as per the Price Schedule and quantum of components finalized in IPC -21  [Refer Exhibit C-61 and C-62]	INR 5642,06,34,670
03	Value of the components MS-4 and MS-5 in the section Bhagega - Iqbalgargh	Computed as per the Price Schedule and quantum of components finalized in IPC -21  [Refer Exhibit C-61 and C-62]	INR 583,92,68,568
04	Value of MS-3 portion of work from Bhagega - Iqbalgargh	[(02)-(03)]	INR 5058,13,66,102
05	Value of Technical design Bhagega - Iqbalgargh	Computed as per Price Schedule - 4.1	INR637,24,43,565
06	Value of Relevant Works for Present Cost Claim  [Value of MS-3 for section from Bhagega - Iqbalgargh (less MS-4, MS-5 and TD of that section)]	(04) - (05)	INR 5004,81,91,105

Computation of Value of MS-3 works for the stretch from Bhagega to Iqbalgargh less TD is filed herewith as Exhibit C-61. Copy of IPC - 21 has been filed herewith as Exhibit C-62.

Value of Relevant Works for Present Cost Claim of INR 5004,81,91,105 is 74.70% of the Total Contract Price.

309. The present cost claims are under the following heads:

- (a) Onsite overhead
- (b) Offsite overhead
- (c) Plant and Equipment
- (d) Labour
- (e) Additional cost on Fuel
- (f) Interest on additional funds
- (g) Loss of Opportunity and Profit

**Documents maintained electronically by the Claimant and relied upon by it for its cost claims**

310. In support of its claims, the Claimant has filed abundant documentary evidence maintained by Larsen & Toubro (member of the Claimant Consortium) in Enterprise Resource Planning (“ERP”) software/system.
311. The ERP system is a centralised system for recording the expenditure incurred in respect of *inter alia* all departments, processes, operations of each project of Larsen & Toubro Limited in electronic form. To record expenditure in each of the projects and to ensure that all expenses are relatable and easily identifiable to such projects, ERP system of accounting has a unique job code generated for each project under which all the expenses incurred towards or related to the project are booked under various accounting heads.
312. For MS-3 from Bhagega to Iqbalgarh, a list of relevant job codes and accounting codes is filed herewith as **Exhibit C-63**. All the expenses related to the execution of work in relation to MS-3 under the present dispute are booked in electronic form under the aforesaid unique project accounting codes.

313. Larsen & Toubro uses the ERP (Enterprise Resource Planning) software/system which has all checks, balances and controls in place for the accounting entries done by Larsen & Toubro Limited. Copy of certificate dated 3 November 2017 by Bureau Veritas Certification Holding SAS-UK certifying Larsen & Toubro Limited's Information Security Management systems covering data centre, IT Infrastructure being ISO/IEC 27001:2013 compliant is filed herewith as **Exhibit C- 64.**
314. The ERP entries along with primary records are verified by the statutory auditors at the time of auditing and certifying the final accounts. The certificate(s) of the Chartered Accountant filed in the present proceedings are a direct evidence of actual expenses incurred by the Claimant and recorded in the ERP system of the Claimant. The said figures have also been duly audited by the statutory auditors during the statutory audit post verification of the primary documents.
315. The Claimant maintains rigorous record keeping through the ERP system in the course of execution of the Project and will provide demonstration during the course of the present proceedings.
- (i) **Onsite Overhead**
316. The Claimant had envisaged that the Respondent would comply with their respective obligations within the contractual timelines and that the Claimant would be able to execute the Works as per the approved time programme. Being time related, the Onsite Overhead costs ear-marked for completion of MS-3 works from Bhagega to Iqbalgargh as per the approved time programme have already been incurred by the Claimant up to the planned date of completion i.e. 9 February 2017.
317. However, due to the Delay Events and the consequent Extension of Time for completion of MS-3 coupled with Respondent's Requirements

and Breaches in the Extended Period set out in Section D, the Claimant had to incur Onsite Overhead in the extended periods i.e., from 10 February 2017 to 30 June 2018 under numerous sub-heads detailed in paragraph 329 below.

318. The Overhead cost for completion of MS-3 works of the section Bhagega to Iqbalgarh till 9 February 2017 considered as part of the Contract Price has already been expended during the scheduled period of completion. Therefore, the Onsite Overhead cost incurred by the Claimant in this extended period from 10 February 2017 to 30 June 2018 are additional.
319. These Costs are a direct consequence of Extension of Time as well as numerous Respondent's breaches which prevented the Claimant from completing MS-3 by 09 February 2017 and other factors/specific requirements of the Respondent (set out in Section D).
320. The Contract is one of reciprocal promises. In the present case and as set out in Chapter C, D and E, there are prior fundamental breaches of the contractual obligations by the Respondent which prevented the Claimant from performing its contractual obligations.
321. It is settled law that when a contract contains reciprocal promises, and one party prevents the other from performing his promise, the party so prevented is entitled to *inter alia* compensation from the other party in breach for any loss which it may sustain in consequence of the non-performance of the contract.
322. Further, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably

be considered either arising naturally, i.e., according to the usual course of things, from such breach of the contract itself.

323. The Claimant is entitled to be put in the same position as it would have been had the contract been performed within the original period.
324. In terms of the Contract and the Law governing the Contract, the Claimant is entitled to Onsite Overhead cost which have been incurred for completion of Relevant Works for Present Cost Claim from 10 February 2017 to 30 June 2018.
325. The Claimant has arrived at the Onsite Overhead incurred by it as per the actual cost incurred in the extended period of MS-3 (10 February 2017 to 30 June 2018). Onsite Overhead incurred by the partners of the Claimant Consortium for Relevant Works for Present Cost Claim is compiled separately and clubbed together to arrive at an amount of INR 163,15,35,753/- being the total Onsite Overhead incurred by the Claimant.

(a) M/s. Sojitz Corporation

326. Total Onsite Overhead cost incurred by M/s. Sojitz Corporation for the Contract / whole work in the period of 10 February 2017 to 30 June 2018 is INR 5,05,48,494/-. The Claimant has filed herewith documents viz. Summary file, Back up working sheet, Invoices, Agreements, Tally extract, Salary Excel for expats, Debit Note for Expat Salary and bonus, TDS Challans supporting Expat Salary, Employment contract, Employee Service rule etc. evidencing Onsite Overhead cost having been incurred by Sojitz Corporation from 10 February 2017 to 30 June 2018 as Exhibit C-65.

327. From the amount of INR 5,05,48,494/-, the Claimant has considered INR 3,77,61,933 being 74.70% of the Cost of Onsite Overhead incurred by Sojitz for the Relevant works for Present Cost Claim.
328. Thus, Sojitz Corporation has incurred **INR 3,77,61,933/-**. Calculations of the Onsite Overhead cost incurred by Sojitz Corporation for Relevant Works for Present Cost Claim in the period from 10 February 2017 to 30 June 2018 is filed herewith and marked as **Exhibit C-66**.

(b) Larsen & Toubro Limited:

329. Onsite Overhead incurred by Larsen & Toubro Limited is based on the actual cost incurred and computed as per the books of account maintained by it. Larsen & Toubro Limited has incurred Onsite Overhead cost of **INR 159,37,73,820/-** from 10 February 2017 to 30 June 2018 towards completion of Relevant Works for Present Cost Claim. The break-up of Onsite Overhead Cost incurred by Larsen & Toubro Limited is set out below:

**Table No. 5**

**Breakup of the Onsite Overhead incurred by L&T from 10 February 2017 to 30 June 2018**

S. No	Cost Head	Amount [INR]
1	Salary	56,31,92,572
2	Employee Benefit Compensation	3,26,26,207
3	Out of Pocket Expenses	39,61,455
4	Staff Travel Cost	1,15,06,152
5	External support staff	36,43,13,495
6	Lease / Rental Cost	8,01,63,374
7	Staff Other Cost	3,63,69,021
8	Insurance	10,02,48,125

9	Conveyance	15,18,58,451
10	Professional Fee	3,47,48,039
11	Security Services	10,98,26,122
12	Other Admin Cost	4,75,83,333
13	Other Cost	1,00,36,967
14	Bank Charges	4,73,40,507
	<b>Total</b>	<b>1,59,37,73,820</b>

Calculations of the Onsite Overhead cost incurred by Larsen & Toubro Limited for the completion of Relevant Works for Present Cost Claim in the period from 10 February 2017 to 30 June 2018 is filed herewith and marked as **Exhibit C-67.**

- 330. Copies of charts containing details of the documents along with supporting documents in respect of Onsite Overhead cost incurred by Larsen & Toubro Limited towards Relevant Works for Present Cost Claim from 10 February 2017 to 30 June 2018 is submitted as **Exhibit C-68 (Colly) to Exhibit C-81 (Colly).**
  
- 331. As part of **Exhibit C-68 (Colly) to C-81 (Colly)**, the Claimant has also filed numerous documents such as ERP System extracts, printouts of Ledger maintained in ERP System, Vendor invoices, rent agreement, copies of Insurance Policy and its renewal, Bank Guarantees etc. substantiating the actual onsite Overhead Cost incurred by Larsen & Toubro for each of the aforesaid 14 subheads. Along with documents for each of subheads, the Claimant has filed an index of such documents under each of the subheads filed by it in support of the Overhead Cost.

332. The total Onsite Overhead cost incurred by the Claimant for Relevant Works for Present Cost Claim from 10 February 2017 to 30 June 2018 is **INR 163,15,35,753** [INR 1,59,37,73,820 + INR3,77,61,933]. Computation and details of the total Onsite Overhead cost incurred by the Claimant Consortium is filed herewith and marked as **Exhibit C-82**.

**(ii) Offsite Overhead:**

333. For the completion of projects, utilisation of part of Claimant's establishment in the Head office and Regional offices is essential and inevitable. Cost incurred *inter alia* in the head office and regional office include Employee Benefits Expense, Repairs Maintenance- Buildings [Electric Installation and Inter Company Overhead (ICO)], Rent, Telephone expenses - other ICO, Power and Fuel, professional fees, travel-inland hotel boarding and lodging, Manpower Hire Charges, Cost of software, stationery and printing, bank charges, rates and taxes, Repairs-other vehicles, travel- foreign tickets, advertising and publicity and other expenses.
334. Establishment in the head office/ regional office is for the benefit of all projects in progress. Offsite Overhead expenses is, therefore, a direct cost to be borne by projects.
335. Offsite overhead expenses on any project is arrived at basis the allocation of the share of head office/regional office expenses for that project. However, in cases where cost incurred in the head office for individual projects cannot be bifurcated and then allocated to the respective projects, this cost is calculated based on the contract price of the relevant contract and % of yearly head office and regional office expenses with respect to the total turnover of the company for the relevant year.

336. Offsite Overhead cost is time related. The Offsite Overhead catered for MS-3 in the Contract Price has been incurred by the Claimant on 9 February 2017 (date of completion of MS-3).
337. However, owing to various Delay Events and all other factors attributable to the Respondent which prevented the Claimant from completing Relevant Works for Present Cost Claims by 09 February 2017, the works had to be carried out in the extended period. Claimant continued to maintain the Offsite overheads relevant to completion of this Contract in such extended period. Cost on Offsite Overhead in the extended period is a direct consequence of the Extension of Time and other factors set out in Section D requiring the Claimant to continue retaining resources in the extended periods for its completion. Offsite Overhead have arisen on account of breach/non-compliance of various obligations by the Respondent under the Contract. Accordingly, for carrying out the Relevant Works for Present Cost Claim in the extended periods, Claimant had to incur Offsite Overhead of INR 78,70,42,922/- over and above the costs reckoned in the Contract.
338. The Offsite Overhead incurred by partners of Claimant Consortium- M/s. Sojitz Corporation and Larsen & Toubro Limited in the extended period towards Relevant Works for Present Cost Claim have been computed hereinbelow.

M/s. Sojitz Corporation

339. Offsite Overhead incurred by M/s. Sojitz Corporation for CTP 1&2 in the period of 10 February 2017 up to 30 June 2018 is JPY 13,14,29,793.

Applying the contractual rate of conversion<sup>27</sup> (1.6672 JPY = 1 INR), it is equivalent to INR 7,88,32,649/-.

- 340. Contribution of relevant Contract Price with respect to total Contract Price is 74.70%. Applying this percentage to the aforesaid amount, Offsite Overhead cost incurred by Sojitz for Relevant Works for Present Cost Claim in the period from 10 February 2017 to 30 June 2018 works out to **INR 5,88,91,432/-**.
- 341. Summary of computation in respect of the Offsite Overhead cost incurred by Sojitz Corporation for the Relevant Works for Present Cost Claim in the period from 10 February 2017 to 30 June 2018 is filed herewith as **Exhibit C-83**.
- 342. Copy of the Certified Public Accountant's certificate dated 14 March 2018 in respect of the expense incurred by M/s. Sojitz Corporation in its Head Office and Regional Office for its Western Dedicated Freight Corridor - CTP 1 & 2 Project from February 2017 up to 31 December 2017 is filed herewith and marked as **Exhibit C-84**. Copy of the auditor's certificate dated 22 October 2018 in respect of the expense incurred by M/s. Sojitz Corporation in its Head Office and Regional Office for its Western Dedicated Freight Corridor - CTP 1 & 2 Project from 01 January 2018 to 30 June 2018 is also filed herewith and marked as **Exhibit C-85**.

*Larsen & Toubro Limited:*

- 343. The Offsite Overhead cost in respect of Larsen & Toubro Limited has been arrived as per "Emden formula"<sup>28</sup> which is widely accepted in the

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<sup>27</sup> Schedule 3, Price Schedule Submission by Bidder

<sup>28</sup> Emden Formula = Overhead % x Contract Sum x Period of delay  
(Scheduled period of Completion)

industry. As per the said computation, Larsen & Toubro Limited is entitled to INR 72,81,51,490 towards Relevant Works for Present Cost Claim for the period of 10 February 2017 to 30 June 2018 period. Detailed Calculation of Offsite Overhead cost in respect of Larsen & Toubro Limited from 10 February 2017 to 30 June 2018 as per Emden Formula and using the percentages set out in statutory auditor's certificate is filed herewith as Exhibit C-86.

344. Copy of the auditor's certificates dated 02 August 2014, 28 July 2015, 31 May 2016, 27 December 2017 and 05 October 2018 evidencing the percentage of Head Office Overheads of Larsen & Toubro Limited is filed herewith and marked as Exhibit C- 87, Exhibit C- 88, Exhibit C- 89, Exhibit C- 90 and Exhibit C- 91 respectively.
345. The total Offsite Overhead Cost to which Claimant is entitled to for Relevant Works for Present Cost Claim in the extended period i.e. from 10 February 2017 to 30 June 2018 is **INR 78,70,42,922/-** [INR 5,88,91,432 + 72,81,51,490/-]
346. Offsite Overhead costs as claimed are a direct consequence of execution of works in the extended period.
347. In view of the Respondent's prior fundamental breaches of its contractual obligations, the Claimant was prevented from performing its contractual obligations. The Claimant having been so prevented is entitled to *inter alia* compensation from the Respondent for all expenses incurred/losses suffered which the Claimant has sustained on account thereof
348. Further, the Respondent failed to perform its obligations. The Claimant is entitled to receive damages in respect of such breach of Contract as

may reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of the Contract itself. The Claimant is entitled to be put in the position it would have been in had the contract been performed.

349. The Claimant is therefore entitled to Offsite Overhead Cost due to execution of Relevant Works for the Present Cost Claims in the extended period.
350. Accordingly, in terms of the Contract and the Law governing the Contract, the Claimant is entitled to **INR 78,70,42,922/-** being Cost on Offsite Overhead from 10 February 2017 to 30 June 2018.

**(iii) Cost incurred due to retention of Plant and Equipment in the extended period:**

351. At the time of submission of bid, the Claimant had envisaged that it would be able to complete all the work of MS-3 by 9 February 2017. The Claimant accordingly computed the requirement of Plant and Equipment to be deployed at site. Further, it was understood by the parties that upon completion of various activities by the dates envisaged in the CCP, Plant and Equipment deployed for such activities can be demobilised to other project sites for utilization therein.
352. Due to the occurrence and continuance of various Delay Events and Respondents' Requirements and Breaches in the Extended Period (section D), Plant and Equipment deployed for the work remained idle/underutilised during the original period of completion of MS-3. To complete MS-3, Claimant was constrained to retain Plant and Equipment beyond the dates set out in the CCP. The Plant and Equipment retained in the extended period were also governed by the requirements of the Engineer/ Employer as set out in Section D. Such

prolonged retention of Plant and Equipment could not be envisaged at the bid stage and hence, its Cost is not catered for in the Contract Price. Due to prolonged retention of Plant and Equipment, Claimant incurred time related cost on Plant and equipment which is over and above the cost that was included in the Contract price.

353. Plant and Equipment deployed by the Claimant fall under following 3 categories:

- a) Own Plant and Equipment - which are Plant and Equipment purchased and owned by the Claimant. These include plant and equipment purchased for the present Contract and those owned and mobilised from elsewhere.
- b) Hired Equipment - which comprises Plant and Equipment mobilised through Equipment suppliers for deployment in the work by Claimant on hire charge basis.
- c) Equipment deployed by Piece Rate Workers ("PRW") - engaged by the Claimant for carrying out activities such as cutting, subgrade, blanket, concrete etc. on piece rate basis

- (a) Cost incurred on Claimant's own plant and equipment:

354. The cost of Claimant's own Plant and Equipment comprises Ownership/ Owning cost (time related cost) and the operating cost (production based cost). The time related owning cost includes depreciation, interest on capital investment and insurance.

355. The owning cost being time related, is affected by the works being carried out in the extended period. The Claimant has calculated time related owning cost of equipment as per the principles and methodology set out in IS 11590 : 1995 (reaffirmed 2000)- "Guidelines for working out unit rate cost of the construction equipment used for

River Valley Projects" which is a standard widely accepted in construction industry (in India).

356. As per Para 2.2 of IS 11590 the Ownership / Owning Cost of the Equipment comprises
- (i) Interest on Capital investment
  - (ii) Insurance cost
  - (iii) Depreciation
357. The methodology to be followed for the computation of the Owning Cost is provided in Para 2.2.1 to 2.2.3 of IS 11590. The Life and Repair provisions of various equipment is provided in Annexure A of the IS 11590. Claimant has computed the Unit Ownership Cost of various equipment owned and deployed by it in the extended period to complete the Relevant works for Present Cost Claim as per the contemplations of IS 11590.
358. Claimant has hereinbelow carried out a sample calculation of owning cost of "Excavator 2.85 cum" Make- L&T Komatsu PC -450 (Asset 1370090) [Sl. No. 2 in Exhibit C- 92] as per IS 11590 which is one of the resources deployed for the Project

**Table No. 6**

S.No	Equipment	Reference	Value	Unit rate [INR]
<b>Equipment: PC 450</b>		Asset - 1370090		
1	Life of equipment as per IS 11590	Annex A item no 1C(2ii)		
a	In years		12	
b	In Hrs		15,000	
2	Capital cost of equipment	DCRN/ Invoice	85,50,000	
3	Depreciation	Para 2.2.3 of IS		

		11590		
	0.9X capital cost / life in hrs			
<b>4</b>	<b>Depreciation per Hr</b>	<b>0.9*(2)/1(b)</b>	<b>513.0</b>	<b>513.0</b>
5	Interest on investment	Para 2.2.1 of IS 11590		
	Average cost of equipment * Interest %/ work hrs/ annum	Para 2.2.1 of IS 11590		
6	Average cost of Equipment			
	Capital cost * (1+life in yrs.) / 2* life in years	(2) *(1+1a)/2*1a	46,31,250	
7	Interest %	As in Cl 14.8	8%	
8	Work hrs per annum			
	10hrs / days * 25days/ month *12 months		3,000	
<b>9</b>	<b>Interest on investment per Hr</b>	<b>(7) *(6)/ (8)</b>	<b>123.5</b>	<b>123.5</b>
10	Insurance	Para 2.2.2 of IS 11590		
	Insurance % of capital cost [Premium Paid/ sum insured]	INR [178,623,691/ 5406,28,60,411]	0.33%	
<b>11</b>	<b>Insurance per Hour</b>	<b>10*2/1(b)</b>	<b>9.41</b>	<b>9.4</b>
	<b>Total Unit Rate / Hr</b>	<b>(4) +(9) +(11)</b>		<b>646.0</b>

359. In support of the aforesaid computation of the unit cost, the Claimant has relied upon *inter alia* the following documents – Delivery Challan dated 16 January 2016, Vendor Invoice No. 920900058 dated 20 January 2010 (for the Capital cost of the Equipment), Own Asset Commissioning Report dated 02 March 2016 and Asset Movement Register ( evidencing date of mobilisation and retention of the Plant and Equipment) which is filed herewith as part of Exhibit C- 95 (Colly).

360. The computation of cost incurred for "Excavator 2.85 cum" Make- L&T Komatsu PC -450 (Asset 1370090) by carrying out the Relevant Works for Present Cost Claim in the extended period upto 30 June 2018 is as below:

**Table No. 7**

S.No	Cost Incurred PC -450 (Asset 1370090)	Ref/ Linkage	Values
a	Equipment months for which the Excavator PC 450 was retained in the extended period	Exhibit C- 93	13
b	Equipment years for which the Excavator PC 450 was retained in the extended period		
	Equipment month/ 12 months	(a)/ 12	1.08
c	Minimum Hrs to which the Equipment is deployed per Annum		
	10hrs / days * 25days/ month *12 months		3000
d	Equipment hours for which the Excavator PC 450 was retained in the extended period	(b)*(c)	3250
e	Unit owning cost of PC 450 per hr (ref. Sample calculation above)	Exhibit C- 92	646
f	<b>Additional cost incurred due to deployment of PC 450 in the extended period up to 30.06.2018</b>	(e) * (d)	<b>20,99,500</b>

Thus, the additional cost incurred by the Claimant for "Excavator 2.85 cum" Make- L&T Komatsu PC -450 (Asset 1370090) in the extended period up to 30 June 2018 was INR 20,99,500/-.

361. Similarly, the Claimant has computed the additional Cost of **INR 61,45,26,661/-** (Rupees sixty-one crore forty-five lakhs twenty-six thousand six hundred and sixty one only) incurred by it due to

retention of 318 Own Plant and Equipment beyond dates in the CCP and up to 30 June 2018. A tabulated chart of Unit cost of 318 number of Own Equipment deployed beyond the planned date of completion as per CCP up to 30 June 2018 is filed herewith as Exhibit C- 92. The computation of additional Cost incurred by the Claimant due to the retention of the Own Equipment in the extended period up to 30 June 2018 is filed herewith and marked as Exhibit C- 93

362. In support of its claim for Cost incurred in respect of Own Plant and Equipment, the Claimant has filed herewith the following documents.
- (i) Copy of IS 11590 – “Guidelines for working out unit rate cost of the construction equipment used for River Valley Projects” is filed herewith and marked as Exhibit C-94.
  - (ii) Printouts of asset movement details maintained in Claimant’s system, copies of Commissioning Reports for Claimant’s own Plant and Equipment, printouts of Material Receipt Note, Delivery Challan Receipt Note and invoices, copies of Claimant’s Plant and Machinery Policy Schedule deployed across the Project is filed herewith as Exhibit C-95 (Colly).
  - (iii) Copies of Monthly Progress Reports containing the list of Plant and Equipment deployed by the Claimant is filed herewith and marked as Exhibit C- 96.

(b) Cost incurred by the Claimant on Hired Equipment:

363. The Claimant entered into agreements with numerous agencies for providing Plant and Equipment on “hire charge basis”. Irrespective of whether the hired equipment(s) are used or not, the Claimant is required to make payment to the equipment suppliers.

364. The hired plant and equipment were also required in the extended period to complete MS-3. The Claimant had to incur cost on hired equipment in the extended period on account of its continued deployment which is a direct cost to the Claimant. The Claimant has claimed the actual cost incurred by it towards the hire charges for plant and equipment beyond the period envisaged in the CCP for completion of Relevant Works for Present Cost Claim.
365. By way of illustration, the Claimant has hereinafter set out the sample computation for Cost incurred by the Claimant in respect of "Excavator Komatsu L&T, PC200" hired through the vendor "Ajab Singh Construction" for Earthwork. As per the approved programme, Earthwork of MS-3 should have been completed in the period 23 Dec 2013 to 24 November 2016, which could not be ensured due to various Clause 8.4 Delay Events. The Claimant has incurred INR 41,10,313/- towards hire charges of the said excavator beyond the dates set out in the CCP and up to 30 June 2018. Following are the particulars from ERP Summary in respect of Excavator Komatsu L&T, PC200" having Asset Code: 0135290H and hired under Work Order: EA421WOD4000243:

**Table No. 8**

<b>Months</b>	<b>Amount [INR]</b>	<b>Reference document</b>
Dec-2016	201779.62	EA421BIL7001020
Jan-2017	209488.04	EA421BIL7001327
Feb-2017	209488.04	EA421BIL7001645
Mar-2017	211261.29	EA421BIL7001944
Apr-2017	218101.00	EA421BIL7002279
May-2017	209089.93	EA421BIL7002638
June-2017	194433.24	EA421BIL7002920
July-2017	234659.64	EA421BIL7003634

Aug-2017	233733.22	EA421BIL7004175
Sep-2017	232323.43	EA421BIL7004477
Oct-2017	215204.27	EA421BIL8000175
Nov-2017	220671.42	EA421BIL8000546
Dec-2017	216401.06	EA421BIL8001021
Jan-2018	216512.53	EA421BIL8001307
Feb-2018	215992.67	EA421BIL8001589
Mar-2018	218332.05	EA421BIL8002190
Apr-2018	211239.58	EA421BIL8002773
May-2018	218851.89	EA421BIL8003037
Jun-2018	222750.86	EA421BIL8003449
	<b>4110313.78</b>	

366. The documents relied for the above sample calculation are (a) Work Order from period 11 November 2014 to 31 July 2019 (b) Bill Summary (c) Commissioning Report dated 11 November 2014, (d) Vendor Invoice and (e) printout of the Ledger Extract in respect of payment made to the vendor towards Hire Charges for carrying out for Relevant Works for Present Cost Claim from 01 Dec 2016 to 30 June 2018, have been filed as part of Exhibit C- 98 (Colly).
367. Similarly, the Claimant has compiled a tabulated chart containing the details of Cost incurred by it in respect of 796 number of hired equipment, which is filed herewith and marked as Exhibit C- 97. The total cost incurred by Claimant on hired equipment(s) for undertaking Relevant Works for Present Cost Claim upto 30 June 2018 is INR **116,88,21,576/-**.
368. In support of the aforesaid computations, the Claimant has filed herewith the following documents:

- (i) Copies of Commissioning Reports of, printouts of EIP Bills and Work Orders of, printouts of Bill Summary evidencing payments made along with invoices issued by the equipment suppliers in respect of, for the Hired Plant and Equipment(s) are filed herewith and marked as **Exhibit C- 98 (Colly)**.
- (ii) Printouts of Ledger Extract for CTP 1&2 from 1 April 2016 to 31 March 2019 which includes evidences of payments made for the Hired Plant and Equipment to the equipment suppliers are filed herewith and marked as **Exhibit C-99**.

(c) Cost incurred by the Claimant on PRW's Equipment:

- 369. As set out hereinbefore, the Claimant has engaged external agencies to carry out some of the activities on Piece rate basis. The Piece Rate Workers mobilised equipment for carrying out such activities. However, the activities in MS-3 could not be completed due to Delay Events for which the Claimant has been granted Extension of Time.
- 370. In order to complete Relevant Works for Present Cost Claim, Claimant had to retain the PRW's equipment in the period beyond the completion dates set out in the CCP. The Claimant had to retain resources of the PRW in the extended periods up to 30 June 2018, also due to reasons stated in Section D not attributable to Claimant. The Claimant incurred time related owning cost on account of the aforesaid extended stay of the PRW's Plant and Equipment.
- 371. The Cost incurred on PRW Equipment has been computed basis the principles and methodology set out in IS 11590. Sample calculation of the Excavator PC -450 (Asset 1370090) set out in paragraph 360 under the category Owned Plant and Equipment is also relevant for PRW Equipment. **Exhibit C- 100** provides the details of the unit owning cost per hour of the Equipment deployed by the PRW up to 30 June 2018 for

undertaking various activities beyond the date of completion reckoned in the CCP

372. From the period of Retention of Equipment in years, number of Equipment and Minimum hours (3000 hrs/ Annum) to which these equipment were to be used in the Relevant Works for Present Cost Claim, the Claimant arrived at the Extended Stay hrs of the equipment as - Period of Retention X Number of Equipment X 3000 Hrs/ annum.
373. Based on the extended stay hours of the PRW Equipment as above and unit owing cost of Equipment per hour as computed in Exhibit C - 100, Cost incurred by the Claimant on the PRW equipment in the extended period for the Relevant Works for Present Cost Claim has been computed as - Extended stay Hours of the PRW equipment x Unit owning cost per hour.
374. Following the aforesaid methodology, the Claimant has computed the total Cost of **INR 41,39,02,516/-** incurred by it for the completion of Relevant Works for Present Cost Claim in respect of all PRW's plant and equipment. Computation of cost incurred by the Claimant on PRW's plant and equipment is filed herewith as Exhibit C-101.
375. In support of the aforesaid computation, the Claimant has filed herewith the following documents:
  - (i) Monthly Progress Report evidencing deployment of Equipment including PRW Equipment is filed herewith and marked as Exhibit C- 96.
  - (ii) IS 11590 used for computing unit cost of all Equipment deployed by PRW is filed herewith as Exhibit C- 94.

376. The total Cost incurred by Claimant due to the prolonged retention of Plant and Equipment in the period beyond that envisaged in the CCP up to 30 June 2018 for the completion of Relevant Works for Present Cost Claim under the above heads are set out herein below:

**Table No. 9**

S.No	Description	Ref.	Amount in INR
a.	Own Plant and Equipment	<u>Exhibit C- 93</u>	61,45,26,661
b.	Hired Plant and Equipment	<u>Exhibit C- 97</u>	116,88,21,576
c.	PRW Plant and Equipment deployed by PRW	<u>Exhibit C- 101</u>	41,39,02,516
<b>d</b>	<b>Total</b>		<b>219,72,50,753</b>

377. Cost incurred by the Claimant on Plant and Equipment in the period beyond that envisaged in the CCP up to 30 June 2018 is purely on account of the delayed completion of MS-3 due to Delay Events not attributable to the Claimant and the Respondent's Requirements and Breaches in the Extended Period (Section D) which led to the execution of the work in the extended period up to 30 June 2018, as detailed in Section D. Hence, under the terms of the Contract and the Law applicable to it, Claimant is entitled to all such unforeseen additional cost incurred by it.

**(iv) Cost incurred on Labour**

378. Claimant reckoned that various activities contemplated in MS-3 could be progressed as per approved time programme, so that MS-3 is completed by 09 February 2017. Claimant required different category of labour namely highly skilled ("HSK"), skilled ("SK"), semi-skilled ("SSK") and unskilled ("USK") to undertake and complete numerous

activities such as Embankment, Subgrade, Blanketing and Concrete comprising concrete placement, Reinforcement, Formwork, handling of materials etc. Based on the quantum of work, time available for construction, labour turnout etc., the requirement of labour to undertake and complete activities in MS-3, as aforesaid was arrived at and provided at site. It was envisaged that upon completion of the relevant activity, the labour engaged for the work could be demobilised in phases by such time as per the approved programme. The time programme submitted by the Claimant was based on the Engineer/ Respondent fulfilling all their reciprocal obligations in the manner and within the contractual timeframe. The time programme was accepted as CCP.

379. Claimant could not fully utilise the labour employed for MS-3 as per its original schedule/plan due to Delay Events as set out hereinbefore. Consequently, Claimant could not complete MS-3 as per the approved time programme. The Claimant was constrained to retain labour as in the extended period to ensure completion of Relevant Works for Present Cost Claim. Besides the above, the Claimant was constrained to retain Labour in the extended period upto 30 June 2018 due to various factors stated in Section D. This prolonged retention of labour was not catered for in the Contract Price and has caused Claimant to incur Cost on labour, over and above that included in the Contract Price which is a direct cost to the Claimant. Therefore, in terms of Contract and Law applicable to it, Claimant is entitled to all such unforeseen cost.
380. Claimant has computed cost incurred by it on account of retention of all categories of labour for ensuring completion of Relevant Works for Present Cost Claim beyond 09 February 2017 as per the statutory provisions.

381. For various categories of Labour, cost of labour per day comprises of the following components:
- (a) Minimum Wages which are paid in accordance with the notifications issued by the Government of India from time to time setting out basic wages and dearness allowance in respect of different categories of labour.
  - (b) Statutory benefits - such as (1) Bonus under the Payment of Bonus Act, 1965 and (2) Provident Fund under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.
  - (c) Other Benefits - As per Clause 6.1 of GCC read with Clause 11 of Appendix 15 of the Employer's Requirement, the Claimant is required to provide the labour employed certain other benefits inter alia Accommodation, Water and Electricity, Transportation etc

382. The Claimant has set out hereinbelow a sample calculation of unit cost (per day) of various category of labour engaged by it in the extended period for completion of the Relevant Works of Present Claim. The sample calculation of unit cost of Labour per day in the month of April 2017 is as under:

**Table No. 10**

<b>S.No</b>	<b>Description</b>	<b>Linkage</b>	<b>Labour category</b>			
			<b>HSK</b>	<b>SK</b>	<b>SSK</b>	<b>USK</b>
1	Minimum wages during month	Circulars/ Notification	593	506	420	359
2	Benefits @ 34.69% PF - 13.36%, Bonus - 8.33% and others - 13%	34.69% of (1)	206	176	146	125
3	Wages of labour including benefits	1+2	799	682	566	484

383. In April 2017, Claimant incurred INR 3,58,15,855.64/- on labour as detailed below:

**Table No. 11**

<b>S.No</b>	<b>Description</b>	<b>Linkage</b>	<b>Labour category</b>			
			<b>HSK</b>	<b>SK</b>	<b>SSK</b>	<b>USK</b>
A	Total Man days of which labour was engaged	Exhibit C-103	25	24975	3400	34850
B	Unit rate of Labour	Exhibit C-104 (Colly)	799	682	566	484
C	Cost incurred in April -2014 (INR)	A*B	19,977	1,70,21,247	19,23,373	1,68,51,268

384. The additional Cost incurred by the Claimant has been arrived at basis the Man days for which various category of Labour was employed for completion of the Relevant work for Present Claims in the extended period and unit cost of Labour computed as above. Detailed calculation of Cost incurred on Labour in the extended period from 10 February 2017 to 30 June 2018 for the Relevant Works for the Present Claim is provided is filed herewith as **Exhibit C-102**.
385. The Claimant has filed herewith the following documents in support of the total cost incurred on labour from 01 February 2017 to 30 June 2018:
- (i) Copies of muster rolls from February 2017 to June 2018 evidencing deployment of Labour is filed herewith as **Exhibit C-103 (Colly)**.
  - (ii) Copy of notifications dated 30 September 2016, 17 March 2017, 20 April 2017, 06 October 2017, 03 April 2018 and 28 September 2018, issued by the Government of India setting out basic wages

and dearness allowance for different categories of labour are filed herewith and marked as **Exhibit C-104 (Colly)**.

- (iii) Payment of Bonus Act, 1965 is filed herewith and marked as **Exhibit C-105**.
- (iv) Computation of other benefits (provided under Clause 6.1 of GCC read with Clause 11 of Appendix 15 of the ER) along with relevant documents evidencing provision of such benefits are filed herewith and marked as **Exhibit C-106(Colly)**.

386. The Cost incurred on Labour is time related. The Cost of Labour catered for in the Contract for completion of MS-3 till 9 February 2017 has already been incurred by the Claimant. For the period of 10 February 2017 to 30 June 2018, the Claimant has incurred INR 63,52,85,786/- towards retention of labour for the completion of Relevant Works for Present Cost Claim in the extended period up to 30 June 2018.

- (v) **Additional Cost incurred by the Claimant on Fuel for the works done in extended period from 10 February 2017 to 30 June 2018 which is uncompensated by adjustment formulae under Clause 13.8 of GCC read with PC**

387. The time for completion of MS-3 was extended up to 11 October 2018, duly considering impact of Delay Events accrued up to 31 August 2016. Claimant had to carry out works in the extended period incurring Cost and losses for completing Relevant Works for Present Cost Claim.

388. One of the additional costs incurred by Claimant in the extended period is cost of the component Fuel and Power not recompensed by Contract payments i.e. cost of fuel and power catered for in the Contract and adjusted as per Clause 13.8 of GCC read with PC.

389. Clause 13.8 of GCC read with PC allows Adjustment for Changes in Cost of various inputs. The weightings representing the estimated proportion of cost element for Fuel and Power related to execution of works in Clause 13.8 of GCC read with PC are provided in the table below:

Cost Centre	Earth work (4.4)	Structures (Minor) (4.3)	Structures Major (4.2)	J&C Station, Buildings (4.5 & 4.7)	Track Works (4.8) Others than HH Rails	Misc Civil Works (4.6)
Fuel and Power (e)	0.20	0.15	0.15	0.15	0.05	0.15

390. In the instant case, the time for completion of MS-3 has been extended on account of Delay Events and Respondent's Requirements and Breaches in the Extended Period (Section D) which are not attributable to the Claimant.
391. Cost incurred on Fuel and Power in the extended period was not recompensed by Adjustment for Changes in Cost even when diesel was considered as the representative cost of component Group "Fuel and Power". Claimant, therefore, incurred additional cost on diesel by undertaking the Relevant Works for Present Cost Claim in the extended period.
392. In respect of the Relevant Works for Present Cost Claim undertaken in the extended period, the Claimant is entitled to be compensated as per the actual cost incurred on Material, Fuel and Consumables and not be limited to the base cost, plus Adjustment for Changes in Cost as per formulae envisaged in Clause 13.8 of GCC/PC. The Claimant is seeking the actual additional cost not covered by the formula for the

Adjustment for Changes in Cost contained in Clause 13.8 of GCC read with PC. Claimant is entitled to all such cost as per the terms of Contract and Law applicable to it.

393. The Claimant has set out hereinbelow the methodology followed by it for the computation of additional Cost incurred on Fuel for July 2017.

**Table No. 12**

S.No	Description	Linkage	Unit	Value
1	Value of work done in July 2017	IPC		
a	Major structures		INR	17,26,09,019
b	Minor structures		INR	5,12,86,325
c	Earth work		INR	14,39,04,492
d	Track work		INR	23,25,54,559
2	Value of Fuel as per Schedule of Adjustment data - Table A, Contract Page 52			
a	Major structures @15%	1a*15%	INR	2,58,91,353
b	Minor structures @15%	1b*15%	INR	76,92,949
c	Earth work @20%	1c*20%	INR	2,87,80,898
d	Track work @5%	1d*5%	INR	1,16,27,728
e	<b>Total fuel value</b>	<b>Sum (2)</b>	<b>INR</b>	<b>7,39,92,928</b>
3	Base rate of Diesel (Jan 2013)		INR/Ltr	49.72
4	<b>Qty of diesel @ base rate</b>	<b>2e/3</b>	<b>Ltr</b>	<b>14,88,192</b>
5	Rate of diesel in July-2017		INR/Ltr	57.70
6	<b>Total cost of Fuel expended</b>	<b>4*5</b>	<b>INR</b>	<b>8,58,76,075</b>
7	<b>Value of Fuel in the Contract + Adjustment for change in cost made in IPC no. 45 = Para 2e + escalation</b>	<b>IPC</b>	<b>INR</b>	<b>7,46,03,110</b>
8	<b>Net additional cost incurred in July-2017</b>	<b>6-7</b>	<b>INR</b>	<b>1,12,72,965</b>

394. As is evident from the above, against INR 8,58,76,075/- expended in July 2017 for diesel, the Claimant could recover only INR 7,46,03,110/-. Therefore, an additional amount of INR 1,12,72,965/- lakhs was incurred by Claimant in the said month.
395. For the sample calculation for July 2017, the Claimant has relied upon the following documents:
- i. Material Receipt Notes for July 2017 in respect of the unit rate of Diesel.
  - ii. Wholesale Price Index of March 2017 and June 2017 which has been considered for the computation of Adjustment for Changes in Cost for July 2017.
  - iii. The value of Work done in July 2017 based on IPC 45.
  - iv. The unit rate of diesel on the base date of January 2013 and the Whole sale price indices as on January 2013 for the adjustment for changes in cost.
396. Tabular Chart of additional cost incurred by Claimant on Diesel in the extended period for completion of Relevant Works for Present Cost Claim upto 30 June 2018 is filed herewith as Exhibit C-107. It is evident from the said chart that against INR 184,33,17,225/- expended from 10 February 2017 to 30 June 2018 for diesel, the Claimant could recover only INR 155,03,52,487/- i.e. an additional amount of **INR 29,29,64,737/-** was incurred by Claimant. In support of the calculation of additional cost incurred between 10 February 2017 to 30 June 2018, the Claimant has filed the following documents:
- (i) Tabular Chart of month wise value of work completed by the Claimant between February 2017 to June 2018 as per certified Interim Payment Certificates ("IPC") is filed herewith and

marked as **Exhibit C-108 (Colly)**.

- (ii) Printout of IPC from January 2017 to June 2018 are filed herewith as **Exhibit C-109 (Colly)**.
- (iii) Tabular Chart of price of fuel consumed month wise in the extended period from February 2017 to June 2018 is filed herewith and marked as **Exhibit C-110**.
- (iv) Copy of Material Receipt Note dated 28 January 2013 in respect of base rate of diesel as on 28 days prior to the last date of opening of tender is filed herewith as **Exhibit C-111**.
- (v) Tabular chart of unit rate of diesel from the month of February 2017 up to June 2018 along with copies of Material Receipt Notes are filed herewith as **Exhibit C-112 (Colly)**.
- (vi) Copies of extract of RBI Bulletin for the base indices and other relevant indices applicable for further periods are filed herewith as **Exhibit C-113 (Colly)**.
- (vii) Supplementary Agreement dated 24 March 2022 for amending Table A of Schedule 1 Clause 13.8 of the GCC read with PC pursuant to changes in WPI indices is filed herewith as **Exhibit C-114**.

397. The Claimant has incurred and is entitled to INR 29,29,64,737/- as cost incurred on diesel during the extended period for the completion of Relevant Works for Present Cost Claim i.e. from 10 February 2017 to 30 June 2018 which is not recompensed by the formula for the Adjustment for Changes in Cost contained in Clause 13.8 of GCC read with PC.

**(vi) Interest on additional funds arranged by the Claimant to meet the Overhead Cost in the extended period**

398. At the time of submission of bid and considering the relevant provisions of Contract, the Claimant envisaged that it could commence

and progress the work in the planned and sequential manner to complete MS-3 on the Scheduled date of 09 February 2017. Thus, the time related Onsite and Offsite Overhead Cost to complete the work within the Scheduled date of completion was included in the Contract price. It was perceived that the Claimant could work within the parameters of the quoted price and recover the time related Onsite and Offsite overheads incurred by it as provided in the Contract by completing the works within the Contract period.

399. Upon commencement, Contractor submitted its programme to complete the work within the Scheduled date of completion which was accepted as CCP. Due to various Delay events attributable to the Respondent, Claimant could not commence and progress the work as per the CCP. The time for completion of MS-3 was extended due to such delay events, requiring the Claimant to continue with the execution of work in the extended period to complete MS-3.
400. By virtue of the execution of work in the extended periods, Claimant could not recover the Onsite and Offsite overhead cost incurred up to the Scheduled date of completion at the relevant time. On the other hand, the Claimant continued to incur additional Onsite and Offsite overheads to complete the works in the extended period.
401. In order to meet all additional and unforeseen cost on Claimant's Overheads for the completion of Relevant Works for Present Cost Claim in the extended period from 10 February 2017 to 30 June 2018, Claimant had to arrange funds from its own source. Claimant is entitled to interest on such amounts funded through its source.
402. The funding to meet the Overhead Costs in the extended periods were on account of delays not attributable to the Claimant and therefore, the

Claimant is entitled to interest on such costs under the provisions of the Contract and the Law applicable to it.

403. Overhead cost expended in the extended period could not be compensated from the Interim payments linked to the progress due to the delays to the execution of the work.
404. In Exhibit C-115, Claimant has computed the interest on funds arranged to meet the additional Onsite and Offsite overheads incurred in the extended period from 10 February 2017 to 30 June 2018 for the Relevant Works for the Present Claim.
405. Claimant planned to complete work worth INR 5731,04,21,420/- up to 31 January 2017. Claimant incurred Onsite overhead of INR 429,78,27,102/- up to 31 January 2017. This account for 7.5% of the value of work planned. The contribution of HO/ RO expenses of the Claimant up to 31 January 2017 was 3.83% with respect to the planned value of work. Thus, up to 31 January 2017 the Claimant has incurred Onsite and Offsite Overhead at the rate of 11.33% of Contract Value. The same is tabulated in Exhibit C-115.
406. Claimant had to continue maintaining the same level of Onsite and Offsite Overheads costs in the extended periods for completion of MS-3 works from Bhagega to Iqbalgarh. These Overheads are met from own sources or capital borrowing as these Overheads were additional and beyond that catered for in the Contract. Claimant is accordingly entitled to Interest on such funds arranged to meet the Overhead cost incurred in the extended period. The sample calculation for the month March 2017 is as under:

Table No. 13

S. No	Description	Reference	Amount (INR)
	<b>Sample Computation of Interest on funds arranged to meet the Overheads Cost for March 2017</b>		
1	Gross value of work relevant to the present claim		5004,81,91,105
2	Value of the work relevant to the present claim completed up to Jan-17	Exhibit C-115	1726,08,80,497
3	Value of work relevant to the present claim completed in Feb and Mar-17	IPC	174,80,53,234
4	Cumulative value of work relevant to present claim completed up to Mar-17	2+3	1900,89,33,731
5	Value of work relevant to present claims which remained incomplete as on Mar-17	1-4	3103,92,57,374
6	<b>Overheads to be incurred by the claimant to complete the value of work relevant to present claims remained incomplete as on Mar-2017 @ 11.33% of (5)</b>	5*11.33%	351,60,56,963
7	Rate of interest on the above amounts to be arranged by Claimant from own sources to meet the Overheads @ 8% per annum (8%/12)	Contract	0.667%
8	<b>Interest on the amounts to be arranged by Claimant from own sources as on Mar-2017 to meet the Overheads @ 8% per annum (8%/12)</b>	6*7	2,34,40,380

407. Calculation of interest on the funds arranged to meet the Overhead in the extended period from 10 February 2017 to 30 June 2018 is filed herewith as Exhibit C-115. Total interest incurred by Claimant on overheads incurred in the extended period from 10 February 2017 to 30 June 2018 is **INR 32,69,14,710/-**.
408. In support of its claim for interest on the additional funds arranged by it to meet the Overhead Cost incurred for continued execution of works during the extended period, the Claimant has filed herewith as Exhibit C-116 (Colly) (a) relevant extract of month wise anticipated cash flow statement (Schedule 6 of Contract); (b) copy of Chartered Accountant's certificate dated 02 August 2014 in respect of % Offsite expenses incurred by Larsen & Toubro Limited for the year ending March 2012; (c) copy of Certified Public Accountant's certificate dated 14 March 2018 in respect of offsite expenses incurred by M/s. Sojitz Corporation up to 31 January 2017 for CTP 1 & 2; (d) copy of Chartered Accountant's certificate dated 19 April 2018 in respect of Onsite Overheads of Larsen & Toubro Limited, Construction Division; (e) copy of Chartered Accountant's certificate dated 27 February 2018 in respect of Onsite Overheads of M/s Sojitz Corporation and (f) copy of MCLR Based Interest Rate Certificate dated 01 July 2021 in respect of interest for Larsen & Toubro Limited Case Credit account(s) in State Bank of India for the period 25 January 2017 to till date, Construction Division and (g) Chart detailing the progress payments made in IPC (Inflow) and expenditure incurred month wise (Outflow) which evidences the deficit in cash flow.

**(vii) Loss of opportunity and profit**

409. While deploying *inter alia* Plant, Equipment, Labour and Overheads as per the approved programme, it was envisaged that Claimant could

complete MS-3 by 09 February 2017. It was also reckoned that upon completion of MS-3 by 09 February 2017, the Claimant could demobilise these resources to some other projects for re-deployment and commercial gain.

410. However, on account of Clause 8.4 Delay Events, MS-3 including Relevant Works for Present Cost Claim had to be carried out in the extended period beyond 09 February 2017. The Claimant has been granted Extension of Time without imposition of Delay Damages.
411. Due to the said extension of time for completion of Relevant Works for Present Cost Claim, the Claimant had no option other than to stay in the extended period beyond 09 February 2017 upto 30 June 2018 with *inter alia* all its Plant, Equipment, Labour and Overheads to complete MS-3.
412. Had the Respondent fulfilled its contractual obligations in timely manner, there would not have been any delay in completion of the works for MS-3. Consequently, the Claimant would not have been required to stay at the project site with *inter alia* all its Plant, Equipment, Labour and Overheads and could have utilized these resources in some other project of similar nature and type for earning revenue from other projects on hand. Therefore, the Claimant had to continue using the resources without any corresponding increase in monetary benefit and without being free to move elsewhere to earn the profit which otherwise it might have earned. Thus, the Claimant has been deprived of the opportunity to redeploy these resources to some other project for commercial gain and earn profits. It is pertinent to mention that Claimant was entrusted with the works of similar type and nature by the Respondent in the extended periods such as CTP14 (awarded on 09 January 2017) and CP 303 (awarded on 15 March 2018). List of major

projects for which an agreement is entered into by the Claimant during the extended period of MS-3 along with supporting documents have been filed herewith as **Exhibit C-117 (Colly)**.

413. The Claimant has taken various mitigation measures including progressing the work as per work fronts made available to it, undertook track laying as and when substantial length of a section was developed, commenced the track work from Bhagega towards Shrimadhopur instead of towards Dabla as per the approved base programme/CCP.
414. Under the Law applicable to the Contract, the Claimant is entitled to receive from the Respondent, compensation for any loss or damage caused to it in the extended period from 10 February 2017 upto 30 June 2018. The Claimant is thus entitled to be compensated for loss of opportunity to deploy *inter alia* the Resources in a similar project. The Claimant is therefore entitled to Loss of Opportunity and Profit.
415. The Claimant has calculated the Loss of Opportunity and Profits as per 'Hudson Formula' which is widely accepted in construction industry for computing loss of profit. Computation of Loss of Opportunity and Profits as per Hudson Formula is set out below:

**Table No. 14**

S.No	Brief Particulars	Linkage	Value
1	Value of Relevant Works for Present Cost Claim	Exhibit C-61	INR 50,04,81,91,105
2	% Profit envisaged by the Claimant	Exhibit C-2	10%
3	Scheduled date of completion of MS-3	Contract	09-02-2017
4	Date of commencement of the Contract	Notice to Proceed Exhibit C-3	30-08-2013

5	Scheduled period of completion	(3) - (4)	1,259 days
6	Date up to which Cost is claimed		30-06-2018
7	Period of delay up to 30.06.2018 ( Extended period of completion)	(6)-(3)	506 days
8	<b>Loss of Opportunity and Profit</b>	<u>(2)X(1) X (7)</u> (5)	<b>INR 201,14,68,205</b>

416. The Claimant is entitled to a compensation of **INR 201,14,68,205/-** towards claim for Loss of Opportunity and Profits on account of execution of Relevant Works for Present Cost Claim in the period beyond 09 February 2017 and upto 30 June 2018.

417. Summary of Claimant's present claims are set out hereinbelow:

- a) A fixed lumpsum price contract was awarded to the Claimant on 6 August 2013 with the object of creating additional capacity of rail freight transportation for an Accepted Contract Amount of INR 6699.5 crores.
- b) The Claimant and the Respondent had reciprocal obligations for completion of the whole work and achievement of milestones within the contractual timeframe.
- c) The Claimant commenced works for execution of Contract. However, there were various Delay Events not attributable to the Claimant.
- d) This entitled the Claimant to EOT for completion of works under Clause 8 of the GCC read with PC.

- e) The Claimant was granted EOT without imposition of Delay Damages and with the benefit for Adjustment for Change in Cost as per Clause 13.8 of the GCC read with PC.
- f) The Claimant had notified the Respondent of its intention to claim Costs incurred and compensation for losses sustained by it during the extended period for completion.
- g) Considering Delay Events accrued up to 31 August 2016 and in view of the continuing nature of Delay Events, the Claimant was granted interim extension of time up to 11 October 2018 for completion of MS-3.
- h) The Claimant had deployed resources such as labour and equipment envisaged in the Contract during the scheduled period of completion but had to retain such resources in the extended period for completion of Relevant Works for Present Cost Claim. Claimant incurred cost beyond that covered in the Contract Price.
- i) The Claimant maintained and retained Onsite and Offsite management in the extended period for which it incurred additional Overhead costs.
- j) One of the additional costs incurred by Claimant in the extended period is cost of Fuel and Power not recompensed by Contract payments i.e. cost of fuel and power catered for in the Contract and adjusted as per Clause 13.8 of GCC read with PC.
- k) As a result of execution of works in the extended period, the Claimant arranged funds to meet the additional Overheads cost during the extended period.

- l) Claimant has also been deprived of the opportunity to redeploy these resources to some other project for commercial gain and earn profits.
- m) The Claimant filed a detailed claim seeking Costs incurred and compensation for losses sustained by it for execution of Relevant Works for Present Cost Claim pursuant to the Engineer's direction/communication dated 11 October 2018.
- n) Due to the extension of time due to Clause 8.4 Delay Events, Claimant incurred additional cost. Additional costs were incurred also on account of Respondent's breaches as well as other factors and specific requirements of the Respondent set out in Section D. The present claim(s) arise from and is based upon the additional costs incurred and compensation for losses/damages suffered by the Claimant in the extended period up to 30 June 2018.
- o) Under the GCC, the Claimant is entitled to all expenditure reasonably incurred (or to be incurred) towards Onsite/Offsite Overhead and related charges during the extended period which *inter alia* includes:
  - (i) Cost on Onsite Overhead incurred in the extended period towards administration Cost, departmental workmen, rental, security services etc. for executing the work.
  - (ii) Offsite Overhead incurred in the Head office / Regional office towards staff expenses, rent, fees, travel etc. for execution of Relevant Works for Present Cost Claim in the extended period.
  - (iii) Retention of Plant & Equipment (which had been mobilized as per the approved programme) beyond the dates set out

in CCP for completion of Relevant Works for Present Cost Claim. The same includes *inter alia*

- a. Equipment owned and deployed by the Claimant beyond the dates set out in CCP
  - b. Hired equipment from equipment suppliers deployed beyond the dates set out in CCP
  - c. Equipment deployed by PRW deployed beyond the dates set out in CCP.
- (iv) Cost of labour *inter alia* highly skilled, skilled, semi-skilled and unskilled labour for undertaking and completing numerous activities such as embankment, earthwork, structures ( concrete, rebar and formwork), blanket, ballast and Track skeleton etc in the extended period.
- (v) Additional Cost of fuel and power to carry out works in extended period.
- (vi) Interest on additional funds arranged by the Claimant to meet Cost on Overheads.
- (vii) Loss of earning capacity and profit.

#### **G. SUMMARY OF CLAIMS AND EXCLUSIONS THEREFROM:**

418. Tabulated chart of Cost incurred, and damages sustained by the Claimant on account of undertaking Relevant Works for Present Cost Claim in the extended period up to 30 June 2018 is set out below:

**Table No. 15**

S. No.	Heads of Cost and compensation for losses sustained by the Claimant from 10 February 2017 to 30 June 2018	Amount (In INR)
01	Onsite overhead	163,15,35,753

02	Offsite overhead	78,70,42,922
03	Plant and Equipment	219,72,50,753
04	Labour	63,52,85,786
05	Additional cost on Fuel	29,29,64,738
06	Interest on additional funds	32,69,14,710
07	Loss of Opportunity and Profit	201,14,68,205
<b>Total Cost incurred and compensation for losses sustained by the Claimant up to 30 June 2018</b>		<b>788,24,62,868</b>

419. While the Claimant has incurred the above cost and losses amounting to INR 788,24,62,868/-, the Claimant has recovered additional payments amounting to **INR 11,96,03,789/-** in respect of track skeleton executed in MS-1 and Variations for which Payments were admitted in the period 10 February 2017 to 30 June 2018. Hence, the Claimant is deducting the said payments/cost recovered by it.

**Table No. 16**

Description	Deductions				
	Overhead	Machinery	Labour	Profit	Total [INR]
Track skeleton executed in MS-1 in the period 10.02.2017 to 30.06.2018	91,11,230	8,04,33,140			8,95,44,369
Variations for which Payments were admitted in the period 10.02.17 to 30.06.2018	81,79,766	39,22,801	1,38,66,970	40,89,883	3,00,59,420
<b>Total</b>	<b>172,90,996</b>	<b>8,43,55,941</b>	<b>1,38,66,970</b>	<b>40,89,883</b>	<b>11,96,03,789</b>

420. Computation of **INR 8,95,44,369/-** and **INR 3,00,59,420/-** towards additional payments in respect of track skeleton executed in MS-1 and

Variations for which Payments were admitted together with relevant documents in the period 10 February 2017 to 30 June 2018 being deducted above is filed as **Exhibit C- 118** and **Exhibit C- 119 (Colly)** respectively.

421. As set out below, the **net claim amount** in the present reference related to execution of Relevant Work for the Present Claims in the extended period from 10 February 2017 up to 30 June 2018 pursuant to the above deductions is for INR **776,28,59,079**.

**Table No. 17**

S. No.	Particulars	Amount (in INR)
1.	Additional costs incurred/damages sustained by the Claimant for undertaking works in the extended period for completion of MS-3 from 10 February 2017 to 30 June 2018	788,24,62,868
2.	Total Deduction towards Cost recovered by the Claimant for the period of 10 February 2017 to 30 June 2018	11,96,03,789
	<b>Net claim amount</b>	<b>776,28,59,079</b>

## H. CLAIM FOR INTEREST

422. The Claimant is a commercial party who has suffered loss on account of being deprived of this significant sum for a long time. Claimant submits that it is entitled to interest on such unpaid sums @ 8% per annum compounded monthly for the period to be reckoned from the date on which such payments became due and payable until the date of actual payment.

423. The Claimant further submits that the obligation to make payments on time is even contractually agreed upon. The Parties had determined that payments due from Respondent to the Claimant shall be made within the period set forth in Clause 14.7 of GCC read with PC. In the event of delay beyond such period, the Parties had agreed as contained in Clause 14.8 of GCC read with PC and ATB that the Respondent shall pay interest for the period of delay calculated at a rate equal to 8% per annum compounded monthly on the amount unpaid during the period of delay, and recovery thereof shall be without any formal notice or certification or without prejudice to any other right of the Parties.
424. Even as per the contractual provisions, the Claimant is entitled to interest on its claims for the period of delay in payment of compensation till the realization of Award in full. The Claimant states that despite its claims, there has been immense delay in payment of its claims.
425. The Claimant submits that the rate of 8% is a reasonable rate prevalent as per the market rate. The statement of interest payable for the delay in payments amounting to INR 271,97,79,569/- is filed herewith and marked as **Exhibit C-120**.
426. Thus, the Claimant is entitled to claim an amount of INR 271,97,79,569/- as interest on delayed claim payments up to the date of filing of Statement of Claim i.e. 30 September 2022 in this regard.
427. Further, the Ld. Tribunal also has wide power under Section 31 of the Arbitration and Conciliation Act, 1996 to award *inter alia* post award interest. The Claimant respectfully submits that the Ld. Tribunal be also pleased to grant post award interest accruing @ 12% until Respondent's full and final satisfaction of the Award.

**I. FURTHER INTERIM EXTENSIONS GRANTED CONSIDERING THE IMPACT OF DELAY EVENTS ACCRUED UP TO 30 NOVEMBER 2017**

428. Since Delay Events were continuing, the Claimant reserved its rights for further EOT on the said count. The Claimant has sought for further EOTs and the Engineer has recommended the same. As on date, EOT of MS-3 considering delay events up to 31 January 2021 is under determination of the Engineer.
429. To date, the Engineer has, from time to time, assessed Claimant's entitlements to Extension of Time as follow:

**Table No. 18**

S. No.	Date of EOT	Cut off date of delay events for EOT assessment	Milestone revised date
1.	12 September 2019 (Communicated Respondent's agreement on 07 October 2021)	30 November 2017	MS-3 – 16 March 2019  MS-4 – 12 June 2019  MS-5 – 22 August 2019
2.	14 September 2020	30 September 2019	MS-3 – 21 October 2019 MS- 4 – 23 October 2019 MS-5 – 01 October 2020
3.	18 October 2021	14 September 2021 (target date of completion of civil works assessed)	MS-5 – 24 September 2021

430. The Engineer has made the aforesaid assessment of Extension of Time for completion of Milestones. As on date, there is no agreement by the

Parties in respect of the said assessment. The Claimant reserves its rights to invoke the provisions of the Contract in respect of all future time and cost evaluations as and when the said issues crystallize.

#### **J. STATUS OF PRIOR DISPUTES BETWEEN THE PARTIES AND EXCLUSIONS FROM THE PRESENT DISPUTE**

431. The present cost claims do not include the cost incurred and damages sustained by the Claimant towards the following:

- (i) Extended stay cost relevant to completion of MS-1 (Civil and track skeleton work from Bhagega to Rewari) during the extended period of MS-3 i.e. from 10 February 2017 to 30 June 2018.
- (ii) Technical Design of the section Bhagega to Iqbalgargh during the extended period from 10 February 2017 to 30 June 2018 and
- (iii) Execution of Works for the stretch from Bhagega to Iqbalgarh for completion of MS-4 and MS-5 during the extended period from 10 February 2017 to 30 June 2018.

The Claimant reserves its rights in respect of the above.

432. Claimant's cost claims due to execution of work of MS-1 in the extended period from 06 August 2015 and Technical Design during the extended period from 30 April 2014 are being dealt separately and not covered in this reference. The Claimant reserves its rights in respect thereof.

#### **K. CAUSE OF ACTION AND LIMITATION**

433. The cause of action for the present claim *inter alia* arose on each and every date the Claimant incurred the additional cost/expenditure /additional payments and compensation for losses/damages set out in Section F. The cause of action further arose when the Claimant was

granted Extension of Time for completion of MS-1 without imposition of Delay Damage. The cause of action further arose when the Claimant *vide* letter dated 30 October 2018 notified its claims for Cost and compensation for losses which were due and payable to the Claimant. The cause of action further arose when the Engineer *vide* letter dated 25 January 2019 erroneously denied the cost and compensation for losses entitlement of the Claimant. The cause of action further arose when the Claimant *vide* letter dated 8 February 2019 notified that a Dispute has arisen between the parties and further notified of its intention to commence Adjudication of Dispute. The cause of action arose on numerous subsequent occasions when the Claimant filed its Request for Decision before the DAB and further when decision was given by DAB on 31 December 2019. The cause of action further arose when the Claimant issued Notice of Dissatisfaction and notified its intention to invoke Arbitration. It is submitted that the cause of action in the present claim is a continuing one and accrues on a day to day basis since the claims of the Claimant for additional cost/additional payments and compensation for losses have not been settled till date and further, since the Claimant's claims for additional cost/additional payments and compensation due to execution of work in period beyond the dates in the CCP continue to arise on a daily basis. Thus, the present claim is within the period of limitation.

## L. JURISDICTION

434. The present claims are within the jurisdiction of this Hon'ble Tribunal pursuant to Clause 20.6 of GCC read with PC the Contract between the parties.

**M. RESERVATION OF RIGHTS**

435. The Claimant craves leave of this Hon'ble Tribunal to refer to all relevant documents and correspondence including those referred to hereinabove, compilation whereof has been separately filed along with the Statement of Claim. The documents presently produced are those that the Claimant deems to be relevant to the Statement of Claim. The ultimate relevant documents to this arbitration will depend upon the issues joined by the Respondent and the precise evidence which needs to be adduced to address those issues and the Claimant craves leave of, the Hon'ble Tribunal to file further documents.
436. The Claimant herein reserves its rights to add or update other or further reliefs and/or alter or amend the statement of claim and produce further documents in support of the claim.
437. The Claimant also reserves its rights to initiate any fresh arbitration for any other cause of actions or claims against Respondent, which may not have been included in the present arbitration.

**N. RELIEF(S)**

438. Reserving its rights to supplement or otherwise amend its claims and the relief requested in connection therewith on any other or further or alternate basis, the Claimant requests the following relief:
- (i) An award granting additional cost/additional payments and compensation/damages in the sum of INR 776,28,59,079/- incurred on account of execution of Works for the completion of Milestone-3 from Bhagega to Iqbalgarh (less Technical Design) in the extended period from 10 February 2017 up to 30 June 2018 or such other amount as the Ld. Tribunal may decide in favour of the Claimant and against the Respondent.

- (ii) Declaration that the Claimant is entitled to receive further sums/additional cost/additional payments and compensation for losses/damages to be computed in the same manner as set out in the Statement of Claim on account of execution of the Works of Milestone-3 for further extended periods (i.e. beyond 30 June 2018) and till all delay events are concluded.
- (iii) Interest on the above amount of INR 776,28,59,079/- @ 8% per annum compounded monthly for the period to be reckoned from the date on which such amounts became due and payable up to the date of the award;
- (iv) Post Award interest accruing @ 12% per annum till the final satisfaction of the Award;
- (v) All costs and expenses of arbitration, including but not limited to the fees and disbursements of the ICC, this Tribunal and the Claimant's legal and associated fees, costs and expenses incurred in connection with and preparation for the conduct of proceedings, fees and expenses of arbitrators and legal counsel, experts and witnesses together with interest on such costs as the Tribunal considers appropriate;
- (vi) Any other orders / directions in favour of the Claimant which may deem fit and proper in the facts and circumstances of the present case.

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**Law Chambers of Megha Mehta  
(Advocate for the Claimant)**

**Dated: 30 September 2022**