IN THE MATTER OF ARBITRATION UNDER THE RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE

ICC CASE NO. 26834/HTG

BETWEEN

SOJITZ-L&T CONSORTIUM

Claimant

-AND-

DEDICATED FREIGHT CORRIDOR CORPORATION OF INDIA LIMITED

Respondent

STATEMENT OF DEFENCE & COUNTERCLAIM

Advocates for the Respondent

AKS Partners

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I. INTRODUCTION

1. This Statement of Defence ('**SOD**') is being filed on behalf of the Respondent, Dedicated Freight Corridor Corporation of India Limited ('**Respondent**' or '**DFCCIL**'), contesting the claims raised by the Claimant, Sojitz - L&T Consortium ('**Claimant**' or '**Contractor**') in its Statement of Claims dated 30 September 2022 ('**SOC**').

2. Based on the claims raised and averments made by the Claimant in its SOC, the broad issues that arise for the Arbitral Tribunal's consideration *inter alia* include the following matters that go to liability:

    a. whether the Claimant can claim prolongation costs considering its own delays (i.e., the Claimant's delays which were concurrent with the delays that led to the agreed EOT of 608 days for events up to and including 30 August 2016),
    b. whether the costs claimed are indeed for the correct period of prolongation (i.e., is the Claimant's entitlement to prolongation costs for cost incurred when the effect of the Respondent's delay was felt in the period up to 30 August 2016 or is it for prolongation costs for the period between 10 February 2017 to 10 October 2018, being the revised date for achievement of MS-3[1]);
    c. whether the heads of cost claimed are compensable in law;

    and the following matters that go to quantum, assuming that liability has been demonstrated:

    d. whether the Claimant has demonstrated its actual loss caused by the events that led to the revision to the date of achievement of an interim milestone (MS-3) or whether the Claimant's claim suffers from a lack of analysis of causality.

[1] The Claimant has claimed cost for the period up to 30 June 2018 and has "reserved" its right to claim for cost between this date and 10 October 2018 (the revised date for achievement of MS-3) (see SOC paragraph no. 10). To the extent that the Tribunal allows the Claimant's claim for cost incurred during the period post 10 February 2017 (which, in the Respondent's view, is not the correct period for assessing prolongation costs), it is the Respondent's position that the Claimant ought not to be allowed to bring a further claim for any cost in the period between 30 June 2018 to 10 October 2018 arising from the events that had an impact until 31 August 2016 on the *Henderson* principle which requires a party to bring all its claims arising from the same cause of action in the same proceedings.

3. Furthermore, to the extent the Claimant has relied on certain alleged delay events accruing after 31 August 2016 to found the basis of its assessment of costs,[2] such matters are outside this reference and the Tribunal does not have jurisdiction to consider those claims. This is elaborated further in Section III below.

4. The Statement of Defence is structured in two main sections. The first sets out the factual background to the events that are the subject of the Claimant's claim and the Respondent's position thereto. The second is a shorter section that sets out in a paragraph-wise form a response to the paragraphs to which there is not already a response in the first section.

II. FACTUAL BACKGROUND

A. The Project

5. The Dedicated Freight Corridor is an important public infrastructure project in India for setting up high-speed rail dedicated to the movement of freight and cargo. It will play an important role in reducing the cost of transportation, boosting the Indian economy, and bringing millions out of poverty. The Dedicated Freight Corridor consists of two parts: The Eastern Dedicated Freight Corridor between Ludhiana (Punjab) and Dankuni (West Bengal), and the Western Dedicated Freight Corridor between Dadri (Uttar Pradesh) and Mumbai (Maharashtra) in India.

6. The present arbitration proceedings are in relation to the stretch of track between Rewari (Haryana) and Iqbalgarh (Gujarat) on the Western Corridor of approximately 648 kilometres. However, the actual stretch of Track Skeleton works for MS-3 as per the Contract Agreement runs from Dabla to Iqbalgarh is 569.39 kilometres.

B. Contract Price and Adjustments thereto

[2] Section D of the Statement of Claim.

7. The lumpsum Contract Price under 'Schedule 3: Price Schedule Submission by Bidder' is INR 6699,50,00,000 (Six Thousand Six Hundred Ninety-Nine Crores Fifty Lacs) ('**Contract Price**'). This was the sum total of the bids in four different currencies—Indian Rupees, Japanese Yen, United States Dollar, and Euro.

8. The Contract Price was to cover the entirety of the Claimant's scope to design, procure and construct the project works ("the Works"). Clause 4.11 of the GCC states that the Contractor shall have taken into consideration all aspects while quoting the Accepted Contract Amount (which became the Contract Price[3]) and shall have satisfied itself as to both, the correctness and the sufficiency of the Contract Price. Clause 4.11 is reproduced below:

> ***4.11 Sufficiency of the Accepted Contract Amount***
>
> *The Contractor shall be deemed to:*
> *(a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and*
> *(b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10 [Site Data] and any further data relevant to the Contractor's design.*
>
> *Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor's obligations under the Contract (including those under Provisional Sums (if any) and all things necessary for the proper design, execution and completion of the works and the remedying of any defects.*
>
> (emphasis supplied)

9. Clause 13 of the GCC refers to Variations and Adjustments to the Contract Price. The permissible Adjustments under clause 13 of the GCC read with the PCC provide. *Inter alia*, for the following:

[3] Contract Clause 14.1

(i) Variations to the Contract *i.e.*, where there was a change in the work / scope of work and the manner of their assessment (clause 13.1–13.3 & 13.6 of the GCC/PC);

(ii) Price Adjustment for change in legislation (clause 13.7 GCC/PC);

(iii) Price Adjustment for change in cost (clause 13.8 GCC/PC).

10. The Engineer made several assessments / determinations in respect of Variations for which additional costs, overheads, and profits were allocated towards deployment of additional resources (*i.e.*, manpower, materials, and equipment) along with a stipulation as to time for completion of the Variation work. The Respondent made payments for Price Adjustment under GCC Clause 13.8 [amended in the PCC] through Interim Payment Certificates ('**IPCs**') including in the period post 17 February 2017. While it is the Respondent's primary position that the period for which the prolongation cost is being claimed is wrong. The total amount of payments made towards Price Adjustment under various IPCs (IPC nos. 40–56) in the extended period alone *i.e.*, from February 2017 to June 2018 aggregates to over INR 111 crores. As explained in detail in paragraphs 230 to 339 below, the Claimant's claim for prolongation costs does not take into account the extent to which the matters for which it is claiming additional cost is already the subject of compensation through the Price Adjustment mechanism. To this extent, the quantum for the costs and entitlement to compensation claimed during the period February 2017 to June 2018 amount to double-recovery.

C. Timeline for the Contract and significance of Milestones

11. The time for completion of the entire project was set at 208 weeks from the date of commencement.[4] It is not in dispute that the date of commencement was 30 August 2013. Accordingly, the project was supposed to be completed on or before 24 August 2017. The Contract stipulated certain milestones, which were designated as MS-1 to MS-5. These milestones were stipulated to be completed in terms of the timelines referred to in clause 8.2 of the PC and the Appendix to Bid ('**ATB**').

[4] Clauses 8.1 & 8.2 of the Contract

Milestone	Description in ATB	Time period
MS1	Completion of Civil and Track Skeleton works Dabla-Rewari	120 weeks (840 days)
MS2	Commencement of all Civil & Track works for Commencement of Testing of Prototype Loco Dabla-Rewari	135 weeks (945 days)
MS3	**Completion of Track Skeleton for entire Package: 180 weeks (1260 days) 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)**
MS4	Completion of all Civil & Track works for Commencement of Integrated Testing & Commissioning	196 weeks (1372 days)
MS5	Completion of all works by Contractor and Taking over of Works by Employer	208 weeks (1456 days)

12. It is important to bear in mind that the aforementioned milestones are not stage-wise payment-related milestones that would entitle the Claimant to any specified amount if the milestone has been reached regardless of the extent of the completion of the entirety of the Works. The milestones were only time-related, inserted in the Contract with the sole objective of ensuring interfacing and coordination and commencement of works of the other contract packages.

13. Thus, while the timely achievement of individual milestones was important, as can be seen from the provisions entitling the Respondent to levy liquidated damages if the milestones are not achieved by the date originally scheduled or as modified[5], the timely completion of the overall project was of paramount importance to the Respondent. For this reason, clause 8.7 of the GCC/PC (pertaining to 'Delay Damages') prescribes that delays by the Contractor in achieving one milestone could be offset by the early or timely completion of a subsequent milestone.

14. While the above is in relation to the grant of an EOT/levying of Delay Damages, when one considers this in the context of a claim or prolongation costs, it can be seen that

[5] Contract Clause 8.7 as amended by the Particular Conditions

any claim raised by the Claimant—whether interim or otherwise—prior to the completion of MS-5 would be premature and speculative. This is because the Contract is a Design Build Lump Sum ('**DBLS**') contract where the Claimant is required to complete the overall project. The Claimant can only properly ascertain its loss (if any) upon the achievement of MS-5 *i.e.*, when the entire expenditure / loss (if any) would be crystallised. This is because the Contract does not segregate the work that is required for MS-3 as separate from that which would also be required for subsequent milestones (MS-4 and MS-5. Given that delays in earlier intermediate milestones could be excused by timely achievement of later intermediate milestones, were the Claimant to make a claim for additional cost in relation to the prolongation of an intermediate milestones, the Claimant must exercise utmost care in identifying which particular cost is "additional" as the result of matters for which the Respondent is responsible and demonstrate that such "additional" cost is properly demonstrated as being "additional" (i.e. that it is not already the subject of compensation through the payment of IPCs in relation to other milestones). The Tribunal will be requested to scrutinise the Claimant's cost claimed with this principle in mind and to dismiss the Claimant's claim if it is not able to satisfactorily "carve out" the cost that is truly "additional".

15. Merely stating that claims are of an 'interim nature' would not protect the Claimant against the danger identified above. In the Claimant's case, as presently pleaded, there is a real danger that the Claimant will reap the benefit of multiple claims, which are overlapping. Therefore, the Respondent invites the Claimant to withdraw its present claim (with the payment of costs wasted as a result) and to bring its claim once it has achieved MS-5. Should the Claimant fail to do so, and it continues to take steps in this arbitration post-receipt of the Statement of Defence, the Respondent will request the Tribunal to dismiss the Claimant's claims "with prejudice" so as to disentitle the Claimant from bringing claims arising from the same cause of action at a later stage.

D. Cost Centres

16. The Contract Price payable under the Contract was distributed under 'cost centres' (or Price Schedules) described in Schedule 4 of the Contract. The cost centres, and their breakup in the Price Schedule, were a means of facilitating interim payments based on

extent of completion of the Works[6]. That was the only relevance of the cost centres; the breakdown in the cost centre was not reflective of the value of the particular items of work. It is relevant to note that the cost centres were distributed across the project and were not for any specific milestone of the project works. For example, station buildings, junctions, miscellaneous civil works and even some elements of track works could be completed at any stage and claimable under any of the milestones; they were not fixed to a particular milestone. This can be seen from the major cost centres and their apportionment according to the percentage of Contract Price, which is tabulated below:

S. No.	Cost Centre	Percentage of Contract Price (%)
1.	Validation of Survey Data, Investigation, Design, Setting out and 'As Built Drawings'	**2.11**
2.	Major Structures	**17.5356**
	2.1 Important Bridges / Viaducts	6.9543
	2.2 Major Bridges	8.1996
	2.3 RFO	0.5664
	2.4 ROB	1.8153
3.	Minor Structures - Minor Bridges, RUB and Sub-way	**12.1290**
4.	Earth Work	**22.1070**
5.	Junction / Crossing Stations	**1.4231**
6.	Miscellaneous Civil Works	**1.0930**
7.	Station Buildings including Residential Quarters and Non-traction Power Supply & Distribution	**3.0132**
8.	Track Works	**38.5891**
	8.1 Main Line	33.3321
	8.2 Yards	5.2217
	8.3 Signage	0.0354
9.	Integrated Testing and Commissioning	**2.00**
	Total	100%

Table 1: Cost Centres

17. The Contract makes it clear that the Contractor is entitled to payment for the work completed only. In this context, clause 14.4 is reproduced below:

[6] Clause 14.4 of PCC of the Contract

14.4 Schedule of Payments

The Employer shall make interim payments to the Contractor as certified by the Engineer under Sub-Clause 14.6 on the basis of the payment stages defined in the respective Price Schedules for the Works executed as determined in accordance with the following procedure:

(a) The Price Schedules 4.1 to 4.9 lay down the frame work for estimating the value of stages of work completed. The Price Schedules specify the Contract Price for the Works offered by the Contractor and accepted by the Employer, along with the estimated value of work of different cost centres. The description of items of work in the Schedules does not limit in any way the Contractor's obligations under the Contract to provide all the Works described in the Employer's Requirements.

(b) The entire Works have been divided into Nine (9) cost centres along with their respective weightage percentages of the Contract Price in Schedule 4 of section 6. Each of the cost centres has been broken into items of works with percentage weightage of the Contract Price to items of the works/stages as indicated in Schedules 4.1 to 4.9.

(c) The Bidder shall compute, and supply to the Engineer, the total quantities (in units as described in the Price Schedule-4 of section -6 Financial Submissions) of various items of works and components on the basis of detailed design reviewed/approved by the Engineer.

(d) The Contractor shall base its claim for interim payment for each stage for various items of the work on completion till the end of the month for which the payment is claimed, supported with documents and an up-dated programme in accordance with the Employer's Requirements.

(e) The weightage/percentage assigned to cost centre will apply only to the Contract Price stated in the Contract Agreement. It shall not apply to any additions or subtractions to the Contract Price arising from the issue of any Variation Orders.

Each Variation Order shall specify the manner of interim payments and completion of stages for it.

(f) For items of unchartered utilities, extra payment over and above the Contract Price shall be made in accordance with variation proposals made on case-to-case basis as per the provisions of Contract. Contractor shall make a detailed report/ proposal for removal/ relocation of unchartered utilities as per the procedure outlined in "Employer's Requirement, Vol. II of the Bid Documents."

(emphasis supplied)

E. The project works were not 'linear' and did not necessitate sequential execution as wrongly alleged by the Claimant

18. Contrary to the Claimant's assertion in SOC paragraph 42 that "the linear Project was milestone based", the project was not 'linear'. The linearity of the physical alignment, or indeed that the NTC machine "operates in forward linear direction"[7], does not dictate the manner in which the execution of the Works is to be carried out; as the Claimant's pleaded case states, the entire "linear" route length was divided by the Claimant into four "packages" and each package was subdivided into "21 sections"[8], much of the work in which was to be "progressed concurrently"[9]. Linearity of the project is only in terms of its geographical stretch only and not in terms functional linearity requiring a strict sequential execution of the works. This is also reflected in the approved baseline programme, as explained below.[10]

19. Under the Contractual Construction Programme ('**CCP**'), the construction work was divided into four parts— Part (A) from Bhagega to Rewari, Part (B) from Bhagega to Madar, Part (C) from Marwar to Madar, and Part (D) from Marwar to Iqbalgarh. Various activities had to be carried out in each of the four parts such as the following, among others—

• Utility Diversion

[7] SOC paragraph 40
[8] SOC paragraph 75
[9] SOC paragraph 76(f)
[10] Ref to baseline

- Earthwork and Embankment
- Bridges
- Buildings, Stations, Depots & Misc. Works
- Permanent Way.

20. In each of the four Parts A, B, C, and D, various activities were to commence and continue in parallel, and not in linear manner. Permanent Way, which contains track work, is only one of the elements of the work. All the items of the Work were programmed to progress in parallel on all sections. The entire stretch of pre-track-linking works between Rewari and Iqbalgarh could be carried out simultaneously and there were no limitations on how the Claimant should have undertaken the activities.[11] Only the works related to initial readiness for carrying out track Skelton work w.r.t. MS-1 were required to be executed sequentially and all other activities were required to be under taken parallel including track linking.

21. The non-linear nature of construction of the Works can also be seen from Clauses 8.1 & 8.2 of the Contract which stipulate that the time for completion of the entire project was 208 weeks from the date of commencement. This time for completion of work was not proportionately divided across the milestones as a factor of the length/linearity of the works comprised in that milestone. The bar chart below illustrates that the intent of the Parties while entering into the Contract was the milestones were not to be taken up sequentially, but simultaneously:

[11] The only caveat was that MS-1 and MS-2 works had to be given some priority so that the prototype locomotive could be run and tested on the track in time for completion as per the schedule.

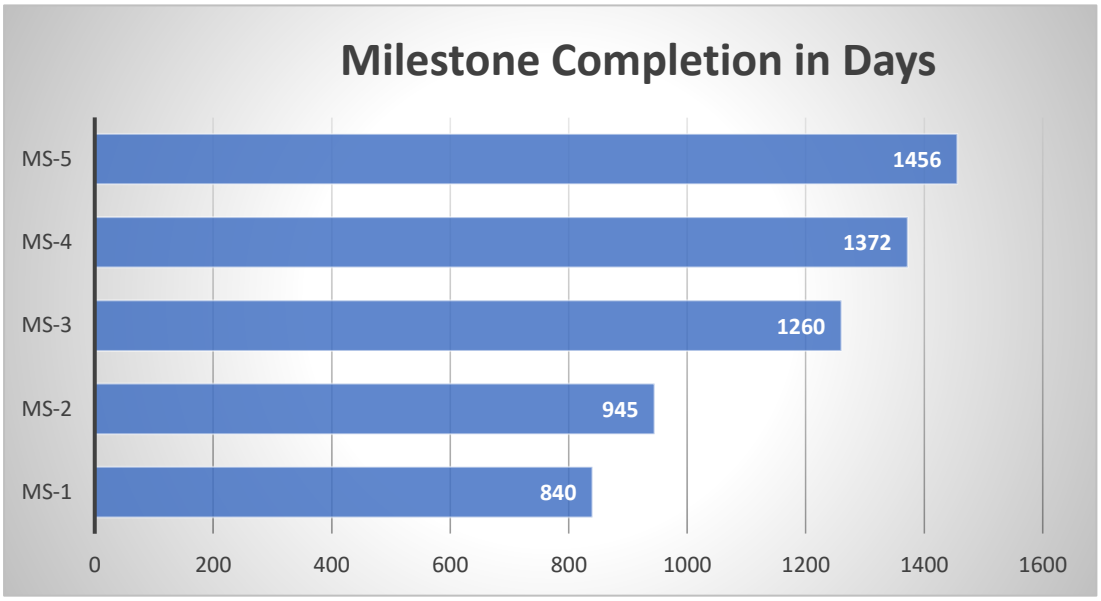

Figure 1: Milestone Bar Chart

22. The Respondent does not contend that all Works could be executed simultaneously; certain elements of the work would logically precede other elements. This, however, would depend on the specific activity and would be restricted to the location where the activity was being carried out. Therefore, for example:

a. Generally speaking, survey and design would precede procurement and construction activities. Similarly, integrated testing and commissioning, by its very nature, would occur after construction activities are complete to the extent necessary for integrated testing and commissioning.

b. However, it was not necessary that <u>all</u> survey and design activities would have to be completed before start of the construction phase[12]. In fact, as per the Claimant's CCP itself,[13] construction activities were to commence on 18 November 2013, although the design and engineering phase was scheduled to be completed only on 16 April 2014 (having commenced on 01 October 2013). Therefore, as and when the design approvals for certain sub-activities were received, construction could commence for those sub-activities.

[12] The Claimant was to commence its works as per planned sequence which involves design and execution in a parallel basis as per Employer's Requirements [Design] under Clauses 4(11) and 10. See also the CCP which reflects this parallel execution of parts of the Claimant's scope of Work.
[13] Exhibit C-6 @ p. 3444 of the SOC.

c. It was not necessary for the construction activities to follow a linear path. While it was necessary for certain structures to be completed before track-linking work could proceed, it was not necessary for each structure to be complete before track works could be progressed. Certain items, such as stations and Road Over Bridges ('ROB'), could be constructed independently of track works i.e., they could be completed even after completion of track laying.

d. The activities were to start 'in parallel' and there existed no end-to-end dependency of activities. Even the Claimant in its 'Narrative to CCP' has defined the different phases of the project contemplating that "while the above phases are distinct in function, they are not mutually exclusive and overlap in their time schedule."

e. Execution of formation / earthworks could, and were planned to, have been carried out across different stretches simultaneously. This means that in the event that one stretch / length of a section was not available for any reason, the activity of formation/earthwork did not need to stop; it could have progressed at a different location. Hence, non-availability of a continuous stretch could not have been the cause for delay of earthwork / formation completion in other stretches / lengths of the project where sufficient land was available.

f. The SOC lays a lot of emphasis on delays to Road Under Bridges ('RUB') as a cause for the Claimant's additional cost. While the Respondent will respond to the detail of this claim in due course, at this stage, it must be highlighted that it was not necessary for the RUB to be completed in its entirety before the laying of track. It is possible to advance the construction of the RUB box to the extent required for the track-laying activity to progress even though the entire RUB cannot be completed prior to the laying of track. This is evident from the Engineer's assessment of extension of time ('EOT') and letter dated

17 March 2016 enclosing the Minutes of Progress Review Meeting dated 14 February 2016.[14]

23. Even for track-linking works, and contrary to the Claimant's contention in paragraph 76(a) of the SOC, the Contract contemplated at least 2 NTCs to be fed by 2 depots—at Bhagega and at Marwar.[15] This meant that work of track linking could proceed in parallel on at least two fronts, and on more than two fronts if additional NTCs were deployed. Therefore, track linking was not merely a 'forward linear' activity as projected by the Claimant. In fact, the sequence of track laying as per the CCP shows that the Claimant in Sequence 1 (Bhagega to Rewari) and Sequence 3 (Marwar to Madar) envisaged to lay and link the tracks in the opposite direction. Besides, the track-linking in Bhagega towards Iqbalgarh (Shrimadhopur) was executed prior to track-linking work in Rewari-Bhagega.

F. The Claimant overlooked the fact that the Contractual Completion Programme was a 'live document'

24. The CCP was the Claimant's proposal on how it proposed to proceed with the activities pertaining to the project works. The CCP describes itself as a "live document".[16] This reflects that the CCP was dynamic and adaptable to change as per the changing circumstances and the ground realities at site, with the objective of achieving completion within the time stipulated. Few aspects must be noted in this regard:

a. The Contractor was contractually obligated to plan its activities for achieving completion of the project by the time for completion, which is why the CCP was to emanate from the Claimant.

b. The agreement by the Engineer and the Respondent to the CCP represented the Parties' understanding as to what appeared to be reasonable for achieving the timely completion of the overall project at the time the CCP was prepared. Approval of the CCP did not mean that it was set-in-stone or that it could not

[14]Exhibit R-82.
[15] Part -6 [Contractor's Technical Proposal] of the Contract Agreement.
[16] Exhibit C-6 of the SOC.

be altered given a change in circumstances. Pertinently, the consent of the Engineer to the CCP was based on the then current project conditions which, were the project conditions to change, could be monitored, and the CCP updated and revised[17].

c. The CCP was only an initial programme submitted by the Claimant. It ought to have been revised taking into account the changing circumstances. However, the Claimant failed to provide any updates to the CCP or revised programmes in breach of the obligation to do so under Contract Clause 8.3.

Furthermore, whenever the CCP ran inconsistent with the Claimant's obligations or with the actual progress of works, or where the works had fallen behind the programme submitted by the Claimant, the Engineer could instruct the Claimant to revise the CCP, pursuant to Contract Clause 8.6, and the Claimant would have to comply.

25. Paragraph 5 of Appendix 5, Volume II of the Employer's Requirements ('**ER**') also stipulates that the purpose of having a CCP was that it "shall serve as the base against which the Contract progress shall be monitored." However, while placing reliance of Paragraph 5 of the Appendix 5, Volume II of the ER, the Contractor has omitted to mention the following stipulations for revision of CCP, which are relevant. Paragraph 5.3 and 5.4 of Appendix 5, Volume II, ER are reproduced below:

"***5.3*** *If, at any time, actual progress is too slow to complete in the Time for Completion, and/or progress has fallen (or will fall) behind the current Contractual Construction Programme, then the Engineer shall instruct the Contractor to submit a revised Contractual Construction Programme and supporting report describing the revised methods and resources which the Contractor proposes to adopt in order to expedite progress and to complete the Work within the Specified Time for Completion as stipulated in Clause 8.6 [Rate of Progress] in the Conditions of Contract.*

[17] Clause 5 of Appendix 5 (Employer's Requirements)

5.4 *Any changes to the Contractual Construction Programme shall be subject to the consent of the Engineer and shall not relieve the Contractor of his responsibility to complete the Work within the Time for Completion as per the Contract.*"

(emphasis supplied)

26. On several occasions, the Engineer notified the Claimant that the CCP should properly be revised and updated,[18] and to submit the recovery plan (including in the meetings held in July 2014,[19] August 2014,[20] October 2014,[21] December 2014,[22] February 2015,[23] and May 2015.[24]) However, the revised programmes that were submitted by the Contractor were not in line with the contractual completion dates for various milestones and hence were not acceptable. The revision to the CCP had to be such that the progress of the work met the requirements of timely completion under the Contract as per the then current completion date. A failure to revise the CCP amounted to a breach of the Claimant's obligations under clauses 8.3 GCC/PC and 8.6 GCC/PC. What this means is that even though the circumstances of the Project changed, the Claimant did not submit acceptable revised programmes to reflect the changed circumstances. Furthermore, at no point in time did the Claimant communicate to the Engineer or the Respondent the basis of its CCP in terms of the labour, plant and machinery, and overheads, that would be required for achievement of the project works. The absence of a 'resource-loaded' programme and of revisions to the CCP from the Claimant prevent a reliable assessment to be made of its prolongation costs.

III. THE CLAIMANT APPEARS TO RELY ON ALLEGED DELAY EVENTS ACCRUING AFTER 31 AUGUST 2016

[18] In this regard, the Parties' communications may be referred to, including communications marked as Exhibit R-16, Exhibit R-69, Exhibit R-74, Exhibit R-174, Exhibit R-176, Exhibit R-182, Exhibit R-206, and Exhibit R-214, etc.
[19] Exhibit R-17.
[20] Exhibit R-19.
[21] Exhibit R-24.
[22] Exhibit R-38.
[23] Exhibit R-43.
[24] Exhibit R-55.

27. In Section D of its SOC, the Claimant appears to rely on delay events that occur after 31 August 2016, the cut-off date for the delay events that are the subject of this arbitration.

28. We say "appears to rely" because the Claimant has made cost claims for the extended period from 10 February 2017 to 30 June 2018 without reference the delay events that occurred or continued to have effect post 31 August 2016; it appears to be relying on these additional delaying events to somehow support its calculations and quantification that it had already submitted on 30 October 2018. But it does so without indicating which how much of its cost claim was the result of delay events pre-31 August 2016 and how much of it cost claim was incurred due to events post 31 August 2016. The Claimant contends that the delay events pre-31 August 2016 had a cascading effect thereby resulting in the delay events post 31 August 2016.

29. If the events post 31 August 2016 are being relied upon just "by way of information" and not to substantiate its cost claimed, no particular difficulties arise. However, should the Claimant wish to rely on delay events occurring or continuing after 31 August 2016, a serious jurisdictional issue arises as we explain below. Unless the Claimant clarifies otherwise in its responsive pleading, the Respondent will assume the latter of the two positions set out above and, in that event, the submissions below would be apposite.

30. According to the Claimant, these delay events continuing or occurring after 31 August 2016 form the cause of action for claiming compensation in the extended period of the Contract *i.e.*, 10 February 2017 to 30 June 2018[25]. The Respondent, without prejudice to its other defences, submits that any purported cause of action and claims based on alleged delay events after 31 August 2016 are not part of the current reference and the Tribunal does not have jurisdiction in relation to these matters.

[25] Exhibit R-215.

31. To this end, it is important to briefly discuss the underlying events prior to initiation of the present arbitration as well as certain material facts and events thereafter, which are relevant for proper adjudication in the present arbitration.

A. The provisions of the Contract dealing with the Pre-Arbitral Procedures

32. Clause 20 of the GCC sets out the procedure for resolution of any disputes arising in relation to the Contract.

33. It is provided that if the Contractor considers itself to be entitled to any extension of time for completion and/or any additional payment, it shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware of the circumstances giving rise to the claim.

34. Within 42 days of becoming aware of the circumstances giving rise to the claim, the Contractor is expected to provide the Engineer with a fully detailed claim with supporting particulars. Within 42 days of receiving the claim, the Engineer shall respond with approval or disapproval, with detailed comments. The Engineer is required to determine the amount of any additional payment in accordance with clause 3.5 of the GCC (*i.e.*, the Engineer shall endeavour to reach an agreement in consultation with the parties, and failing an agreement, shall make a fair determination, in accordance with the Contract, taking due regard of all relevant circumstances.

35. Any dispute arising from the Engineer's determination is to be referred to a Dispute Adjudication Board ('**DAB**'). If either party is dissatisfied with the decision of the DAB, it may give a notice of dissatisfaction to the other party. Pursuant to a notice of dissatisfaction, the parties may attempt to amicably settle the matter. However, unless the parties otherwise agree, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

36. The Respondent submits that in respect of delay events that have allegedly occurred after 31 August 2016, the procedure set out in Clause 20 of the GCC has not been

followed and therefore any claims arising from these purported delay events fall outside the scope of the Tribunal's jurisdiction in the present proceedings.

37. The 'Respondent's Submissions on Preliminary Objections to Jurisdiction and Admissibility of the Claimant's Claims' submitted before the present Arbitral Tribunal on 08 September 2022 detail all relevant facts and contractual provisions in this regard. These matters are not part of the current reference and therefore, the Tribunal does not have jurisdiction to consider these matters.

B. Claimant's application seeking extension of time against delay events up to 31 August 2016

38. The genesis of the present dispute lies in the application and subsequent grant of EOT to the Claimant in relation to MS-3 arising out of the delay events up to 31 August 2016. The following timeline in relation to the Claimant's EOT requests must be considered:

20-10-2014	Initially, the Claimant sought interim EOT for delay events accrued up to 30 June 2014. [SLT letter no. SLT/1200 dated 20-10-2014] (for MS-1 to MS-5)
03 November 2015[26]	Initially, the Claimant sought interim EOT for delay events accrued up to 31 January 2015. (for MS-2 to MS-5) Subsequently, the Claimant requested the Engineer to withhold the determination of EOT of MS-3 till interim EOT of MS-2 as on 31 January 2015 was settled between the Claimant and the Respondent.
28 June 2016[27]	The EOT for MS-2 for delay events as on 31 January 2015 was accepted by the Parties up to 16 September 2016.

[26] Exhibit R-70.
[27] Exhibit R-102.

28 November 2016[28]	While the Engineer's assessment with regards to MS3, MS4 and MS5 for delay events as on 31 January 2015 was pending, the Claimant issued another letter whereby it claimed EOT for MS-3, MS-4 and MS-5 for delay events accrued up to 31 August 2016. By virtue of this revised EOT claim, the earlier delay events up to January 2015 got subsumed in the delay events up to 31 August 2016. Thus, the Claimant elected to abandon its earlier claim considering its revised EOT claim on 28 November 2016.

Table 2: Timeline for EOT Applications

39. In the letter dated 28 November 2016, the delay events were categorised under the following heads:

a) The Engineer's consent/NONO to Contractor's design documents were delayed beyond the review periods stated in the Contract.

b) Change in the law requiring prior Environmental clearance [EC] for the State of Rajasthan to issue lease for mining of minor minerals having an area less than 5Ha and delay in granting EC due to various Authority delays and NGT stay.

c) Delay caused to commencement of RUB, due to variations in the Employer's requirements/ reasons not attributable to Contractor

dl Non handing over of unencumbered possession of land/ Right of way within such periods stated in the Contract

e) Delay/ disruptions to shifting/ diversion of Charted and Uncharted utilities due to various Authority delays.

f) Delay caused to the work due to paucity of cash flow

[28] Exhibit R-121.

g) Delay in commencement of track skeleton work of MS3 due to delay impacted to MS1 and impact of Cl 8.4 delay events to the track skeleton work of MS3

h) Impact of delay caused to MS3 to other Project milestones (i.e., MS4 and MS5)

40. It is relevant to take note of the Claimant's own stand in paragraph no. 5 of the above letter:

5) Delay events stated in Appendix - CE10.a was not concluded on 31.08.2016, therefore, EOT of MS3, MS4 and MS5 sought in this submission is also 'interim'. Contractor reserve its right to submit particulars seeking further EOT of MS3, MS4 and MS5 at regular intervals, till all delay events are concluded.

From the above it is clear that at least insofar as the Claimant's claim for EOT was concerned, it was restricted to delay events up to 31 August 2016 and not for any events after the said date.

41. At this juncture, it is important to note that the Claimant in its letter did not claim additional / prolongation costs and / or compensation for the same delay events forming the basis for its EOT claim.

C. Engineer's determination of the Claimant's application seeking extension of time

42. On 24 August 2017, the Engineer recommended EOT of 608 days for MS-3 against delay events accrued up to 31 August 2016.[29] The revised date for completion of MS-3 was recommended as 11 October 2018. It is relevant to note that the delay events analysed in paragraphs nos. 3.4–3.9 of the above letter[30] were all prior to 31 August 2016, which is in line with what was claimed by the Claimant.

43. The following delay events were accepted by the Engineer in EOT determination 24 August 2017

[29] Exhibit C-16, CD 15–17, paragraph no. 7.3 @ p. 8672 of the SOC.
[30] Exhibit C-16, CD 15–17, @ pp. 8572–8590 of the SOC.

"b) Change in the law requiring prior Environmental clearance [EC] for the State of Rajasthan to issue lease for mining of minor minerals having an area less than 5Ha and delay in granting EC due to various Authority delays and NGT stay.

c) Delay caused to commencement of RUB, due to variations in the Employer's requirements/ reasons not attributable to Contractor

dl Non handing over of unencumbered possession of land/ Right of way within such periods stated in the Contract

g) Delay in commencement of track skeleton work of MS3 due to delay impacted to MS1 and impact of Cl 8.4 delay events to the track skeleton work of MS3"

The majority of these accepted delay events fall under Clause 8.5 [Delays by Authorities] of GCC of the Contract Agreement which entitles the Claimant for Extension of time without any cost entitlement.

44. The Parties consented to the assessment of the 608-day EOT. The Contractor gave its no objection to the EOT assessment on 10 October 2017[31] whereas the Employer consented to the EOT assessment on 08 August 2018[32]. Accordingly, the Engineer notified the agreement between the Parties on EOT for MS-3 on 10 August 2018.[33] As a result, the completion date for MS-3 was revised from 09 February 2017 to 11 October 2018.

D. Claimant's subsequent cost claims linked to the grant of 608 days' extension of time for MS-3

45. It is only after the agreement of the Parties with regards to the EOT of 608 days was notified by the Engineer that the Contractor sought to raise its cost claims for the delay events accrued up to 31 August 2016 *vide* its letter dated 30 October 2018.[34] It is

[31] Exhibit R-165.
[32] Exhibit R-210.
[33] Exhibit C-19 @ p. 9136 - 9137 of the SOC
[34] It is relevant to mention that prior to the above cost claim dated 30 October 2018, the Claimant on 10 October 2018 submitted a separate EOT claim before the Engineer for the delay events accrued up to 30 November 2017 while reserving its right to claim additional cost as against the said delay events.

pertinent to mention that instead of claiming additional / prolongation costs in respect of the delay events for the period up to 31 August 2016, the Claimant sought all costs incurred by it for carrying out the work of MS-3 in the extended period *i.e.*, from 10 February 2017 to 30 June 2018. The total sum claimed was INR 906,16,65,257 plus interest.

46. In line with the observations of the DAB,[35] the Engineer also commented in its preliminary response dated 25 October 2019 on the non-eligibility of the Claimant's the cost claims. Referring to clause 20.1 of the GCC, the Engineer *inter alia* observed that a claim for additional / prolongation cost or compensation must pertain to the 'actual period' of delay and not the 'extended period' of delay. Evidently, the Claimant had sought claims from 10 February 2017 to 30 June 2018. The Engineer, however, allowed the Claimant to furnish particulars and details of the additional cost(s) incurred during the actual period of delay *i.e.*, up to 31 August 2016 so that it could properly determine the Claimant's cost claims.

47. However, instead of providing the requisite details as sought by the Engineer, the Claimant elected to approach the DAB when in fact no dispute had yet arisen between the Parties.

E. Proceedings before the Dispute Adjudication Board

48. The Claimant in its Request for Decision dated 31 August 2019 before the DAB prayed that it was entitled to INR 906,16,65,257 plus interest towards cost / damages due to the execution of the MS-3 works "in the extended periods up to 30 June 2018. The reasons and justification provided by the Engineer to deny the claim is not in accordance with the Contract and Law applicable to it." Pertinently, there was no mention of any delay events after 31 August 2016 by the Claimant, let alone such events forming the cause for claiming any corresponding additional cost.

49. In its decision dated 31 December 2019, the DAB agreed with the Engineer's observation. It *inter alia* held that the Claimant could only be held entitled to claim the

[35] Clause 4.11 of the GCC.

actual extra cost and not the notional cost for the period far exceeding the period for which delay had been analysed and agreed by the Parties *i.e.*, up to 31 August 2016.[36] It was further held that the Claimant has not provided any supporting details for the period of delay as sought for by the Engineer. In the absence of such details, the DAB noted that it could not have considered the Claimant's cost claims.

"32. The Engineer while determining the extension of 608 days considered only those delays for which Contractor was not responsible with the sole purpose of ascertaining delays not attributable to Contractor so that he has not imposed L.D under 8.7 He did not at all consider the concurrent delays which he would have surely considered, had the Contractor claimed cost simultaneously while applying for EOT. The intent of Engineer is very clear from the reading of an extract of his determination at page 1026 of Vol. III reproduced below:

I) "Non submission of detailed claim on additional payment should not be the reasons to prevent the Engineer from assessing EOT for completion. However, the Contractor cannot be entitled to any claim unless such particulars are submitted to Engineer for review and determination.

Accordingly, the contractor's request for submitting the details of additional cost if any at a later stage has been considered in line with the provisions of FIDIC CL.20.1 and the Engineer Shall proceed with determination of claim on EOT and the claim on additional payment (if any) separately.

With this understanding, the Engineer has analysed the Contractor's claim of further EOT for MS 3, 4 and 5 above."

However, when the Contractor later claimed cost for all the 608 days, the Engineer at page 1036 at para 3.5 has remarked " ... it may be noted that the delays attributable to the Contractor (concurrent to ·the determination of EOT of 608 days) shall not be eligible for any claim"

[36] Para 34.1.2 of the DAB's decision: "The Contractor is entitled to only claim the actual additional cost during the period of delays and not up to the period of extension."

Thus, the Engineer did intend to discuss about concurrent delays while determining costs under 3.5. In absence of any analysis and consultations between the Engineer and Contractor as was required under 3.5, the DAB cannot quantify the number of days for which Contractor would be entitled for cost for delay events up to 31/08/2016 in respect of MS 3. As already stated, the DAB cannot become the first level of examination of claim. We can only rule at this stage that the Contractor is entitled to cost on account of delays to the extent of 608 minus concurrent delays."

50. It is apparent that the Claimant did not raise the issue of its entitlement arising from delay events after 31 August 2016 before the Engineer or the DAB. This is evident from not only the assessment of the Engineer and the DAB, but from the submissions made by the Claimant before the Engineer and the DAB. The following documents shed light on this:

a. Appendix CC6a to Cost Claim by Contractor up to 30 June 2018:

i. At paragraph no. 14,[37] only delay events up to 31 August 2016 are listed as the delay events relating to the cost claim.

ii. At paragraph no. 20 of this submission, the Claimant stated the following:

"*20. Interim extension of time for completion of MS3 granted up to 11.10.2018 (as determined by the Engineer) <u>was due to excusable delay events accrued up to 31.08.2016</u> and Contractor is no way responsible for the consequence accruing from it. In other words, the events which delayed MS3 up to 11.10.2018 were compensable delay events. Contractor is accordingly submitting impact of Cl 8.4 delay events in terms of 'Cost' to enable the Engineer to make determination as per Cl.3.5 of GCC.*"

(emphasis supplied)

[37] Exhibit C-20, CD-26, @ pp. 9147–9148 of the SOC.

b. Insofar as the Request for Decision dated 31 August 2019 before the DAB is concerned, only delay events up to 31 August 2016 were relied upon by the Claimant from paragraph no. 32 onwards.

51. For the first time, the Claimant in its SOC referred to and relied upon, as the basis of its claims, not only on the delay events up to 31 August 2016[38] ('**Delay Events**') but also on the alleged delay events accruing after 31 August 2016[39] ('**New Delay Events**'). The New Delay Events did not form part of the subject matter of determination either in the EOT claims or the cost claims before the Engineer. They were never part of the 'dispute' before the DAB either. As such, a consideration of the New Delay Events—which are being mentioned for the very first time—without resorting to the mandatory pre-arbitration dispute resolution procedures under clause 20 GCC/PC[40] - would be outside the terms of this reference and outside the jurisdiction of the Tribunal in these proceedings.

52. It is well settled under Indian law that claims raised without compliance with mandatory pre-arbitration steps can be rejected as not admissible in the arbitration.[41] The Respondent accordingly submits that the New Delay Events cannot be the subject matter of adjudication for the first time in this arbitration. Hence, any claims relatable to the New Delay Events are not maintainable / admissible in the present arbitral proceedings.

53. Without prejudice to its above position, the Respondent submits that, in any event, further submits that the New Delay Events beyond 31 August 2016 are the subject matter of a different EOT claim. Prior to submitting its cost claim dated 30 October

[38] Section C (xiv) @ paragraph nos. 81–129 of the SOC.
[39] Section D @ paragraph nos. 184–265 of the SOC.
[40] FIDIC Golden Principles: GP-5:" Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration."
It is well settled that conditions precedent to arbitration in clauses such as clause 20 GCC/PC are mandatory under Indian law. Nirman Sindia v. Indal Electromelts Ltd., Coimbatore, 1999 SCC Online Ker 149, paragraph nos. 6–12, relying on M.K. Shah Engineers & Contractors v. State of M.P., (1999) 2 SCC 594, paragraph no.17; Tech Mahindra Ltd. v. Union of India, Arb. P. No.35/2021 (Order dated 16 March 2021 of the Delhi High Court), paragraph nos. 4 & 5; Peterborough City Council v. Enterprise Managed Services Ltd, [2014] EWHC 3193 (TCC), paragraph no. 36.
[41] RL-5, Legal Authorities on behalf of the Respondent.

2018[42] in relation to the Delay Events, the Claimant on 10 October 2018[43] submitted a separate EOT claim before the Engineer for the delay events between 31 August 2016 and 30 November 2017. The Engineer *vide* its letter dated 12 September 2019[44] recommended a further grant of EOT of 156 days considering the delay events up to 30 November 2017. In the said letter, the Engineer expressly granted the Claimant the opportunity to claim corresponding additional cost, if any, for the above-mentioned delay period. This was subject to the qualification that no additional cost would be payable where the excusable delays were concurrent with Contractor's delays. This EOT was notified on 07 October 2021 and the completion date for MS-3 was revised to 16 March 2019.[45]

54. It is clear from the above that the delay events beyond 31 August 2016 are the subject matter of a separate claim for EOT by the Claimant, with liberty to claim additional cost, if any, subject to its own delays. The EOT has already been notified by the Engineer. However, the Claimant is trying to base its claim in the present arbitration on the New Delay Events which, as a matter of record, were never put before the Engineer or the DAB or considered by them. Hence, the New Delay Events cannot be adjudicated upon in these proceedings. As to whether and when the consequences of the further EOT until 16 March 2019 may be made the subject of a separate dispute, the Respondent fully reserves its rights and defences in this regard.

IV. THE CLAIMANT IS NOT ENTITLED TO PROLONGATION COSTS

55. In paragraph 269 of the SOC, the Claimant asserts that the Engineer's determination of the 608-day EOT, and the Parties' agreement to that EOT, "have rendered conclusive all matters relating to 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 likewise mutually agreed the Engineer's determination of an interim award of extension of time of 608 days as at 31 August

[42] Exhibit R-215.
[43] Exhibit R-213.
[44] Exhibit R-232.
[45] Exhibit R-242.

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."

56. It is the Respondent's position, and a view that the DAB, Engineer and the Claimant itself took contemporaneously, that the 608-day EOT relates only to the issue of relieving the Claimant from liability for delay damages. That the Claimant has been granted an EOT for 608-days does not mean that there would be a resultant entitlement to prolongation costs because:

    a. The EOT grant may have been based on events for there is an entitlement to an EOT but not for cost; and/or
    b. The Claimant may have been in concurrent delay during part or all of the same period over which the critical delays which entitled it to an EOT had an effect.

57. As regards the first of these matters, the Claimant has not established that the basis on which it has been granted the 608-day EOT entitles it to compensation under the Contract. The burden of establishing an entitlement to prolongation cost is on the Claimant. The Claimant has relied on Indian law in general but its first port of call has to be the Contract (which is the law applicable to the Parties) and a reference to which provisions of the Contract it relies on as establishing an entitlement to prolongation cost for the events that resulted in the 608-day EOT. For instance, to the extent the unavailability of unencumbered land is shown to have caused critical delay, the Contract limits the Respondent's liability for prolongation cost to a fixed rate per km per day of compensable delay.[46] As the Claimant has not set out the grounds on which it bases its claim for compensation as a result of the 608-day delay, it is not possible for the Respondent to plead to whether such grounds give rise to an entitlement to prolongation costs and, if it does, whether such entitlement is subject to any limitation.

58. As regards the second of these matters, to the extent that the Claimant itself was in delay during the period where the events that resulted in the 608-day EOT had effect,

[46] Contract Clause 2.1(b) as amended by the Particular Conditions

the Claimant would be disentitled to any prolongation costs. This would be on the principle that the Claimant cannot take advantage of its own wrong; if the Claimant was concurrently in delay with the Employer, it cannot be entitled to compensation for those delays by way of delay-related compensation. As we will set out below, there were delays solely attributable to the Claimant which led to delays in completion of the project works and the consequential failure to complete MS-3 as per schedule. These delays ran concurrently with the Delay Events, for which 608 days' EOT had been granted for the Delay Events. In fact, given that the EOT granted was only for a part of the total period (608 days) for which entitlement was claimed (869 days), the impact of these delays by the Claimant was in excess of the EOT granted ('**Concurrent Delays**').

59. The Respondent submits that to the extent the Claimant is able to establish a contractual or legal basis for compensation for prolongation cost for any part of the period for which EOT has been granted, the impact of the Concurrent Delays is to completely disentitle the Claimant for even those of its claims for which it may have a contractual or legal basis for compensation.

A. Intimation of the Engineer's Assessment of Concurrent Delays to the Claimant

60. By way of an assessment as set out in the Engineer's letter dated 16 March 2020,[47] the Engineer assessed that the Claimant's own delay amounted to 911 days and, therefore, exceeded the delays which were not attributable to it *i.e.,* 608 days. Accordingly, the Claimant was not entitled to any cost claims. The relevant portion of the Engineer's letter is as follows:

> "*As seen from the attached programme, the total concurrent delay by the Contractor has been evaluated as 911 days for MS-3 for the delay events accrued up to 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.*

[47] Exhibit R-237.

> *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. The detailed assessment of concurrent delays has been enclosed as a graphical representation of the planned activities as per the CCP and EOT and the actually executed work. As per the above said meeting, the concurrent delays have to be forwarded to the Contractor. Submitted for further necessary action please*."
>
> (emphasis supplied)

The Engineer's Concurrent Delay Assessment was communicated to the Claimant by the Respondent vide letter and e-mail, both dated 05 May 2020.[48]

61. While the Respondent will rely on the opinion of its experts to be adduced in due course as to the extent of the concurrent delay by the Claimant, for the present, the Respondent considers that the Claimant was in concurrent delay in the following respects. The Respondent reserves the right to add to, or amend, these grounds based on the analysis of its experts in due course.

62. During the course of the Works, the Claimant failed to submit updated programmes to reflect the as-built progress of the works. Therefore, in the absence of physical progress data, the Respondent has relied on financial progress as a proxy for the progress of the Claimant's Works, not for the value of the Works executed. The financial progress is taken from the IPC's which demonstrate the extent of progress achieved in each cost centre.

63. The Scope of Work under CTP-1&2 package can primarily be divided into following cost centres:
    (i) Validation of Survey Data, Investigation, *Technical Design, Construction design*, etc. (Schedule Cost Center-4. 1)
    (ii) Construction of *Major Structures* (Schedule 4.2)
    (iii) Construction of *Minor Structures* (Schedule 4.3)

[48] Exhibit R-238

(iv) Construction of Formation by *Earthwork*. (Schedule 4.4)

(v) Boundary pillars, Safety wall, Service Roads etc. at DFCC/IR Junction and crossing stations. (Schedule 4.5)

(vi) Miscellaneous works. (Schedule 4.6)

(vii) Construction of *Buildings works* (Schedule-4.7)

(viii) *Track works* (Schedule 4.8)

B. Claimant's delay due to non-conformance in the compliances

64. The Engineer has time and again identified and intimated the defective work in the works / activities executed by the Claimant against the required standards and specifications. Additionally, in the cases of no or delayed response from the Claimant, the Engineer had issued reminders for taking up the corrective and preventive actions at the earliest, showcasing delay in compliances in the form of Non-Conformance Reports ("**NCR**").

65. Such deviations from the approved specifications were required to be rectified by the Claimant, thereby also leading to the requirement for the deployment of additional time and resources by Claimant for such rectifications.

66. An analysis of the some of the major / important NCRs, out of approximately 300 NCRs issued by the Engineer to the Claimant, up to 31 August 2016 could be categorized into the following heads:

a) Defects in the Sleepers

b) Failures in the Cube Tests

c) Improper Backfilling

d) Failure of Piles in MJB

67. A copy of the Major / important NCRs is annexed herewith.[49] An analysis of the NCRs providing the details of the time taken by the Claimant to close the NCRs is annexed herewith and marked as **Exhibit R-244**.

[49] Exhibit R-243 to Exhibit R-349.

68. The issuance of the some of the NCRs, and the time taken by the Claimant for closure of the same are tabulated below:

Sr. No.	NCR No.	Date of Issuance	NCR Closure /NONO[50]	Date of Closure (NONO)	Time Taken by the Claimant
Failure of Piles in MJB					
1.	NKC-SLT-NCR-AMRH-03	27-Jul-16	L-NKC-SLT-PMC-1703-101	24-Mar-17	240
Defects in the Sleepers					
1.	NKC-SLT-NCR-BGG-5	19-Aug-15	L-NKC-SLT-PMC-JP-2005-27	18-May-20	1734
2.	NKC-SLT-NCR-BGG-06	22-Jul-16	L-NKC-SLT-PMC-JP-1612-183	29-Dec-16	160
Improper Backfilling					
3.	NKC-SLT-NCR-KHRA-4	12-May-16	L-NKC-SLT-PMC-JP-1702-33	10-Feb-17	274
Failures in the Cube Tests					
1.	NKC-SLT-NCR-AMRH-01	22-Jun-16	L-NKC-SLT-PMC-JP-1612-14	01-Dec-16	162
2.	NKC-SLT-NCR-AMRH-02	18-Jul-16	L-NKC-SLT-PMC-JP-1612-14	01-Dec-16	136
3.	NKC-SLT-NCR-BGM-09	03-Aug-16	L-NKC-SLT-PMC-JP-1612-11	01-Dec-16	120
4.	NKC-SLT-NCR-Biroliya-01	22-Jun-16	L-NKC-SLT-PMC-JP-1612-46	06-Dec-16	167
5.	NKC-SLT-NCR-Biroliya-02	11-Jul-16	L-NKC-SLT-PMC-1611-24	07-Nov-16	119
6.	NKC-SLT-NCR-CNL-04	13-Jul-16	L-NKC-SLT-PMC-JP-1612-165	27-Dec-16	167
7.	NCR-SLT-NCR-CNL-05 Rev: 0	23-Jul-16	L-NKC-SLT-PMC-JP-1701-78	13-Jan-17	174
9.	NKC-SLT-NCR-FHL-02 Rev: 0	31-Aug-16	L-NKC-SLT-PMC-1611-36	09-Nov-16	70
10.	NKC-SLT-NCR-PCMK-01	06-May-16	L-NKC-SLT-PMC-1612-54	14-Dec-16	222
11.	NKC-SLT - NCR-PCMK-03	31-May-16	L-NKC-SLT-PMC-JP-1612-182	29-Dec-16	212

[50] Annexed as Non-Conformance Reports

Table 3: List of NCRs Issued & Resolved

C. Claimant's delays in deployment of sufficient resources

69. The Claimant had to deploy a minimum resource in accordance with Clause 5 [Mobilization] under Part 6 of the Contract Agreement. However, the CCP did not contain any resource planning/resource loaded programme for completion of various activity within the specified timelines such as to enable an assessment to be made of the sufficiency of the resources to be deployed. Moreover, the Claimant had not submitted plan of resources to be deployed at site under Site Setup (Temporary Works) along with narrative to the CCP. However, the evidence reveals that there was a significant delay in deployment of resources by the Claimant which resulted in non-commencement of work in various section/yards simultaneously as planned in CCP particularly in CTP-2 where, no work was started in 11 Yards by October 2014. For instance, during the review meeting for July 2014,[51] the Engineer noted that only 11 nos. of crushers and 17 Batching Plants (out of 18 Nos.) had been deployed at site. However, aggregate production at only 4 crushers had been started. Also, delay by the Claimant in deployment of NTC machine has been detailed in paragraph nos. 147 to 164.

70. This delay by the Claimant has been the subject of various correspondence and discussions during monthly review meetings, as annexed herewith.[52] A tabulated analysis highlighting delay on the part of Claimant is annexed herewith and marked as **Exhibit R-245.**

71. The Respondent's submissions in paragraph nos. 89 to 96 with regard to the delay in deployment of sufficient resources may be read as part of the present paragraph.

D. Claimant's delays in Utility Shifting

72. 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

[51] Exhibit R-17.
[52] *See,* Exhibit R-17; Exhibit R-19; Exhibit R-38; Exhibit R-27; Exhibit R-41; Exhibit R-55; Exhibit R-60; Exhibit R-72; Exhibit R-73; Exhibit R-76; Exhibit R-81; Exhibit R-86; Exhibit R-145; Exhibit R-149, etc.

uncharted utilities (if any) confronted during the execution of work, as a variation to the Contract. Identification of the uncharted utilities was to be reported by the Claimant by 06 February 2014 as per the Contract[53], i.e., within 23 weeks from the Commencement Date. However, the Claimant continued to report/intimate the unchartered utilities as late as till 2021. This resulted in the late shifting of uncharted utilities. The correspondence exchanged between the parties depicting the delays in the shifting of chartered and unchartered utilities are annexed herewith.[54]

73. The Respondent's submissions in paragraph nos. 221 to 229 with regard to the shifting of the chartered and uncharted utility shifting may be read as part of the present paragraph. Additionally, a tabulated analysis highlighting the delays in utility shifting, on the part of the Claimant is annexed herewith and marked as **Exhibit R-246**.

E. Claimant's delay in Design works

74. The Contract to be executed by the Parties is based on 'FIDIC Design-Build' Yellow Book wherein the primary responsibility[55] for design rests with the Claimant. The Claimant has to ensure that its design is accurate and in compliance with the Employer's Requirements and the specifications ("ER").

75. As per clauses 3.1(2), 6.3, 3.2 (7.1), and 3.2 (12) of the ER–Design, any delay on account of the submission of the designs, sufficiency of the ER requirements in the designs *etc*. would be attributable to the Claimant.

76. As per GCC 5.2, the Claimant's design as submitted to Engineer for the Notice of No Objection ("NONO") should be ready for use. However, the Claimant's submitted design and drawings enlisted under Technical Design Package (TDP) and Construction Design Package (CDP) stage were not as required by the Contract.

77. It was recorded by the Engineer at various occasions that the design documents submitted by the Claimant were insufficient and not as per ER. There was a lack of

[53] Coordination Events Table under Appendix to Bid.
[54] *See,* Exhibit R-17; Exhibit R-19; Exhibit R-24; Exhibit R-31; Exhibit R-78, etc.
[55] Clause 1, Employer's Requirements Design, Part 2 of CA

interface between the Claimant and the interface authorities (such as IR, NHAI etc.) in respect of the finalization of the designs and other relevant approvals and no records were maintained for the interface management plan. The Respondent's submissions in para nos. 120 to 123 with regard to the approval of submitted designs may be read as part and parcel of the present paragraph.

78. The details of submissions of designs by the claimant and consent/NONO by Engineer and the time considered as contractor's excusable delay given in the assessment of EOT, for various designs and the contractors delays is Tabulated in **Exhibit R-248**. There have been very significant delays by the claimant in the design due to the aforesaid reasons, which have resulted in delay in starting the execution of the works, on account of contractor's delays. The references with regard to the assessment of EOT by Engineer as enclosed by the Contractor in his SOC as Exhibit-C16 has also been made in the abovesaid Exhibit. This being an accepted document by both claimant and the respondent, copies of letter references as mentioned in EOT assessment are not enclosed.

79. A design delay assessment prepared by the Respondent highlighting the delays attributable to the Claimant is also annexed herewith and marked as **Exhibit R-247**.

F. Claimant's delays in execution of Earthwork

80. Execution of Earthwork[56] comprises of Clearing & Grubbing, Excavation, Embankment, Sub-Grade, Blanket Layer, Slope Protection & Erosion Control.

81. As per the CCP, earthwork (including both cutting and filling) was planned to be completed within a period of 30 months. In the approved CCP, the Claimant had proposed to carry out earthwork in parallel in different work fronts. This would have required the Claimant to mobilise its resources accordingly. However, as stated above, the CCP was not 'resource loaded' with how the Claimant proposed to carry out mobilization of resources for completion of various activities.

[56] Clause 3 Scope of works in Employer's requirement

82. The Contract provides for the Respondent to make 100% of the land available to the Claimant by February 2014. It is admitted that the Respondent failed to do so. However, substantial portions of the land were made available to the Claimant by the Respondent in a timely manner. However, despite the availability of such land, the Claimant failed to progress earthwork as per the approved CCP. In this regard, the Respondent places reliance on the Claimant's physical progress against the data on the corresponding dates which was highlighted to the Claimant in each of the Monthly Progress Review Meetings.

83. Based on the data in the table annexed herewith and marked as **Exhibit R-255**, the Respondent has plotted below a graph with 3 curves depicting percentages of (i) the actual land availability, (ii) planned Earthwork as per CCP, and (iii) actual progress of Earthwork:

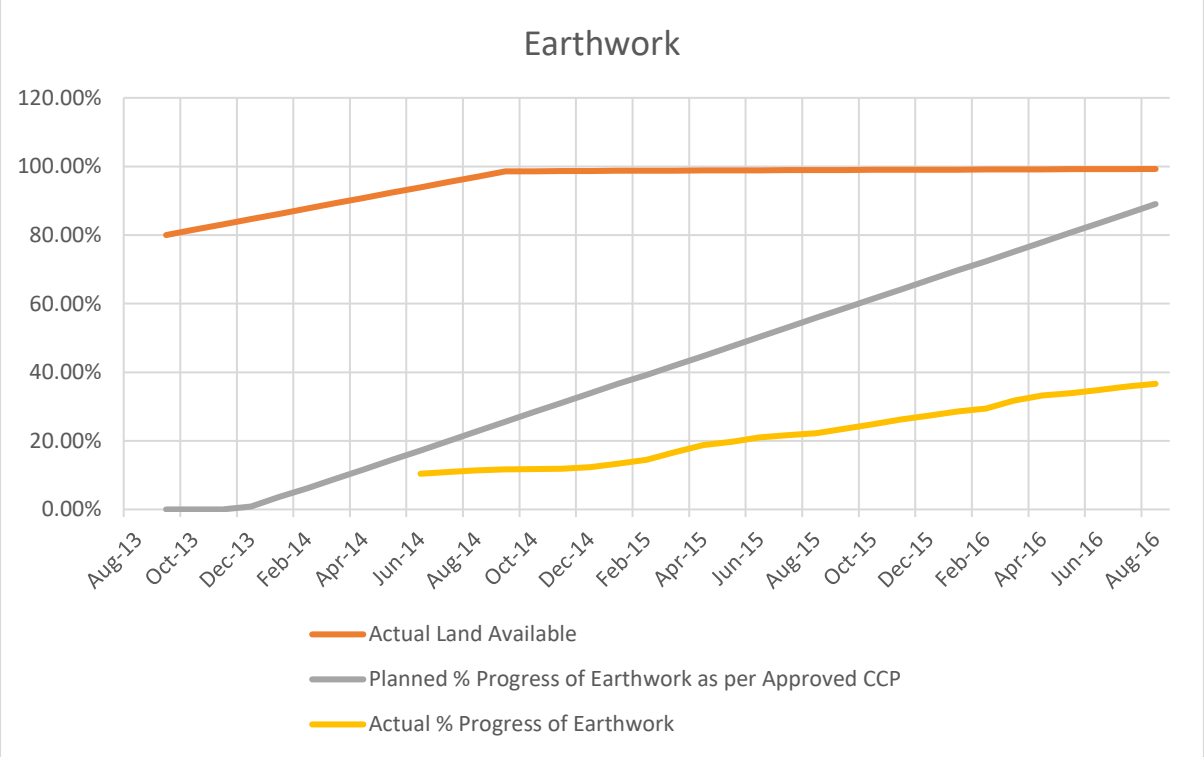

Figure 2: Graphical Representation of Earthwork progress

84. The orange line in the above graph depicts the actual land available; the grey line depicts the planned percent of the progress of earthwork as per the CCP, and the yellow line depicts the actual percent of the progress of earthwork made by the Claimant. It is evident from the above graph that the actual land available (in orange) was always

higher than the actual progress made by the Claimant (in yellow), and that the slow progress of earthwork was not due to the lack of availability of land. This evidences the delay on the part of the Claimant.

85. Criticality in relation to delay may be assessed as resting with the activity that is comparatively lagging. Accordingly, if at a particular time the Claimant had enough work fronts available for construction, but the construction progress was far lower, then the critical path will be defined by the construction activities remaining un-finished due to slow progress rather than the non-availability of the remaining work fronts. As at 31 August 2016, only 2.472 Kms[57] of entire stretch of 648 Kms (i.e., around 0.38%) of the land was not made available but, as can be seen from the graph above, as at August 2016, only around 20% of earthwork had been carried out compared to a planned progress of nearly 90%. Hence, the non-availability of land[58] was not a critical factor for the Claimant's execution of works, and the delay in the earthworks by the Claimant could not be attributed to alleged non-availability of land[59].

86. The correspondence exchanged between the parties which forms the basis of the above data is annexed herewith.[60]

Failure by the Claimant in Mitigating its own delays in Earthwork

87. The Claimant was instructed to take up earthwork in cutting to expedite the earthwork Works and recover its delays.[61] There were no impediments for taking up the earthwork in cutting. Rather, cutting had the advantage of using the cut earth in embankment/sub grade. However, the achieved earthwork in filling by the Claimant was at 2.95 lacs cum. against the required rate of 10.2 lacs cum.[62]

[57] Exhibit R-259 [EOT Recommendation to Employer – para 4.14.1]
[58] Exhibit R-161.
[59] The Claimant reserves its right to submit a Critical Path Method (CPM) based delay analysis at the expert stage of this arbitration.
[60] Exhibit R-41; Exhibit R-55; Exhibit R-60; Exhibit R-72; Exhibit R-73; Exhibit R-76; Exhibit R-86, etc
[61] Exhibit R-17 Exhibit R-19.
[62] Exhibit R-38

88. Despite the availability of GADs / drawings and the Engineer's best efforts, the Claimant showed no inclination towards progressing the work at its originally planned pace.

89. The Engineer/Employer during Monthly Progress Report meetings and through other relevant correspondences regularly informed the Claimant about the required rate at that date so that the Claimant may mitigate its delays by increasing the resources or improvising the planning & execution. However, the Claimant failed in doing so.

Non-availability of Resources/Sub-Contractor at Site

90. Also, the mobilization of Machinery & Manpower was not as per requirement, consequently affecting the progress of work. It is evident from the fact that as on 31 January 2015,[63] 40 teams were mobilized out of 55 teams planned for earthwork execution.

91. In the review meeting for May 2015[64], the Engineer noted that there was very slow progress due only 5 of the 7 pugmills being in working condition. This was one of the reasons of poor progress of blanketing works despite the availability of prepared sub-grade. Also, the blanket material was not available as required on the Site. Even the transport facility for transporting the blanketing material was not available.[65]

92. Without prejudice to the Respondent's submission hereinbelow in para nos. 181 to 205 and para no. 305, in relation to the Claimant's allegation on the NGT stay, it is submitted that the requirement of obtaining an EC for mining of minor minerals in Rajasthan could at most have been an issue at WS-20 to WS-136, thereby affecting the embankment work only. However, there was no restriction on cutting at the said work segments rather cutting section has the advantage of using the cutting Earth. Furthermore, the project works in Haryana (WS-1 to WS-19) and Gujarat (WS-137 to WS-141) were not affected. The slow progress was attributable to the Claimant only due to non-availability of sufficient resources / sub-contractors at site.

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[63] Exhibit R-41.
[64] Exhibit R-55.
[65] Refer MOM for month January-2016

93. On the issue of the slow progress of the work due to the insufficient mobilization of sufficient resources or non-availability of the resources, the Respondent and the Engineer had notified the Claimant *vide* several letters and discussed the said issue during various Monthly Progress Review meetings. The correspondences highlighting and establishing the abovesaid issue are annexed herewith.[66]

94. Another instance of the slow progress due to the shortfall in the deployment of resources can be ascertained from the letter of the Engineer notifying the slow rate of progress of earthwork on 27 April 2016.[67] It was noted in the said letter that there was a shortfall of 50% (in case of filling + sub-grade) The shortfall in the deployment of resources ranged from 60% to 90%. This has been tabulated as follows:

Sr. No.	Activity	Unit	Asking rate for April 2016	Progress achieved during April 2016	Shortfall
1	Filling + Subgrade	Cum	16,84, 193	8,42,741	50.00%
2	Blanketing	Cum	3,74 ,010	1,41,912	62.00%

95. It was also noted in April 2016 that for CTP-1, a 201.22-km front was available for laying of the blanket layer, however, only 16.69 kms of blanketing works were executed by the Claimant. The slow progress in blanketing was due to non-availability of material, non-availability of transport vehicles, and fewer nos. of pugmills, the slow rate of progress of earthworks as the same was not commensurate with the asking rates from 28 November 2016 to 04 December 2016. In relation to CTP-2, it was noted that the earthwork, subgrade, blanketing, etc. had not progressed as per the programme. Only a progress of 72.15% was achieved and a shortfall of 10,087,744 cum. remained as on that date.

[66] *See*, Exhibit R-32; Exhibit R-17; Exhibit R-19; Exhibit R-38; Exhibit R-27; Exhibit R-37; Exhibit R-41; Exhibit R-55; Exhibit R-60; Exhibit R-72; Exhibit R-73; Exhibit R-76; Exhibit R-81, Exhibit R-86; Exhibit R-96.
[67] Exhibit R-96.

96. The Engineer *vide* letter dated 29 June 2016 again notified the Claimant of the slow rate of progress of earthwork with regard to the asking rates in May and June, 2016[68]. In the said letter, the following reasons, among others, were noted for the delay:
    a. non-payment to suppliers;
    b. mismatch/breakdown of excavation and transport equipment;
    c. non availability of material;
    d. non availability of sufficient teams for blanketing and concreting; and
    e. reduced availability of workers at site.

97. Hence, the Claimant was responsible for the slow progress of the work and consequent delays caused to the project due to the non-availability of the resources.

G. Claimant's delays in execution of Major Structures

98. As per Schedule 4.2, Part-1 of Contract, major structures comprise important bridges / viaducts, major bridges, rail flyovers, and ROBs. It was envisaged in the Contract that the bridge works had to start in parallel with the approval of construction design and the site preparation works with foundation works and the precast production in casting yards and production centres. It was also envisaged that the construction work of the bridges would be completed in time before the start of ballast spreading in particular section.

99. However, despite the contractual stipulations, the Claimant's progress was exceedingly slow for no explicable reasons. For instance, during the review meeting for October 2017,[69] the Claimant was notified regarding the slow progress in structure works in CTP-2 and was provided the status of major structures. It was noted that out of total 840 major structures, 208 were works-in-progress and only 340 were completed. The Claimant had not even started the work for 292 structures.

100. The delays caused by the Claimant in the construction works of the major structures can be ascertained from the assessment of the availability of land and the planned

[68] Exhibit R-103.
[69] Exhibit R-167.

progress. In this regard, reliance is placed on the data plotted in the table annexed herewith and marked as **Exhibit R-255**. Based on the data with three parameters as enumerated in the said table, the Respondent has plotted a graph wherein it can be seen that the progress of major structures was always lagging behind despite the availability of land.

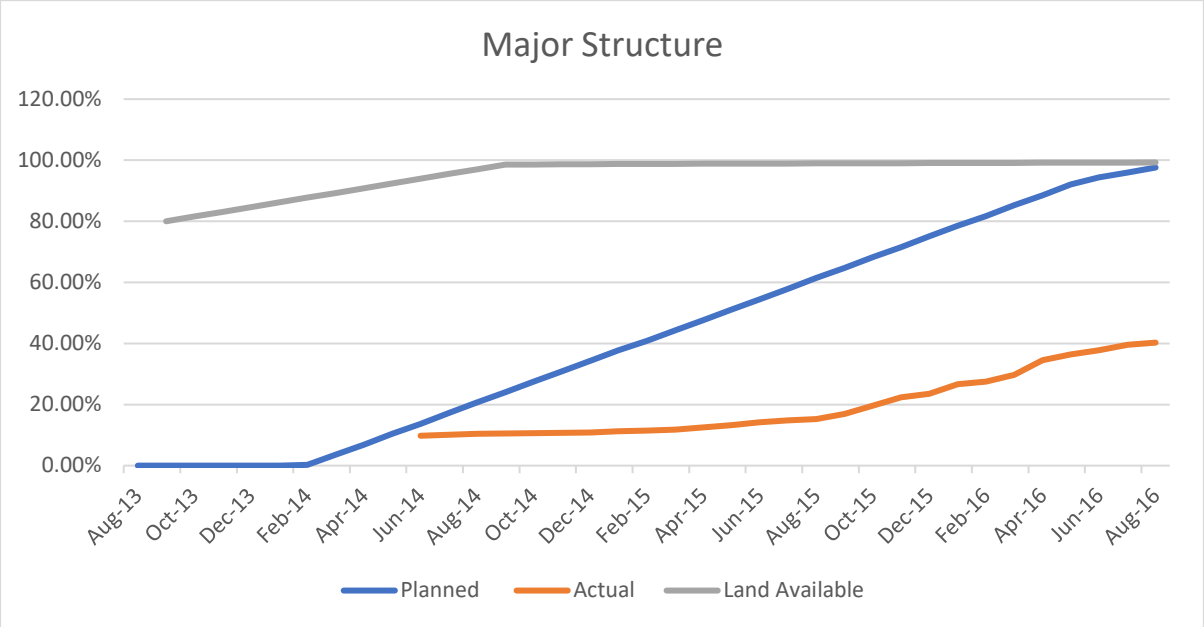

Figure 3: Graphical Representation of Major Structure works

101. It is evident from the graph that the progress achieved by the Claimant for the construction of the major structures was only 10.54% in September 2014 against the planned progress of 23.99%. despite the availability of 98.57% of land. The gap between the two curves *i.e.*, the actual progress construction of the major structures (in orange) and the availability of land (in grey) represents the extent of land available with respect to progress achieved. Since the orange line depicting the actual progress remains consistently and significantly below the grey line depicting the land available, it is evident that the delay to the progress of the Major Structures was on the part of the Claimant.

102. The delays by the Claimant in execution of certain major structures are detailed below:

Claimant's delay in the execution of the ROB works

103. Based on the density of road traffic, IR had provided for a number of ROBs to facilitate the movement of road traffic across its alignment. These number of ROBs, to the extent they crossed the Works, were in the scope of the Claimant and timely execution of the same was the Claimant's obligation under Clause 3.2 - 7.4 (i) of ER [Functional] of the Contract.

104. The Claimant during the execution of the ROB works claimed at various instances that the delay occurred on account of various alleged hinderances. Despite the availability of design for 22 bridges, the Claimant did not start the work for 11 bridges (MOM-July-2015). Accordingly, the said claims were dismissed by the Engineer.

105. For instance, despite the commencement date being 30 August 2013, the Respondent during the October 2014[70] review meeting, instructed the Claimant to finalize the modification of ROB at Reengus. In addition to this, in case of ROB-11A, the Claimant vide letter dated 04 February 2017 notified that the construction of ROB 11A in section 15 RD was affected due to the ambiguity in available DFCC ROW and infringement of 6 electric poles. Therefore, as on 31 August 2016, the Claimant had still not notified these issues.

106. As per Coordinating Events as provided in ATB 8.2 of the Contract, the validation of ROW report was to be submitted on 2 Jan 2014 (CT-2), highlighting the conflict of ROW as pointed out in Clause 15.3 of ER [General]. For ROB-11A, the Claimant pointed out the conflict on 4 Feb 17, i.e., almost after 3 years of the required timeline by the Claimant. Also, the report on uncharted utility was to be submitted by the Claimant on 6 Feb 2014 (CT-3) which was also delayed.

107. The Respondent on 06 March 2017[71] provided its observations on the Claimant's contention that the ROW was validated by the Claimant in its submitted validation report. Additionally, as per clause 4.3 of ER-Functional, Clause 1.3.7(1) and clause 1.3.8(4) in Appendix 14, the Claimant had to notify discrepancies in the ROW during the review period only. It was also noted that the Claimant did not provide details to

[70] Exhibit R-24.
[71] Exhibit R-137.

substantiate its claim and no joint report confirming ROW had been issued to the Respondent.

108. Hence, the delays alleged by the Claimant fall under the purview of the Claimant's responsibilities and are attributable solely to the Claimant. The correspondences in this regard are annexed herewith.[72]

Claimant's Delay in execution of Major / Important Bridges

109. As recorded in various correspondence by the Respondent/the Engineer, the Claimant was instructed to construct Major Bridges on priority. In the review meeting of October 2014[73], the Claimant was instructed to start work on 5 MJBs in each package by November 2014. However, the said work was delayed on account of shortage of labour and resources as recorded in the review meeting of May 2015[74]. The Claimant was also advised to increase the labour force at IMB-609 to achieve progress for completion of project works during the progress review meeting of April 2017.[75]

110. Correspondences exchanged between the parties recording delays on the part of the Claimant in the execution of major/important bridges are annexed herewith.[76]

Claimant's delay in the execution of RFO Works

111. As per Clause 3.2 (6) of Scope of Work in ER-Functional, it was the Claimant's obligation to provide relevant documents and assistance to the Engineer for obtaining the requisite clearance from the authorities. It is pertinent to note here that for CRS approval for RFO Phulera, the preliminary submission was made on 16 November 2015 by the Claimant. After various submissions / re-submissions of the launching scheme and securing arrangement, it was approved on 28 August 2017. There was a considerable delay attributable to the Claimant due to the delayed submission of the

[72] *See*, Exhibit R-19; Exhibit R-24; Exhibit R-55; Exhibit R-86, etc.
[73] Exhibit R-24.
[74] Exhibit R-55.
[75] Exhibit R-144.
[76] Exhibit R-19; Exhibit R-24; Exhibit R-55; Exhibit R-144; Exhibit R-86, etc.

required documents. Hence, the delay in the execution of RFO works was attributable to the Claimant.

H. Claimant's delays in execution of Minor Structures

112. As per Schedule 4.3, Part-1 of Contract Agreement, Minor Structures comprise of Minor Bridges, Road Under Bridges and Subways. The bridge works had to be started in parallel with the approval of construction design and site preparation works and the foundation works along with the precast production in casting yards and production centres. Construction of bridges was planned in such a way that bridge work would be completed before the start of ballast spreading in particular section. The scope of bridge works as per the Contract Agreement is produced below[77]:

Type of Structures in the DFC Corridor:

S. No.	Type of structure	Rewari-Ajmer section	Ajmer-Iqbalgarh section	Total
1	Important Bridges/Viaducts	1	11	12
2	Major Bridges	15	83	98
3	Minor Bridges/Pipe Culverts	270	530	800
4	ROB's	5	1	6
5	RUB's	171	134	305
6	Pedestrian Subways	12	49	61
7	RFO's	3	2	5
8	FOB's	22	31	53
	Total =	499	841	1340

Out of which, Minor Bridges, RUBs, and Pedestrian Subways formed the part of Minor Structures to be constructed by the Claimant as per the Scope of Work under Clause 3 of ER [Functional] of the Contract.

113. The progress of the minor structure construction works with regard to the availability of land and planned progress is plotted in the table annexed herewith and marked as **Exhibit R-255**. On the basis of the data enshrined in the table mentioned above, the following graph has been prepared to highlight the gap between the two curves (*i.e.*, available land and the actual progress of works pertaining to construction of minor structures) representing the extent of land available with respect to progress achieved.

[77] Clause 3 [Scope of works] of the ER[Functional] of the Contract

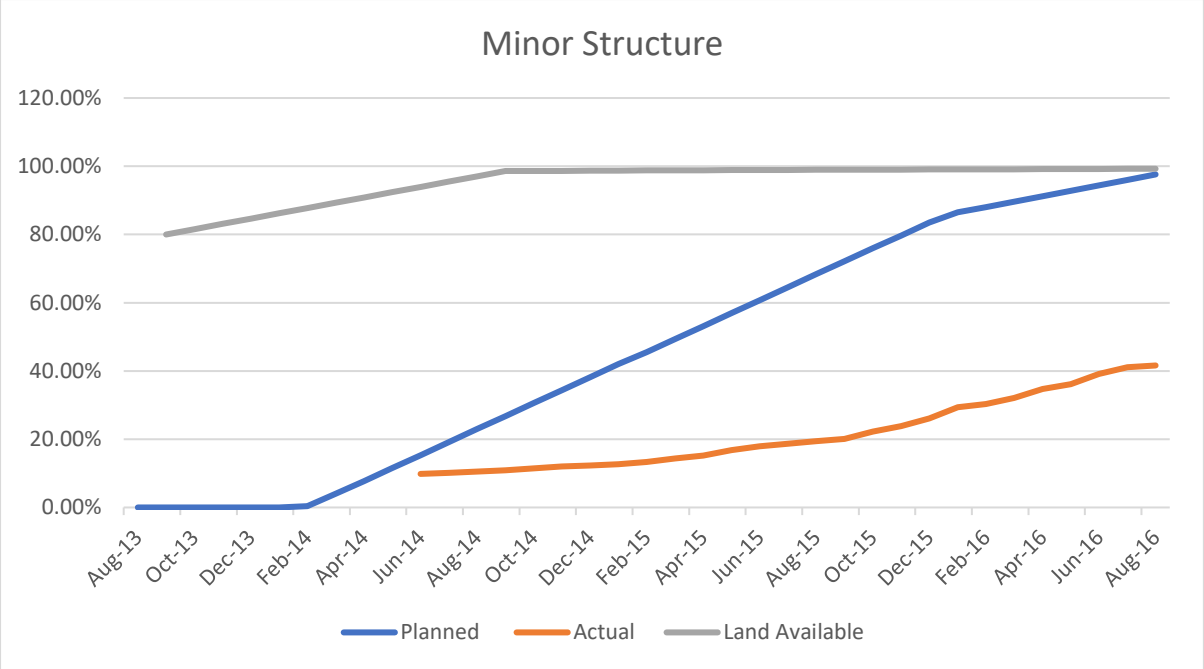

Figure 4: Graphical Representation of Minor Structure works

114. The graph shows that the extent of availability of land (the grey line) versus the progress of construction of minor structures (the orange line). It is evident that there is a substantial gap between the two. Further, the progress achieved in respect of the minor structures was only 15.25% as of April 2015 against the planned progress of 53.10% despite the availability of 98.84% land. Hence, the delay in the execution of the minor structures was attributable to the Claimant.

Claimant's delays in the execution of RUBs

115. The proposed Alignment (DFC tracks) is generally parallel to the existing IR alignment. Based upon the density of road traffic, IR had provided number of RUBs and Level Crossings to facilitate the movement of road traffic across its existing tracks at number of locations. Timely execution of the same was the obligation of the Claimant.

116. During the November 2014 review meeting,[78] the Claimant was instructed to start work on 40 RUBs on the main line and 12 RUBs on the detour. Despite the planned commencement of the RUB works under the CCP being 24 February 2014, the work

[78] Exhibit R-31.

on 40 nos. of RUBs in parallel to the IR line and 12 nos. in Detour line did not start even though the Integrated GAD for 40 RUBs were approved and available to the Claimant.

117. The Respondent in the review meeting dated 21 April 2015[79] noted that the Claimant had not started any work on the RUBs. It was instructed to take up the RUBs at LC45/1, LC 46/1 and LC 13 on priority. During review meeting for October 2016, the Claimant was advised to complete all the works of RUBs 9, 54, 55 & 56 as per commitment with IR.

118. It was noted that no hindrances were observed at any of the said RUBs' locations. As there were no hinderances or delay at the end of the Respondent, the delays and/or slow progress of the works was attributable to the Claimant due to its poor planning and execution strategy.

119. The delay was noted to be attributable to the Claimant on account of not following Respondent's instructions for joint inspection. It was stated therein that the said utility was 'Chartered' and it was incumbent upon the Claimant to divert the same as per the contractual provisions.

120. As per Clause 3.3.(2) of ER [Functional] and 3.3 (a) of Appendix 15 of the ER, submission of a diversion plan was the Claimant's responsibility. Further, the Claimant as per the Coordination events dates under the Contract had to notify the Respondent about the same within 23 weeks from the commencement of the Project, i.e., by 06 February 2014. However, the Claimant did notify the issues with respect to approach roads for a few locations after the original completion date of the Project.

121. A table highlighting the design delays on the part of the Claimant in the execution of RUBs is attached herewith and marked as **Exhibit R-249,** along with a delay analysis chart marked as **Exhibit R-250.**

Delay due to coordination with the IR

[79] Exhibit R-49.

122. As per clause 10.2 of Appendix-5 of the ER, coordination with the IR and other interfacing parties / authorities for access and other works was the Claimant's responsibility. In this regard, any delay caused on account of the failure in coordination or interfacing would be attributable solely to the Claimant. The correspondence between the parties evidences the Claimant notifying delays due to the slow progress / delay / stoppage of work on the interfacing party. However, in view of the contractual stipulations, the obligation to coordinate with the interfacing party was on the Claimant.

123. The Respondent on 24 December 2016[80], confirmed burial of DFC RUB box was feasible with necessary safety measures, showcasing the suitable RUBs where construction of RUB boxes was delayed by the Claimant.

124. The delay in interfacing with IR subsequently delayed the dependent activities, for which the Claimant was responsible. Several similar delays were notified by the Claimant through various letters. The same were duly addressed and responded to by the Engineer / Respondent. The correspondences exchanged between the parties evidencing the lack of coordination by the Claimant with the IR are annexed herewith.

Claimant's delay in execution of Minor Bridge (MIB) works

125. Despite the commencement date being 30 August 2013, the Claimant did not commence the work on various MIBs until October 2014. Accordingly, during the Monthly Review Meeting for October 2014,[81] the Claimant was instructed to start work on 100 MIBs in each package by November 2014. However, the progress made by the Claimant was not found to be satisfactory for the following reasons:

- During the meeting dated 17 March 2016,[82] the Respondent notified Short of financial progress at MIB 640 and WS-107. Further, in relation to the progress review of CTP 2, it was noted that for Package 8, no progress of work in any work section

[80] Exhibit R-129.
[81] Exhibit R-24.
[82] Exhibit R-86.

except WS-140 and WS-136 had been observed; and for Package 5, a shortage of manpower was observed to achieve the monthly targets.

- During the May 2015[83] review meeting, the Claimant was notified that Package-C works on 92 MIBs had been initiated and that no work had been observed in Package-D.

126. In view of the above, it is evident that the delay in execution of minor bridge works was caused by the Claimant. The relevant letters exchanged between the parties in this regard are annexed herewith.[84]

I. Claimant's delays in execution of Track works

127. In order to begin the execution of the Track works with the NTC, it was essential that the earthwork, major and minor structures were complete up to the formation level. These activities were to be carried out simultaneously in various sections along the alignment. Any delay in the completion of the formation works would consequently delay the track works and potentially impact the time for completion of the Project. Track works were one of the key activities of the Project requiring track-linking of 660 kms. in CTP-1 and 728 kms. in CTP -2.

128. The progress of the track works w.r.t. the availability of planned progress is plotted as below. The gap between the two (planned and actual progress) curves represents the extent of planned progress with respect to progress achieved.

[83] Exhibit R-55.
[84] *See*, Exhibit R-24; Exhibit R-86; Exhibit R-55, etc.

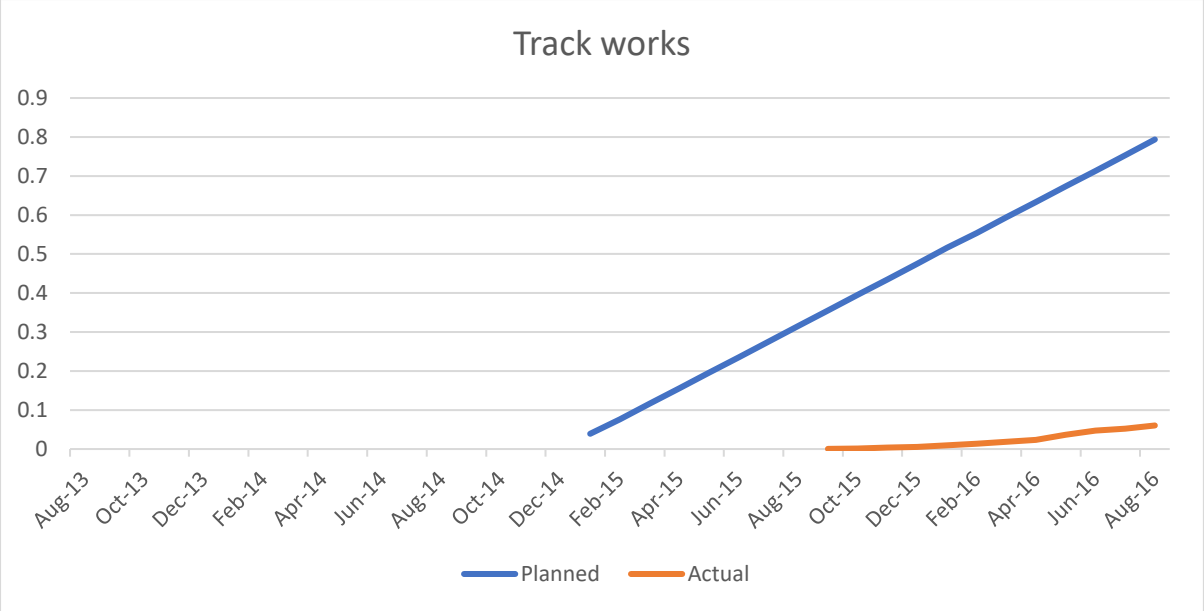

Figure 5: Graphical Representation of Track works

129. From the above graph, it can be seen that the actual progress of track works was always lagging behind the planned progress. As noted, the curve of the actual progress is no way parallel to the planned progress and the following could be inferred:

- Initial Delay in mobilization of the NTC machine for around 8 Months.
- The average rate of the progress of NTC (which can be assessed from the slope of the curve) was not even 1 Km/day as against the planned progress of 2.1 Km/day.
- The NTC did not proceed uninterrupted. There was stoppage of works which the evidence shows was due to frequent breakdowns of the NTC machine.
- to the rate of progress of track-linking work could have been slow due to the insufficiency of the NTC machines/Track Materials/labors

130. An analysis providing the track actual progress chart is annexed herewith and marked as **Exhibit R-251**.

131. It can be seen that the Claimant's achieved progress of track works was 5.84% as of August 2016 despite having all approved design and drawing and the issue of NGT having been resolved (Dec 2014) more than 1½ years back, as of August 2016 against the planned progress of 55.35%.

132. The various activities under Track Works can be divided into following heads:

- Set up of plant & production of Track Materials such as sleepers, welded rail panels, etc.
- Design of Track Works & Procurement of Track Materials such as ballast, rails etc.
- Execution of Pre – Track Works such as laying of ballast.
- Execution of Track Linking Works with the NTC machines.

Delays attributable to the Claimant were recorded at all these stages which are further elaborated below.

Delay in setup of plants and production of track materials at the depots: Delay in set up of PSC Sleeper Plant

133. As per the approved CCP, the sleeper plants were proposed at two depots—at Bhagega and Marwar for CT P-1 and CT P-2 stretches, respectively. The sleeper plant at Bhagega was planned to be commissioned in the 10th month from the commencement date *i.e.*, from 31 May 2014 and the required sleeper production was to be completed by the 29th month *i.e.*, 19 January 2016. The sleeper plant at Marwar was planned to be commissioned in the 13th month from the commencement date *i.e.*, from 26 August 2014 and the required sleeper production was to be completed by the 40th month *i.e.*, 14 December 2016. The production of sleepers was a free-standing matter and was not dependant on the provision of un-encumbered land for the alignment. In other words, save for the land for the depots – which were provided to the Claimant from the outset – the Claimant did not need any further access or provision from the Respondent to proceed with the sleeper fabrication works.

134. It is pertinent to note from the First RFI dated 25 September 2014 and second RFI dated 19 November 2014 raised by the Claimant that it had failed to start production of sleepers for design qualification test because the Claimant was not geared up to progress the work in the Bhagega sleeper plant. The same was noted in the Engineer's letter dated 21 November 2014.[85] In the third RFI dated 26 November 2014,[86] several shortcomings were noticed by the Engineer during the start of the production of sleepers for the design qualification tests.[87] The Engineer also noted that there was no

[85] Exhibit R-26.
[86] Third RFI raised on. 24 November 2014 dated 26 November 2014
[87] Exhibit R-27.

self-validation of its plants by the Claimant, and the Claimant suffered from a lack of detailed planning, non-involvement of the Claimant's QA team, and a lack of interest of the Claimant's site team, which raised doubt on the technical competency of their sub-Claimant *etc*.[88]

135. Further, there was considerable delay in the commissioning of the Sleeper Plants at the two depots Bhagega & Marwar. The Bhagega sleeper plant was actually commissioned & validated by RDSO on dated 13 July 2015 and Marwar sleeper plant was commissioned & validated by RDSO on 21 October 2016. These periods were significantly later than that provided under the CCP.

136. Also, the Engineer *vide* letter dated 06 October 2015[89] intimated that the average production of the PSC sleepers per day at Bhagega plant was extremely low as compared to monthly production of 55,000 number of sleepers proposed by the Claimant, which was having a serious effect on the progress of the track works.

137. Despite the above intimation of low production and delays by the Engineer, the delays in the production of PSC sleepers on the part of the Claimant subsisted as the required turnouts.

138. The Engineer *vide* letter dated 18 July 2016[90] notified that the sleeper production was not increased due to the poor availability of skilled workers. It was also noted that the poor availability of tractor trolleys was also affecting the production of sleepers. At that time, the sleeper plant in CTP-2 had not even started.

139. The Claimant's slow progress in the production of sleepers remained consistent and was discussed in various MPRs & Monthly Review Meetings. The relevant correspondences are annexed herewith.[91]

Delay in set up of Flesh butt Welding ('FBW') Plant

[88] Exhibit R-28.
[89] Exhibit R-64.
[90] Exhibit R-104.
[91] See, Exhibit R-26; Exhibit R-64; Exhibit R-21, etc.

140. As per the approved CCP, the FBW plant was proposed at two depots—at Bhagega and Marwar for CT P-1 and CT P-2 stretches, respectively. The FBW plant at Bhagega was planned to be commissioned by August 2014 and the FBW plant at Marwar was planned to be commissioned by August 2015. However, there were considerable delays in commissioning of the Two FBW plants at Bhagega & Marwar. The Bhagega FBW plant was commissioned in August 2015[92] and Marwar FBW plant was commissioned in November 2016[93]. The commissioning of these plants was not dependant on any action by the Respondent.

141. It was also noted by the Engineer that the facilities for working of second FBW plant at Bhagega had not been made functional by the Claimant[94]. The Engineer advised the Claimant to take the required steps for improving the progress of FBW work at Bhagega so that required progress could be achieved.[95]

Delay in Design & Procurement for Track Works

142. During the review meeting for October 2014,[96] the Engineer observed severe delays in finalization of the track design. The Engineer advised the Claimant to complete the same by March 2015. In order to mitigate the delays and to revise the target dates for various activities caused by the Claimant, a meeting was held on 02 December 2014. In this regard, the Engineer *vide* various letters dated 03 December 2014,[97] 04 December 2014,[98] and 18 December 2014, advised the Claimant to provide the total requirement of track materials and their status of procurement (purchase and supply) for every month.

143. In response to the above, the Claimant provided the requisite particulars *vide* letters dated 08 December 2014, 02 January 2015,[99] and 03 January 2015.[100] On the basis of

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[92] Refer MPR Aug-15
[93] Refer MPR Nov-16
[94] Exhibit R-61.
[95] Exhibit R-65.
[96] Exhibit R-21.
[97] Exhibit R-29.
[98] Exhibit R-30.
[99] Exhibit R-34.
[100] Claimant's Letter No. SLT/NKC/CTP1&2/TECH/TRACK/2014/1749, dated 03 January 2015

the information provided by the Claimant, the Engineer on 28 January 2015[101] notified the Claimant that it was unreasonably delaying in the finalisation of source approvals of the required track materials. Accordingly, the Engineer asked the Claimant to provide a time schedule for the procurement of track materials on an urgent basis.

144. On 15 October 2015,[102] the Engineer again noted a severe delay of 9 months in the intimation of the status of the track materials which was to be done by the Claimant on a monthly basis: after 03 January 2015, the Claimant had next notified the status only on 09 October 2015. It was also noted that the procurement of track fastenings was severely delayed as it was sufficient for only 6.93 TKM. Hence, the Claimant was advised to expedite the same.

145. On 05 November 2015,[103] the Engineer noted that the progress for the ballast supply and PSC sleeper supply, being long lead and critical items for laying of the track, were short by 70% and 87% of their respective asking rates.

146. On 10 March 2016[104], the Engineer analysed that the rate of ballast production was 2500 cum./day against the required target of 10000 cum./day.

Delay in pre-track works

147. Further, the Engineer had issued several letters highlighting the issue of slow progress in the pre-track works for various sections of the project stretch demonstrating that the actual progress for each major activity with respect to the increasing asking rates. For instance—

Letter	Date
L-NKC-SLT-PMC-1508-159	25 August 2015
L-NKC-SLT-PMC-1511-28	05 November 2015
L-NKC-SLT-PMC-1511-55	12 November 2015
L-NKC-SLT-PMC-1511-75	17 November
L-NKC-SLT-PMC-1601-38	13 January 2016
L-NKC-SLT-PMC-1607-21	21 June 2016
L-NKC-SLT-PMC-1607-44	18 July 2016

[101] Exhibit R-40.
[102] Exhibit R-72.
[103] Exhibit R-72.
[104] Exhibit R-81.

L-NKC-SLT-PMC-1606-80	29 June 2016
L-NKC-SLT-PMC-1607-70	27 July 2016
L-NKC-SLT-PMC-1608-40	11 August 2016
L-NKC-SLT-PMC-1608-88	24 August 2016

148. Hence, the pre-track works were plagued with slow progress which delayed the project works. The correspondences evidencing the delay attributable to the Claimant are annexed herewith.[105]

149. An analysis providing the track actual progress chart is annexed herewith and marked as **Exhibit R-252.**

J. Delay in execution of track works

Delay in Deployment of required number of NTC machines

150. The Claimant in the SOC has emphasized that the CCP envisaged deployment of a single NTC and that the CCP was accordingly approved by the Engineer / Employer. However, the Claimant has failed to refer to the fact that it had submitted its tender on the basis that it would deploy two NTCs, as is evident from the Contractor's Technical Proposal,[106] and that it was on this basis that the Technical proposal was accepted. It is important to highlight that the Technical Proposal forms an integral part of the Contract.[107] This contractual requirement was glossed over by the Claimant both at the time, and there is also no reference to the Contractor's Technical Proposal in its SOC. As the Claimant failed to deploy two NTCs, presumably to achieve cost savings at its end, there was significant delay in the completion of the project.

151. The relevant extract of the Technical Proposal as well as of Appendix 5 of ER is reproduced below:

[105] *See*, Exhibit R-21; Exhibit R-32; Exhibit R-40; Exhibit R-61; Exhibit R-65; Exhibit R-67; Exhibit R-72; Exhibit R-81, etc.
[106] *See* paragraph no. 5.2 of I-B-3 'Basic Programme for Works' of Part-6 'Contractor's Technical Proposal Volume C 2/4, Exhibit C-2, Vol. CD-12 @ p. 2909 of the SOC
[107] Clause 2(r)(iii) of the Contract.

Clause 5.1 of Appendix-5

"Time programme shall be developed from the programme submitted in the "Technical Bid Submission".

5.2 Mobilization - Basic Programme for Works

*"**Mobilization for Track Work***

We propose two sets of NTC for track laying. Two base depots are planned to feed NTC. Mobilization for track work Includes mobilization) for setting of base depots, sleeper plants and track laying and same is shown in works programme."

152. It is submitted that the CCP proposing deployment of a single NTC was only approved on the basis that the Claimant, in its own estimation, was ready and capable of completing the milestones by the originally stipulated completion date as part of its obligations as a design-build lump-sum contractor. Such an approval does not mean that the Claimant's plan in the CCP would override the other provisions of the Contract.

153. As per CCP, there were to be 2 Depots namely at Bhagega and Marwar from where P-way works was to be taken up, and not only from Bhagega as stated by the Claimant in paragraph 53 of the SOC.

154. The contemporaneous correspondence evidences that the Claimant's failure to mobilize sufficient number of NTCs along with the overestimation and the incorrect representation of the capacity of an NTC were important causes of delay. These delays are attributable solely to the Claimant. The Claimant cannot be said to be relieved from its contractual obligation to use at least two NTCs, particularly when it ought to have been aware that the usage of one NTC alone would not have ensued timely completion of the project works.

155. As per the approved CCP, the NTC was to be assembled / commissioned by 19 December 2014. However, there was a delay of about 275 days due to which the NTC was assembled / commissioned only on 24 September 2015. The Claimant on 03 January 2015 had stated that a single NTC machine would be able to produce output

of 3 TKM per day *i.e.*, in two shifts of 6 working hours in a day and reiterated the commencement dates for track works.

156. It is to be noted that in the CCP the Contractor assumed an average progress of track-linking with 1 NTC at 2.1 Km per day without allowing for rest days, holidays, maintenance requirements *etc*. This was against the recommended specifications by the manufacturer of the machine as 1.5 Km per day. This was therefore a highly exaggerated output which, in practice, was not achieved.

157. The planned track-linking works under the CCP did not envisage the NTC starting at one end of the alignment and proceeding linearly to the other end. The plan was for the NTC to complete one package and then be dismantled, moved and re-installed at another location to carry out track-linking work at the next package. However, even though the Claimant deployed only one NTC machine, it did not allow time in its plan for dismantling, shifting, and re-installation of the machine for the execution of the track works in subsequent packages.

158. The CCP[108] indicates that the mechanized track laying with the NTC machine was planned from 02 January 2015 to 06 February 2017 for the whole stretch *i.e.*, 765 calendar days. The total track length of the project was 1388 kms. The Contractor had provided 2 years and 35 days, which is inferred to be 250 days/365 days or 530 days' working as per the project calendar. This would mean that the Claimant programmed its works on the basis that the NTC would work at the rate of 1388/530 = 2.62 km. per day which is even greater than 2.1 kms. as stated in the CCP by the Claimant.

159. During the first trial run of the deployed NTC on 24 September 2015, it only laid around 800 mts. of track until 13 October 2015[109] as it was frequently under repair. The machine could only lay 2,250 meters track cumulatively as on 02 November 2015 with frequent breakdowns.[110] It ought to have been evident to the Claimant by this time, if it was not already, that one NTC machine was insufficient to complete the required track works in time. The Claimant was asked again to arrange another NTC

[108] Exhibit R-6.
[109] Exhibit R-54
[110] Exhibit R-71.

at the earliest to attain the required progress. Thus, the delay in arrangement of the same and such poor progress was on account of the Claimant. Reliance may also be placed on the NTC plan annexed herewith and marked as **Exhibit R-253**.

160. The insufficient number of NTCs deployed led to substantial delay in the aforesaid track-linking sequence. This was repeatedly communicated to the Claimant through various slow progress and delay-related letters. For instance, *vide* letters dated 15 January 2015,[111] 10 April 2015,[112] 08 May 2015,[113] and 21 May 2015,[114] the Respondent issued notices for requirement/arrangement of the second NTC to execute the track works. Apart from the above stated letters, several other letters were issued to the Claimant, the same are annexed herewith. [115]

161. During a review meeting held on 08 April 2016, the Claimant was again advised to mobilize the 2nd NTC machine within 6 to 7 months for achievement of the desired execution of track works. However, the Claimant on 28 May 2016 intimated that there the site conditions prevented deployment of a 2nd NTC but did not provide any substantiation. The Claimant further stated that additional track resources would be mobilized if there was any shortfall in the actual rate of progress at the time of completion.

162. In response, the Engineer on 09 June 2016[116] reiterated all the notices and minutes of the meetings regarding the early deployment of 2nd NTC. It also mentioned that procurement of the NTC was a long-lead item and hence the process was required to be initiated immediately to mitigate the delay in track-laying works.

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[111] Exhibit R-38.
[112] Exhibit R-47.
[113] Exhibit R-66.
[114] Exhibit R-52.
[115] *See*, Exhibit R-38; Exhibit R-47; Exhibit R-52; Exhibit R-54; Exhibit R-66; Exhibit R-71; Exhibit R-74, etc.
[116] Exhibit R-98.

163. In the meeting held on 16 June 2016,[117] the Claimant intimated that the 2nd NTC was expected to be delivered by February 2017, which was later reiterated in several letters dated 07 July 2016,[118] 23 July 2016,[119] and 06 October 2016[120].

164. Considering the delays and the resources deployed by the Claimant, the Engineer during the MPR meeting on 16 July 2016[121] noted that 3 NTCs were required for achieving the targets.

165. As at 31 August 2016, the 2nd NTC had not been procured. After a series of letters and MPRs calling upon the Claimant to deploy an additional NTC, the 2nd NTC was deployed on 10 May 2017[122] .

166. The Claimant commissioned the second NTC in the Marwar–Jawali section on 08 June 2017. The machine linked only 36 TKM of track as on 22 December 2017[123] against the plan of 164 TKM with an average progress of 5.6 TKM per month. As notified by the Respondent, the main reason of poor track-linking progress of this NTC was its poor condition. The machine remained in an intermittent breakdown state. The daily track-linking data was itself an indication of the poor health of the NTCs. This has also led to wasteful expenditure of the Engineer's manpower deployed to supervise the track-linking activities.

167. Later, a 3rd NTC machine was under commissioning at the Marwar Depot in the month of October 2017 as inferred from the Claimant's MPR submitted on 09 November 2017. In view of the above, the delay on this count was solely attributable to the Contractor.

168. In addition to the above, reliance may also be placed on the analysis prepared by the Respondent on the working of NTC Machine from September 2015 to December 2018. The analysis is annexed herewith and marked as **Exhibit R-254**.

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[117] Exhibit R-101.
[118] Claimant's Letter No. SLT/NKC/CTP-1&2/TECH/TRACK /2016/6415, dated 07 July 2016
[119] Exhibit R-106.
[120] Exhibit R-115.
[121] Exhibit R-104.
[122] Claimant's Letter No. SLT/NKC/CTP1&2/PLNG/MPR/2017/9073, dated 02 June 2017
[123] Exhibit R-175.

Slow Progress in Tracking Linking & Installation Works

169. Further, the Engineer issued other slow progress notices regarding track works for various sections of the Project stretch demonstrating the actual progress for each major activity with respect to the increasing asking rates, as tabulated below:

Letter	Date
L-NKC-SLT-PMC-1508-159	25 August 2015
L-NKC-SLT-PMC-1511-28	05 November 2015
L-NKC-SLT-PMC-1511-55	12 November 2015
L-NKC-SLT-PMC-1511-75	17 November
L-NKC-SLT-PMC-1601-38	13 January 2016
L-NKC-SLT-PMC-1607-21	21 June 2016
L-NKC-SLT-PMC-1607-44	18 July 2016
L-NKC-SLT-PMC-1606-80	29 June 2016
L-NKC-SLT-PMC-1607-70	27 July 2016
L-NKC-SLT-PMC-1608-40	11 August 2016
L-NKC-SLT-PMC-1608-88	24 August 2016

170. The noted reasons for slow progress in the track works, i.e., the progress of track linking, rail welding, ballast and sleeper supply was found to be due to:

(i) Poor progress by suppliers due to irregular payment to them.

(ii) Poor planning of sequence of completion of works like major/minor bridges.

(iii) Earth work progress being almost Nil in Packages C and D in CTP-2 stretch.

(iv) Subgrade was ready at various sections but blanketing was not being carried out at required pace resulting in delay in track linking.

(v) Workers strength was decreasing in CTP-2. Due to this, erection work of precast segments of RUBs was also not progressing resulting in delay in track linking.

(vi) Sleeper production was not increased at both the units due to poor availability of skilled workers and tractor trolleys and, was, as a result, affecting the pace at which the NTC could progress.

(vii) Commencement of Sleeper plant in CTP-2 at Marwar had been delayed.

(viii) Delay in deploying the additional track machines.

(ix) Constant break down of various machineries.

(x) Delay in concreting of structures.

(xi) Delay in erection of RUB Boxes to meet the requirement for NTC movement.

(xii) Delay in deployment of resources such as Dumatic Tamper, DTS Track Stabilizer, BRM Ballast regulator, etc.

(xiii) Non-availability/shortage of materials

171. In view of the above, there were substantial delays in completion of track linking from Rewari to Iqbalgarh required for completion of MS-3, can be seen from below:

1) Non-completion of Major Bridges, RFO Phulera and delay in execution of RUB's by the Claimant, where IR had already launched their RUBs/RUB Boxes could be erected.

2) Blanketing work was slow/not progressed at various sections due to insufficient pug mills along with (refer to para no. 92):
   i) Non-completion of cutting/embankment/subgrade at various locations
   ii) Delay in arranging of the material (i.e., Subgrade was ready but blanketing not done)
   iii) Mismatch of transport vehicles, motor grader, non-availability of material, breakdown of graders and loaders
   iv) Slow pace of construction of central drain between DFC and IR embankments, drains in cutting areas and country side due to non-payment by the Claimant to its suppliers/vendors. Due to this, the service road/approaches to the site became waterlogged and affected the progress.

3) Despite prior approval of ballast source, the Claimant had delayed in supply of the ballast. It had consistently failed to maintain the ballast supply to site as against the asking rate for the ballast supply. This being a long-lead item, the delay in procurement had affected the progress of track linking and post track installation work. Also, due to improper planning of resources and activities, there was inadequate space for the stacking of ballast.

4) Production of sleepers had been slowed due to shortage of skilled labour, frequent break down of machinery and overhead gantry (one gantry remained under repair for 15 days), a smaller number of tractor trolleys, frequent changing the experienced labour and staff and frequent shortage of cement. (i.e., the average production of sleepers remained at about 800 sleepers per day despite each of the two plants having the capacity to produce 2,000 sleepers per day per plant).

5) The NTC machine was deployed on the Site after a delay of almost 8 months. Further, after the commencement of track works it was found that the machine was under frequent breakdowns resulting in extremely poor progress even when compared to the minimal output of the NTC machine. Also, there was a high requirement for additional track machine to expedite the track works as per the planned sequence.

K. Assessment of slow progress for the period of January 2016 to July 2016 by the Engineer

172. In addition to the above detailed paragraphs pertaining to the delays attributable to the Claimant, the Engineer vide letter dated 02 September 2016[124], submitted the analysis/assessment carried out with reference to daily/weekly progress reports for the sections/packages A, B, C, D in consideration of earthwork, subgrade, blanket and structures works by the Claimant in the period from January 2016 to July 2016.

173. The progress achieved up to July 2016 is reproduced below:

Sr. No.	Description	PACKAGE - A		PACKAGE - B		PACKAGE - C		PACKAGE - D	
		Progress During Last 6 Months ending July 2016	Cumulative Progress up to July 2016 (% to Total)	Progress During Last 6 Months ending July 2016 (% to Total)	Cumulative Progress up to July 2016 (% to Total)	Progress During Last 6 Months ending July 2016 (% to Total)	Cumulative Progress up to July 2016 (% to Total)	Progress During Last 6 Months ending July 2016 (% to Total)	Cumulative Progress up to July 2016 (% to Total)

[124] Exhibit R-112.

		(% to Total)							
1	Earthwork (100% Completed)	6.4%	91.1%	19.9%	61.1%	6.2%	24.4%	10.7%	20.4%
2	Subgrade (100% Completed)	7.5%	84.2%	30.1%	61.1%	12.8%	29.8%	3.3%	6.3%
3	Blanket (100% Completed)	35.6%	52.7%	9.4%	9.4%	3.6%	4.3%	0.0%	0.0%
4	MJB Concrete Quantity (cum)	33.4%	59.2%	34.0%	75.8%	19.2%	40.0%	14.8%	37.3%
5	MIB Concrete Quantity (cum)	28.4%	80.4%	33.8%	60.9%	27.5%	36.4%	23.0%	40.1%
6	RUB/PS Concrete Quantity (cum)	32.9%	49.9%	20.3%	21.8%	10.4%	11.7%	3.2%	6.6%

Table 4: Six Month Analysis of Slow Progress

174. The above analysis shows that the Claimant had significantly delayed the performance of the Works as at 31 August 2016 for reasons that had nothing to do with the Respondent. As the Claimant was concurrently in delay, it is not entitled to prolongation cost for the period of its delay. Currently, the Respondent assesses the period of the Claimant's concurrent delay to be coterminous with the 608-days of EOT granted to the Claimant for events up to 31 August 2016, but the Respondent will rely on its expert's assessment of the extent of concurrent delay in the expert's opinion to be adduced in due course.

V. THE CLAIMANT'S ALLEGATION PERTAINING TO 'DELAY EVENTS' UP TO 31 AUGUST 2016 ARE UNTENABLE

175. The Respondent's position set out below is the Respondent's position as regards the delay events pleaded by the Claimant. The Respondent accepts of course that the Engineer has taken the view that some of these delay events are the cause of critical

delay and has recommended the grant of an EOT, which the Respondent has accepted. The Respondent's exposition below is not with an aim to challenge the Engineer's recommendation of a 608-day EOT or to open up the agreement between the Parties as regards what is the revised date of completion, but with an aim to set out factually and legally what is the position as regards the events of delay. This will inform the Tribunal's understanding as to the true causes of delay to the achievement of MS-3. The Tribunal is not bound by the Engineer's analysis by which it arrived it its decision, though it is accepted that the Respondent cannot suggest that the date for achievement of MS-3 ought not to be extended by 608-days. The Respondent will await its expert's analysis of these events in due course and will rely on that analysis in these proceedings for the purposes of assessment of prolongation cost.

176. Before adverting to the individual delay events, it is important to highlight three important aspects that apply across all the seven delay events alleged by the Claimant in the SOC:

(i) The Claimant has referred to seven different delay events as the basis for its claims on account of delay in completion of MS-3 for delay events accruing up to 31 August 2016. It is important to note that the impact of the said delay events on the completion of MS-3 had already been assessed by the Engineer by way of its letter dated 24 August 2017. In fact, the Claimant had provided its unconditional consent to the said Engineer's assessment insofar as the impact of the Delay Events.

(ii) The Claimant has failed to link any of its claims for additional costs to any of the seven Delay Events. Without identifying and quantifying the specific loss caused to it, the Claimant has sought to attribute the additional costs to all the seven Delay Events, apart from alleged delays stated in Section D of the SOC. Naturally, it is not the Claimant's case that the entirety of its claims is on account of only one alleged delay. The Claimant's claim for prolongation cost is impermissibly global in nature.

(iii) The Claimant has not identified the contractual basis for its claim for prolongation cost. The Contract provides expressly where an event of delay would also result in an entitlement to prolongation cost. Where the Contract is silent as regards the entitlement to Cost, the Tribunal must proceed on the basis that there is no contractual entitlement

to such cost. As the Claimant has not identified the events on which it relies as having caused it to incur additional cost in the nature of prolongation, it is not possible for the Respondent to plead to whether such cost is recoverable under the terms of the Contract. Accordingly, the Respondent must limit itself to demonstrating that the cause of delay was not one that is attributable to the Respondent in fact.

A. Whether the Engineer's consent / 'Notice of No Objection' to the Claimant's design documents was delayed beyond the review periods stated in the Contract

177. Clauses 1.1.2.4 and 1.1.2.2 of the GCC allow the Respondent to appoint any person to function as the Engineer, provided the Claimant is notified of the same. Clause 3.2 of the GCC also permits the assignment of duties and the delegation of authority by the Engineer to its assistants who are suitably qualified and competent to carry out such functions.

178. The issue is not whether the Respondent was entitled to appoint an external Engineer, or even by when it made the appointment. The issue is whether as a result of the external Engineer not being in place from the outset, the Claimant's progress was delayed. This could be the case if the review of the Claimant's submissions was delayed because of the external Engineer not being in place and the document reviews being carried out by CPM Jaipur and CPM Ajmer acting as "Engineer" until the external Engineer was appointed in 2014.

179. The Claimant states that the Engineer's review of the Claimant's design documents was delayed much beyond the contractual review period of 21-days and the Engineer's comments following the review were issued piecemeal.[125] However, the Claimant does not provide any detail as to the particular instances of such delay or piecemeal comments that caused delay to its Work as a result, or how many days of impact resulted from this delay event so as to inform an assessment of the appropriate prolongation cost. Accordingly, the Respondent can only respond in general terms.

[125] SOC paragraph 88(a) and (b)

180. As a design-build contractor, the primary responsibility for the preparation of design lies with the Claimant. While the Contract provides that the Respondent is to review and revert on the Claimant's design within 21-days, it also allows the Claimant to proceed with the Works if it has not received such response within the 21-day period: in such event, the Claimant's design will be deemed as approved. This is set out in Clause 5.2, the material parts of which read as follows:

"*5.2 Contractor's Documents*

The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, and the documents described in Sub-Clause 5.6 [As-Built Documents] and Sub-Clause 5.7 [Operation and Maintenance Manuals]. Unless otherwise stated in the Employer's Requirements, the Contractor's Documents shall be written in the language for communications defined in Sub-Clause 1.4 [Law and Language].

The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel. The Employer's Personnel shall have the right to inspect the preparation of all these documents, wherever they are being prepared.

If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Engineer for review and/or for approval, they shall be submitted accordingly, together with a notice as described below. In the following provisions of this Sub-Clause, (i) "review period" means the period required by the Engineer for review and (if so specified) for approval, and (ii) "Contractor's Documents" exclude any documents which are not specified as being required to be submitted for review and/or for approval.

Unless otherwise stated in the Employer's Requirements, <u>each review period shall not exceed 21 days, calculated from the date on which the Engineer receives a Contractor's Document and the Contractor's notice</u>. This notice shall state that the Contractor's Document is considered ready, both for review (and approval, if so specified) in accordance with this Sub-Clause and for use. The

notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply.

The Engineer may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this Sub-Clause, at the Contractor's cost.

For each part of the Works, and except to the extent that the prior approval or consent of the Engineer shall have been obtained:

(a) in the case of a Contractor's Document which has (as specified) been submitted for the Engineer's approval:

(i) the Engineer shall give notice to the Contractor that the Contractor's Document is approved, with or without comments, or that it fails (to the extent stated) to comply with the Contract;

(ii) execution of such part of the Works shall not commence until the Engineer has approved the Contractor's Document; and

(iii) the Engineer shall be deemed to have approved the Contractor's Document upon the expiry of the review periods for all the Contractor's Documents which are relevant to the design and execution of such part, unless the Engineer has previously notified otherwise in accordance with sub-paragraph (i);

(b) execution of such part of the Works shall not commence prior to the expiry of the review periods for all the Contractor's Documents which are relevant to its design and execution;

(c) execution of such part of the Works shall be in accordance with these reviewed (and, if specified, approved) Contractor's Documents; and

(d) if the Contractor wishes to modify any design or document which has previously been submitted for review (and, if specified, approval), the Contractor shall immediately give notice to the Engineer. Thereafter, the Contractor shall submit revised documents to the Engineer in accordance with the above procedure.

If the Engineer instructs that further Contractor's Documents are required, the Contractor shall prepare them promptly.

Any such approval or consent, or any review (under this Sub-Clause or otherwise), shall not relieve the Contractor from any obligation or responsibility."

(emphasis supplied)

181. The Claimant has not explained why it could not proceed on the basis of deemed approval in the instances where it did not receive the Engineer's comments within the 21-day period. Clause 5.2 exists so as to avoid any suggestion by a contractor that it was 'held up' waiting for the Engineer's comments as, given the provision for deemed approval, the contractor is able to proceed in line with its planned programme.

Furthermore, (i) clause 5.2 of the GCC contemplated contemplates multiple rounds of review by the Engineer (each within the review period not exceeding 21 days) where the Contractor's Documents do not comply with the Contract to the satisfaction of the Engineer;

(ii) if a Contractor's Document fails to comply with the Contract, the same shall be "rectified, resubmitted and reviewed… at the Contractor's cost".

182. In this respect, the purported delay in the Engineer's consent / NONO had been considered by the Engineer in its EOT assessment for MS-3 dated 24 August 2017[126]. The Engineer determined as follows:

3.4.*2. […]*

(c) Poor quality of the Contractor's design and Contractor's failure of design submissions in compliance with the requirement of Employer Requirements (ER) and relevant Codes and Standards were the major cause of delay except for the case of Road Under Bridges (RUBs) Pedestrian Subways (PSs) and Road Over Bridges (ROBs) which included additional requirement of prior approval from Indian Railways (IR).

[…]

[126] Exhibit R-160

3.4.4.7. On analyzing the EOT assessment due to delayed approval with reference to the critical path analysis, it is noted that the delay due to the Engineer's approval is shadowed under the period on other concurrent (dominant) delay's events on the critical path and as such is absorbed by those events. As such the said assessed delay due to delayed approval is not on the critical path."

*(Em*phasis added)

183. There existed several technical non-compliances with design documents submitted by the Contractor. For instance, documents pertaining to waterway bridges including MIB, MJB, IMB *etc*.; bridge GADs, accepted geo-technical report, hydrological report, examining foundation details of existing IR bridges *etc*. were required to be submitted during validation of the data stage in terms of Appendix 14 [Requirements of Design] of the ER. Furthermore, the requirement of coordination by the Contractor at design stage with IR and Road authorities with respect to RUBs was also not complied with by the Contractor.

184. Thus, not only had the Claimant consented to the above assessment by the Engineer for the purposes of the Delay Events, but the same did not even give rise to any EOT for MS-3 works as the Delay Events did not affect the critical path as defined in the Claimant's CCP submitted on 05 December 2013.

B. Whether a change in law in the State of Rajasthan mandated the Claimant to secure prior environmental clearance for mining of minor minerals having an area of less than 5 hectares, and whether there was a delay in grant of the environmental clearance

185. The Respondent submits that the requirement of obtaining the requisite Environmental Clearance ('**EC**') was not a new requirement as on the base date of the Contract *i.e.*, 21 January 2013. Hence, the requirement of ECs could not have amounted to a delay event and could not have delayed the project works.

186. The Central Government on 14 September 2006 issued the Environmental Impact Assessment Notification, 2006 ('**EIA Notification 2006**'),[127] in terms of which the Ministry of Environment and Forests ('**MoEF**') categorized projects into two categories: Category 'A' and Category 'B'. While projects falling under Category 'A' had to acquire EC from the MoEF itself, projects falling under the Category 'B' had to acquire EC from State/Union territory Environment Impact Assessment Authority ('**SEIAA**'). The relevant provision has been reproduced below:

"***2. Requirement of prior Environmental Clearance (EC):***

The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification.

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization.

(iii) Any change in product - mix in an existing manufacturing unit included in Schedule beyond the specified range.

"***4. Categorization of projects and activities****:*

(i) All projects and activities are broadly categorized in to two categories - Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and manmade resources.

[127] S.O.1533(E) dated 14 September 2006.

(ii) *All projects or activities included as Category 'A' in the Schedule, including expansion and modernization of existing projects or activities and change in product mix, shall require prior environmental clearance from the Central Government in the Ministry of Environment and Forests (MoEF) on the recommendations of an Expert Appraisal Committee (EAC) to be constituted by the Central Government for the purposes of this notification;*

(iii) *All projects or activities included as Category 'B' in the Schedule, including expansion and modernization of existing projects or activities as specified in sub paragraph (ii) of paragraph 2, or change in product mix as specified in sub paragraph (iii) of paragraph 2, but excluding those which fulfil the General Conditions (GC) stipulated in the Schedule, will require prior environmental clearance from the State/Union territory Environment Impact Assessment Authority (SEIAA). The SEIAA shall base its decision on the recommendations of a State or Union territory level Expert Appraisal Committee (SEAC) as to be constituted for in this notification. II "In the absence of a duly constituted SEIAA.*"

187. The following table, which contains the relevant portion of the Schedule of the EIA Notification 2006, details the projects and the categories they would fall under:

Project or Activity		**Category with threshold limit**		**Conditions if any**
		A	**B**	
1		**Mining, extraction of natural resources and power generation (for a specified production capacity)**		
(1)	(2)	(3)	(4)	(5)

"1(a)	(i) Mining of minerals.	≥ 50 ha. of mining lease area in respect of noncoal mine lease.	<50 Ha. ≥ 5 Ha. of mining lease area in respect of non-coal mine lease.	General Condition shall apply.
		> 150 ha of mining lease area in respect of coal mine lease.	≤ 150 ha ≥ 5 ha of mining lease area in respect of coal mine lease.	Note: Mineral prospecting is exempted."
		Asbestos mining irrespective of mining area		

Table 5: EIA Notification 2006

188. The EIA Notification 2006 was amended by Notification dated 01 December 2009.[128] Certain amendments were made to projects concerning non-coal mine leases wherein projects with an area of more than 50 hectares would require prior EC from the MoEF, while projects having less than 50 hectares but more than 5 hectares of mining area would require prior EC from the SEIAA.

189. On 27 February 2012, the judgment of the Indian Supreme Court in ***Deepak Kumar v. State of Haryana***[129] was delivered. In the judgement, the Supreme Court, after taking into consideration the environmental impact that river and sand mining projects had had on the environment, directed States and Union Territories to frame appropriate rules. The Court specifically directed that all leases pertaining to minor minerals, including renewal for areas of less than 5 ha., will only be granted after getting the EC clearance by the MoEF.[130]

[128] S.O. 3067(E) dated 01 December 2009.
[129] RL-7, Legal authorities on behalf of Respondent.
[130] Id. "We, in the meanwhile, order that leases of minor mineral including their renewal for an area of less than five hectares be granted by the States/Union Territories only after getting environmental clearance from the MoEF."

190. It is evident from the above discussion that the requirement of prior EC for mining leases of less than 5 ha. was already present in as of 27 February 2012, i.e., much before the base date of the Contract and the submission of the bids by the Contractor. For this reason, the Claimant is wrong to suggest that there was a "change in law" post the base date.

191. Subsequently, in compliance with the direction of the Supreme Court in the aforenoted judgment, the MoEF issued an Office Memorandum ('**OM**') dated 18 May 2012.[131] In addition, the OM also referred to the directions passed by the Supreme Court on 16 April 2012 in the same case. The relevant parts of the said OM are reproduced below:

> *'In order to ensure compliance of the above referred order of the Hon'ble Supreme Court dated 27.2.2012, it has now been decided that all mining projects of minor minerals including their renewal, irrespective of the size of the lease would henceforth require prior environment clearance. Mining projects with lease area up to less than 50 ha including projects of minor mineral with lease area less than 5 ha would be treated as category 'B' as defined in the EIA Notification, 2006 and will be considered by the respective SEIAAs notified by MoEF and following the procedure prescribed under EIA Notification, 2006.*
>
> *Further, the Hon'ble Supreme Court in its order dated 16.4.2012 in the above-mentioned matter and the linked applications has observed as under:*
>
> *'All the same, liberty is granted to the applicants before us to approach the Ministry of Environment and Forests for permission to carry on mining below five hectares and in the event of which Ministry will dispose of all the applications within ten days from the date of receipt of the applications in accordance with law.'"*
>
> (emphasis supplied)

[131] Office Memorandum dated 18 May 2012 bearing subject 'Order of Hon'ble Supreme Court dated 27.2.2012 in I.A. no. 12-13 of 2011 in SLP (C) no. 19628-19629 of 2009 in the matter of Deepak Kumar etc. Vs State of Haryana and Ors. - Implementation thereof - Regarding.'

192. Thus, not only did the Supreme Court clarify the position that a prior EC was acquired for mining leases, both new and existing, below 5 ha., it was also clarified *vide* OM dated 18 May 2012 that such leases would be treated as Category 'B' under the EIA Notification 2006. A time limit was also imposed on SEIAA *vide* the Supreme Court's order dated 16 April 2012 for processing and disposing of the applications made to it.

193. On 19 June 2012, the Government of Rajasthan by way of gazette notification amended Rule 4 of the Rajasthan Minor Mineral Concession Rules, 1986 by adding sub-clause (12) under Rule 4 which stated that no mining lease could be granted in contravention of the EIA Notification 2006[132]. Accordingly, the Rajasthan Government also complied with the Supreme Court's judgment in ***Deepak Kumar v. State of Haryana*** (supra). The sub-clause has been reproduced below:

> "*(12) No mining lease shall be granted or renewed in contravention of Environment Impact Assessment Notification dated 14.09.2006 issued by the Ministry of Environment and Forest, Government of India, as amended from time to time*."

194. Therefore, the Indian Supreme Court's judgment dated 27 February 2012 and the gazette notification of the Government of Rajasthan dated 19 June 2012 inserting Rule 4(12) to the Rajasthan Minor Mineral Concession Rules, 1986 elucidate that there was a requirement of prior EC which had been implemented in the State of Rajasthan prior to the base date of the Contract.

195. The MoEF through OM dated 24 June 2013[133] further categorized the activities of borrowing / excavation of 'brick earth' and 'ordinary earth' up to an area less than 5 ha. as Category 'B2'.

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[132] Refer Clause 4.10 (d) and 5.4 of GCC of the Contract

[133] Office Memorandum dated 24 June 2013 bearing subject 'Guidelines for consideration of proposals for grant of environmental clearance under EIA Notification, 2006 for mining of 'brick earth' and 'ordinary earth' having lease area less than 5 ha – regarding categorization as Category 'B2''.

196. An amendment was made on 09 September 2013 in Item 1(a) of Schedule to the EIA Notification 2006 wherein all leases of minor mineral less than 50 ha. were included under Category 'B'.

197. The MoEF issued another OM dated 24 December 2013[134] for consideration of proposals for grant of EC regarding categorisation of Category 'B' projects into Category 'B1' and 'B2'. The OM also stated that no river sand mining project with mining lease area of less than 5 hectares may be considered for grant of EC. The relevant portion has been reproduced below:

Mining of minor minerals

> *As of now, mining projects of minor minerals with less than 50 ha of mining lease area are categorized as Category 'B' as per Notification S.O.2731(E) dated 9th September, 2013. Also vide OM No. L-11011/47/2011-1A.II(M) dated 24.06.2013, guidelines have been issued regarding categorization of mining projects of 'brick earth' and 'ordinary earth' having lease area less than 5 ha as category 'B2' subject to stipulations stated therein.*
>
> *In the above backdrop, the projects of mining of minor minerals, categorized as Category 'B' are hereby categorized as 'B2' as per the following:*

i. *'Brick earth' / 'Ordinary earth' mining projects having lease area less than 5 ha will be considered for granting EC as per the aforesaid guidelines issued by MOEF on 24.6.2013*

ii. *'Brick earth' / 'Ordinary earth' mining projects with mining lease area ≥ 5 ha but < 25 Ha. and all other minor mineral mining projects with mining lease area < 25 Ha., except for river sand mining projects will be appraised as Category 'B2' projects.*

[134] Office Memorandum dated 24 December 2013 bearing subject 'Guidelines for consideration of proposals for grant of environmental clearance Environmental Impact Assessment (EIA) Notification, 2006 and its amendments- regarding categorization of Category 'B' projects/activities into Category 'B1' & 'B2'.'

iii. No river sand mining project, with mine lease area less than 5 ha, may be considered for granting EC. The river sand mining projects with mining lease area ≥ 5 ha but < 25 ha will be categorized as 'B2'.

(emphasis supplied)

198. Following the OM issued by the MoEF on 24 December 2013, certain guidelines were issued by the Government on Rajasthan on 08 January 2014.

199. The OM dated 24 December 2013 was stayed by the National Green Tribunal ('**NGT**') on 28 March 2014 in ***Ranbir Singh v. State of H.P. & Ors.***[135] The Tribunal noted that "the Office Memorandum is an administrative order and cannot frustrate the legislative act". The relevant paragraph is reproduced below:

> "*The Ministry of Environment & Forest (MoEF) has not been able to explain as to how the Office Memorandum dated 24 December 2013 is in conformity with the order of the Hon'ble Supreme Court in Deepak Kumar's case, order of the NGT and the Notification dated 9 September 2013 issued by the MoEF itself. We do not think that the MoEF could have issued such memorandum.*
>
> *The Notification issued by the MoEF is an act of subordinate legislation and was issued in exercise of statutory powers. The Office Memorandum is an administrative order and cannot frustrate the legislative act. In fact, it falls beyond the scope of administrative powers. Consequently, we stay the operation and effect of the order of Office Memorandum dated 24 December 2013*."

(emphasis supplied)

200. The NGT on 06 June 2014, in ***Himmat Singh Shekhawat v. State of Rajasthan***[136] stayed the operation of the guidelines issued by the Government of Rajasthan on 08 January 2014 noting that the office memorandum was issued to wriggle-out of the

[135] RL-8, Legal Authorities on behalf of the Respondent.
[136] RL-8, Legal Authorities on behalf of the Respondent.

directions earlier passed by the Supreme Court by creating Category 'B2' having an area of less than 25 ha. and above 5 ha. The NGT also noted that although the guidelines under OM dated 08 January 2014 were issued prior to the order passed by the Tribunal staying the operation of the OM dated 24 December 2013, further action could not be legally initiated by the Government of Rajasthan when the operation of the said OM stood stayed by the order of the Tribunal. The NGT's order dated 06 June 2014 is reproduced below in relevant part:

> "*The office memorandum dated 24.12.2013 provides that projects categorized as B-1 require EIA report for appraisal and has also to undergo public consultation process as applicable, while projects categorized as B-2 will be appraised based on the application in Form-1 accompanied by Pre-feasibility Report. Under clause 1(iii) no river sand mining project, with mine lease area less than 5 ha. may be considered for grant of environment clearance and river sand mining projects with mining lease area of 5 ha. but less than 25 ha. will be categorized as category B-2. In addition to the requirement as stated earlier, such projects will be considered subject to the stipulations shown therein.*
>
> *The Hon'ble Supreme Court in the case of "Deepak Kumar Vs State of Haryana" 2012 4 SCC 629 declared that lease of mine or minerals including their renewal for the area of less than 5 ha. also, would be granted only after getting/granting environment clearance from MoEF. Evidently, the office memorandum was issued to wriggle-out of the said directions by creating category B-2 having an area of less than 25 ha and above 5 ha.*
>
> *[…]*
>
> *The guidelines issued by the Government of Rajasthan on 08.01.2014 were following the office memorandum issued by the MoEF on 24.12.2013. Though, the said guidelines were issued prior to the order passed by this Tribunal staying the operation of the said office memorandum, further action cannot be legally initiated by the Government of Rajasthan, when the operation of the sand office memorandum stood stayed by the order of this Tribunal. In such circumstances, the Government of Rajasthan cannot be permitted to proceed as provided under*

the office memorandum dated 24.12.2013, granting permission to mine. In such circumstances, the respondent nos. 1 and 2 are directed not to proceed further pursuant to the guidelines issued by the Government of Rajasthan on 08.01.2014."

(emphasis supplied)

201. It is pertinent to note that neither of the interim orders of the NGT dated 28 March 2014 and 06 June 2014 altered the prevailing legal position at the time: that prior EC would be required for extraction of minor minerals, pursuant to the Supreme Court's judgment in ***Deepak Kumar v. State of Haryana*** (supra).

202. Finally, on 13 January 2015, the NGT passed the final judgement in ***Himmat Singh Shekhawat v. State of Rajasthan & Ors***.[137] It is relevant to note that the Claimant had also filed an application before the NGT seeking certain reliefs, which was also disposed of by this judgment. The relevant part of the NGT order dealing with the Claimant's case is reproduced below:

"*In this application, M.A. No. 419/2014 was filed by various applicants, including the project proponent - Larsen and Toubro Ltd., praying therein that SEIAA be directed to consider the application for Environmental Clearance filed by the applicant in respect of the mining of minor minerals in areas which were owned/were under the mining lease of the applicants. According to these applicants, they are only carrying on the activity of brick earth and ordinary earth excavation for the purposes of completing the project of construction of railway line of the portion of the Dedicated Freight Corridor from Rewari in Haryana to Iqbalgarh in Gujarat running along a length of 626 kms. on design build lumpsum price basis. The project involves formation in embankment/cuttings, bridges, structures, buildings, ballast on formation and track work, including testing and commissioning. The work comprises of railway track along a length of 626 kms, 110 major bridges, 1229 minor bridges and 20 stations. According to the applicants, they were not covered by the injunction*

[137] RL-8, Legal Authorities on behalf of the Respondent.

order passed by the Tribunal, in as much as, the areas of lease mine holders were less than 5 hectares and in alternative, all of them had applied for taking Environmental Clearance as they are category 'B2' projects in terms of Office Memorandum dated 24th June, 2013. The challenge to the Office Memorandum dated 24th December, 2013 is also raised on the ground that though the Office Memorandum refers to the report of the Committee constituted by MoEF vide its Office Memorandum dated 30th January, 2013 but that Committee had not made any recommendations in regard to the criteria that should be adopted for categorisation of the projects as 'B1' and 'B2' respectively. Factually, it is correct that the report of the Committee in its recommendations has not made any recommendations in regard to the bifurcation of 'B' category projects into 'B1' and 'B2'. However, there is some discussion in the opening paragraphs of the report in that behalf. Once, Clause 7 of the Notification of 2006 empowers MoEF to issue guidelines on that behalf then such jurisdiction cannot be taken away on the ground that the Committee constituted by the Ministry did or did not make a particular recommendation. Of course, it is always more appropriate to issue Notifications/Office Memorandums which are based and are supported by scientific reason, but, that does not mean the absence thereof would vitiate office memorandums, which, otherwise have been issued in accordance with law and within the framework of the power vested in the MoEF. Therefore, we are unable to accept the contention of the applicants that this Office Memorandum should be quashed or declared invalid in its entirety on that ground alone.

Therefore, in their application, the only prayer is that their application for grant of Environmental Clearance should be considered expeditiously to avoid any prejudice to the progress of the projects. In view of the limited prayer made in this application, it is not necessary for us to again deliberate much on this application.

We dispose of this application with a direction that SEIAA shall consider these applications filed for seeking Environmental Clearance, in accordance with law and observations made in this judgment, expeditiously and in any case within a period of three months from today."

(emphasis supplied)

203. The NGT *inter alia* passed several directions, some which are reproduced below:

"*I. For the reasons afore recorded, we hold and declare that the Notification dated 9th September, 2013 is invalid and inoperative for non-compliance of the statutorily prescribed procedure under the Environment (Protection) Rules, 1986 and for absence of any justifiable reason for dispensation of such procedure.*

II. We also hold and declare that the Office Memorandums dated 24th June, 2013 and 24th December, 2013 to the extent afore-indicated are invalid and inoperative being beyond the power of delegated legislation.

III. All the Office Memorandums and Notifications issued by MoEF i.e., 1st December, 2009, 18th May, 2012 and 24th June, 2013 and 24th December, 2013 (except to the extent afore-stated) are operative and would apply to the lease mine holders irrespective of the fact that whether the area involved is more or less than 5 hectares.

IV. We further hold that the existing mining lease right holders would also have to comply with the requirement of obtaining Environmental Clearance from the competent authorities in accordance with law. However, all of them, if not already granted Environmental Clearance would be entitled to a reasonable period (say three months) to submit their applications for obtaining the same, which shall be disposed of expeditiously and in any case not later than six months from pronouncement of this judgment.

V. All the States and the Ministry of Environment and Forest shall ensure strict compliance to the directions issued by the Hon'ble Supreme Court in the case of Deepak Kumar (supra). We direct Secretary, Ministry of Environment and Forest to hold a meeting with the State of Rajasthan, Himachal Pradesh and Karnataka to bring complete uniformity in application of the above referred Notifications and Office Memorandums including the Notification of 2006.

IX. It is stated before us that in large number of cases, particularly in relation of State of Rajasthan, persons carrying on mining activity of minor minerals, non-coal mining and brick earth and ordinary earth have applied for obtaining Environmental Clearances in accordance with the terms and conditions of the Notification of 2006. Let all such applications be dealt with and orders passed by the concerned authorities at the earliest and in any case not later than six months from today.

XI. We dispose of Original Application No. 123/13 with a direction that SEIAA shall consider the applications filed for seeking Environmental Clearance in accordance with law and observations made in this judgment, expeditiously, and in any case within a period of three months from today.

XII. In the meanwhile, no State shall permit carrying on of sand mining or minor mineral extraction on riverbed or otherwise without the concerned person obtaining Environmental Clearance from the competent authority.

XIII. We direct the Ministry of Environment and Forest to issue comprehensive but self-contained Notification relating to all minor mineral activity on the riverbed or otherwise, to avoid unnecessary confusion, ambiguities and practical difficulties in implementation of the environmental laws."

(emphasis supplied)

204. In view of the above, it is clear that the requirement of obtaining prior EC for extraction of minor minerals in areas of less than 5 ha. was present from at least 27 February 2012, being the date of the judgment in ***Deepak Kumar v. State of Haryana*** (supra). Further, neither the NGT's interim orders nor the final judgment in ***Himmat Singh Shekhawat v. State of Rajasthan*** (supra) altered the position. Thus, prior EC continued to be a pre-requisite for grant of a licence for minor mineral leases for areas of less than 5 ha. throughout the relevant time.

205. The Respondent accordingly submits that the Claimant was well-aware, or ought to have been aware, of the requirement of obtaining prior EC for extraction of minor minerals[138]. However, the Claimant neglected in obtaining the EC, which led to delays in the project. This is also evident from the contemporaneous correspondence between the Claimant and Respondent.

206. On 17 December 2013,[139] the Claimant wrote to the Respondent stating that it had approached the Rajasthan State Pollution Control Board ('**RSPCB**') seeking consent to establish and operate a short-term permit of quarry at Village Kanakheda in the district of Ajmer, Rajasthan. The Claimant stated that the RSPCB had written back *vide* letter dated 20 November 2013 stating that in terms of the MoEF notification dated 09 September 2013 and the RSPCB's letter dated 31 October 2013, a prior EC was required for obtaining a short-term permit of minor minerals with lease area less than 5 ha. The RSPCB had accordingly directed the Claimant to seek the requisite approval from them only after acquiring an EC from the MoEF. However, the Claimant failed to apply for EC. Instead, it asserted that there was a change in legislation.

207. In response to the aforementioned letter dated 17 December 2013, the Respondent *vide* its letter dated 21 December 2013[140] stated that since the work was awarded to the Claimant in August 2013 whereas the base date of the Contract was 22 January 2013, it had sufficient time to apply for a permit from the State Government. In fact, the Respondent had also recommended the possibility of having the mine area as more than 5 ha. The Claimant, however, did not pay any heed to such requests and suggestions of the Respondent. Instead, there were inordinate delays on the Claimant's part and a claim for compensation is now being made without any valid reason.

208. Furthermore, to repudiate the Claimant's contention as to 'change of law, the Respondent *vide* its letter dated 24 December 2013 brought to the Claimant's attention the judgment of the Indian Supreme Court in ***Deepak Kumar v. State of Haryana***

[138] Clause 4.10 (d), and 5.4 of GCC of the Contract
[139] Exhibit R-7.
[140] Exhibit R-8.

(supra) as well as the notification dated 09 September 2013[141] issued by the MoEF to buttress its position that neither was there a new law in place, nor a repeal or modification of any existing law that would have entailed an increase in cost after the base date of the Contract. In subsequent communications between the parties, the Claimant refused to accept its failure and negligence, whereas the Respondent reiterated and maintained its stand.[142]

209. Finally, and in any event, even if there was a Change in Law, the Claimant has failed to identify the number of days' prolongation which was the result of the delay event in question. Therefore, there can be no basis on which the prolongation period allocable to this event can be considered.

C. **Whether delays in the construction of the Road Under Bridge was beyond the Claimant's control**

210. At the outset, the Respondent submits that the ER always contemplated that coordination with the Indian Railways in relation to the RUBs was within the scope of works of the Claimant—both at the stage of design as well as construction. Even the Engineer's instructions to the Claimant dated 05 November 2014[143] did not include any requirement not envisaged in the Contract. In any event, and without prejudice to the Respondent's other submissions, any delay on account of coordination with and approval by the IR would constitute a 'delay' within the meaning of clause 8.5 of the GCC and would not give rise to any basis for compensation under the Contract.

211. At this juncture, it is relevant to refer to the relevant contractual provisions applicable in this context:

Clause 8(4) of the Employer's Requirement – General	"***Programme Requirements*** *(4) In compiling its Works Programme and in all subsequent updating and reporting, the Contractor shall make provision for the time required for coordinating and completing the*

[141] Exhibit R-9.
[142] *See*, for instance, the Claimant's letter dated 20 January 2014; Exhibit R-10 ; Exhibit R-12
[143] Exhibit R-23

design, testing, commissioning and integrated testing of the Works, including inter alia, design co-ordination periods during which the Contractor shall co-ordinate its design with those of Other Contractors, the review procedures, determining and complying with the requirements of all government departments and all others whose consent, permission, authority or license is required prior to the execution of any Work."

Clause 13 of the Employer's Requirement – General

"***Contractor's Coordination with Others***

The Contractor shall take in to account the interface coordination requirements of Other Contractors who will be working at site and or duly constituted authorities who will be employed or required by the Employer to execute the work within or adjacent to site in connection with or ancillary to the works. In this regard, the Employer/Engineer shall organize coordination meetings to sort out any interfacing issues amongst the interfacing Contractors. In addition to the coordination meetings to be arranged by the Employer/Engineer; the Contractor may also arrange his own coordination meetings with the Other Contractors.

The Contractor shall fully integrate and coordinate the design and construction of the Works with Other Contractors, Interfacing Parties and related bodies parties and entities including but not limited to Indian Railways, Railway Board, RDSO, as well as the designated contractors / consultants / service providers, other than other contractors who are engaged in part of the Works, relevant statutory authorities, relevant public utility agencies and adjacent contractors who are or may be working adjacent to the Site."

Clause 3.1(2) of the Employer's Requirement – Design

"3.1 Review of Indicative Design included in Reference Drawings

(2) Span Arrangement of Important / Major / Minor Bridges, ROBs, RUBs, Rail Flyovers

The Contractor shall undertake the detailed review of the GADs / span arrangements and type of foundation for all the proposed Bridges viz. Important Bridges, Major Bridges, Minor Bridges, Road Over Bridges, and Road Under

	Bridges, Rail Flyovers and submit to the Engineer for his consent. Detailed review undertaken by the Contractor shall be in reference to the span arrangement and type of the foundations of the existing IR Bridges for coincidence of pier locations as a first priority, as well as for the standardization of the span length and for any supplementary protection works that shall be required to avoid scour around piers of the both of existing IR bridges and the DFC bridges. *The GADs/spanning arrangement and the type of foundation for all the Bridges shall require the consent of the Engineer prior to undertaking the Technical Design.* *Before communicating the Notice of No Objection for , the GADS/spanning arrangement of all Major/ Important Bridges in parallel with existing IR line shall require approval of IR which shall be arranged by the Employer*." (emphasis supplied)
Clause 6.3 of the Employer's Requirement – Design	"*Span arrangement, type of structure, and their Technical Design proposed by the Contractor 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.* *The Contractor shall be required to submit one additional copy of all his GADs/span arrangement and Technical Design of all such structures to the Engineer for onward submission to Indian Railways. The Employer shall co-ordinate seeking the approval from Indian Railways; however, the Contractor shall facilitate the Engineer I Employer in seeking the approval from Indian Railways including but not limited to providing clarifications/additional data, attending meetings etc. as required*."
Clause 3.2 (7.1) of the Employer's Requirements – Functional	"***7.1 Road Under Bridges (RUBs)*** *(i) The proposed Alignment (DFC tracks) is generally parallel to the existing IR alignment. Depending upon the density of road traffic, IR has provided number of RUBs and Level*

Crossings to facilitate the movement of road traffic across its existing tracks at number of locations.

(ii) 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.

(iii) In case of detour sections, RUBs has also been proposed across DFC tracks to avoid Level Crossings, Design and construction of RUBs across DFC tracks at such locations is in Scope of Work 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

(iv) The Scope of work for RUBs across DFC tracks shall also include but not limited to design and 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.

(v) <u>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</u>.

(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."

(emphasis supplied)

Clause 3.2 (12) of the Employer's Requirements – Functional

"*(12)* ***[Level Crossing]*** *Design and construction of the Level Crossings as identified in the List of Level Crossings in Attachment 3 herewith. The Scope of Work shall be as detailed below:*

[…]

(d) <u>Under the policy of elimination of Level Crossing by Indian Railways, the existing Level Crossings across IR tracks shall be required to be converted in to Road Under Bridge (RUB) / limited height Subway / Road Over Bridge (ROB). Accordingly, there is a possibility that during execution of the Work, some of the present Level Crossings across IR tracks may be sanctioned by IR to be converted to Road Under Bridge / limited height Subway / Road Over Bridge</u>. Accordingly, the proposed Level Crossings across the Alignment (DFC tracks) shall also have to be converted to the similar structure. Design & construction of such structures shall also be within the Scope of Works of the Contractor. <u>Such changes, if any and as considered necessary, shall be advised to the Contractor subsequently</u>

during currency of the Contract and shall be got executed under Variations [Clause 13 of General Conditions in Volume I of the Bid Documents] as per the provisions of the Contract."

(emphasis supplied)

Clause 8.6 of the Employer's Requirements – Functional

"*Particular attention shall be paid to the existing IR track ways, stations and any other related facilities so as not to affect the railway operations. The Contractor shall consult with IR through Engineer and Employer with respect to this matter and shall include the agreement resulting from the consultation in his Works Programme and his Construction Method Statement and relevant drawings and documents as part of his Technical Design development. This shall include but not limited to:*

(a) precautionary measures to ensure the safety of the IR moving trains;

(b) precautionary measures to existing IR railway properties including, but not limited to, rail tracks, embankment, railway structures, electrical and communication cables, and other railway operation facilities/ equipment.

(c) the works to be executed in the specified traffic block;

(d) treatment of unchartered embedded items along the existing IR embankment; and

(e) emergency procedures in case of an accident.

Maintenance activities of the Indian Railways for their tracks and structures adjacent to the Work. It is a requirement that Indian Railway remains operational during the execution of the Work."

(emphasis supplied)

Clause 2.3 of the Appendix 10 of the

"*The Contractor shall be responsible for the detailed co-ordination of his design, manufacturing, installation, construction, testing and commissioning activities and shall take the lead in the management of the coordination process*

Employer's Requirements	*<u>with Indian Railways</u>, Other Contractors and Interfacing Parties*." (emphasis supplied)
Clause 1.1.6.9 of the PC	"*'Variation' means any change to the scope of works, design criteria and specifications, and criteria for the testing and performance of the completed works specified in the Employer's Requirements*."

212. It is clear from the aforementioned clauses and the definition of 'Variation' that the Engineer's instruction to the Claimant dated 05 November 2014[144] was in line with what the Claimant was required to achieve under the ER and did not entail any change to the requirements or specifications under the Employer's Requirements under the Contract. The only consequence of the said instructions was that the Claimant was to plan the progress of its works in such a manner that the IR had sufficient time to provide its approval to the concerned GADs. Accordingly, the Engineer's instructions did not constitute any Variation to the Contract in terms of Clause 13 of the GCC/PC.[145] Accordingly, it is noted that:

i. Respondent explains that IR is an Independent Authority and DFC has no control over IR and delay, if any, by IR comes under GC Cl. 8.5.

ii. Nowhere it is mentioned that IR will construct the RUBs prior to or along with DFC RUB. Rather it is a matter of coordination by Contractor with IR as referenced in Cl. 2.3 of Appendix 10 of ER and Cl. 13 of ER-General.

iii. Contractor was to coordinate his construction with IR as reference in clause 1.3 of Appendix-10 and clause 8.6 of ER functional.

[144] Exhibit R-23

[145] It is important to note that clause 3.1(2) of the Employer's Requirement – Design specifically sets out the requirements in respect of Span Arrangement of Important/Major/Minor Bridges, ROBs, RUBs, Rail Flyovers *etc*. The said provision states that the approval of IR to the Span Arrangement is required for Major and Important Bridges before the NONO to the Claimant's design document is issued by the Engineer and that the approval from IR will be arranged by the Respondent.

213. The Respondent reiterates if there was any delay on the part of IR (being a public authority under the GCC/ Contract) to provide its approval, the Claimant would be entitled to extension of time in accordance with clause 8.5 of the GCC. The Engineer had accordingly provided its assessment of delay in its letter dated 24 August 2017.[146] In respect of the delay in the approval of the Technical Design/ Integrated GADs, the Engineer noted that "[t]here has been delay in approval of Integrated GAD (new requirement) as detailed in para 3.6.1 and 3.6.4 above and finalization of location / span arrangement by IR during the period up to 31 August 2016. Details are as summarized in para 3.4.4.3 and Table - 07 above".

214. The Engineer's observations with respect to delay in construction of RUBs were as follows:

> "***3.6.3.3. Delay in Construction of RUBs***
>
> *a) The total number of the RUBs as per the original Scope of Work (SoW) of the Contractor which are considered in the CCP and the total number of RUBs structures in the revised SoW of the Contractor including the additional RUBs instructed as Variation to Contract is as follows when the status of 31.08.2016 is considered:*
>
> *[…]*
>
> *There is no change in the total number of RUBs as 305 nos. of structure as considered in CCP and as per the present Scope of Work of the Contractor are equal. Accordingly, it is noted here that addition of RUBs has not affected the time for completion of MS-3.*
>
> *c) 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*

[146] Exhibit R-160.

IR RUBs. Such requirement delayed the construction of DFC RUBs. This 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/SL T/NWR/Corres./12 dated 31-03-2016) is also relevant.

d) 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.

d) The delay in construction of DFCC RUB box (to the extent required for laying of track skeleton 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 skeleton, 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.

e) Assessment of EOT due to the delay in construction of RUBs in each section is further detailed."

(emphasis supplied)

215. It follows from the Engineer's findings that (i) time remained unaffected as the total number of RUBs were the same in number; (ii) the instances where the DFCC RUB boxes could not be constructed were considered eligible for delay; and (iii) where the DFCC RUB boxes had been constructed or buried, such instances were not considered eligible for delay. Thus, the Engineer had considered the factors causing delays in the

construction of RUBs and had accordingly recommended EOT, where considered appropriate. The same, however, does not entitle the Claimant to any additional costs under the Contract. Further, it is relevant to note that the Claimant was already compensated in terms of clause 13 of the GCC/PC for any additional work/Variation ordered in respect of the construction of RUBs. Accordingly, no further claims for additional costs on account of construction of RUBs can be sought by the Claimant in the present arbitration. NTC progressed save for 4 or 5 locations where the approaches were not available. Also, side elements were not required for track to be progressed and could be completed in time for the achievement of MS-4.

216. Finally, and in any event, even if the Engineer's instruction amounted to Variation, the Claimant has failed to identify the number of days' prolongation which was the result of the Respondent having to carry out the Variation. Therefore, there can be no basis on which the prolongation period allocable to this event can be considered.

D. Whether there was failure on the Respondent's part in handing over unencumbered land and Right of Way to the Claimant within the contractual period

217. It is relevant to consider clause 2.1 of the GCC/PC, which provides as follows:

"***2.1 Right of Access to the Site***

The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender. The right and possession may not be exclusive to the Contractor. If, under the Contract, the Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Employer's Requirements. However, the Employer may withhold any such right or possession until the Performance Security has been received.

If no such time is stated in the Appendix to Tender, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as may be required to enable the Contractor to proceed in accordance with the programme submitted under Sub-Clause 8.3 [Programme].

If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) [payment of any such cost-plus reasonable profit subject to a maximum of Rs. 2000.00 (Two Thousand) per day for every km. For length less than a kilometre pro-rata amount shall be calculated. Provided further that if such delay in handing over does not affect the execution of formation works for laying tracks, provisions under para 2.1(b) of this sub clause shall not apply.][147]

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

However, if and to the extent that the Employer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time, Cost or profit."

(emphasis supplied)

218. Clause 2.1 of the GCC/PC provides that it is the Claimant's responsibility under the Contract to provide the particulars for any alleged delay to the execution of the formation work that resulted from late provision of access. The provision also specifies

[147] Modified by Clause 2.1 of the Particular Conditions.

that the cost and reasonable profit is pre-estimated and subject to the agreed upper limit of INR 2000 per day for every kilometre. The particularisation of such details regarding non-handing over of unencumbered land / Right of Way ('**ROW**') is essential in light of the fact that clause 2.1 of the GCC/PC provides that the Claimant would not be entitled for costs and reasonable profits "if such delay in handing over does not affect the execution of formation works for laying of tracks".

219. Furthermore, it is relevant to note that the said delay event with respect to unavailability of unencumbered land / ROW had been considered by the Engineer in its EOT assessment for MS-3 for the Delay Events. The relevant portion of the Engineer's assessment in its letter dated 24 August 2017 provides for the following:

"*3.7.5. In this context, it is noted that:*

a) Although the Contractor took possession of the site with encumbered land conditions, such obstructions are in isolated locations within each section and lot of area with I the section otherwise available to proceed with the works.

b) Regarding Contractor's contention that 4.4 km of land is still to be handed over by DFCC in Saradhana to Madar section, the Engineer vide letter at sl. no. 14 (dated 05-08-2017) above requested the Employer to confirm the handing over status of 4.40 km as on 31.08.2016 in Madar to Saradhana section so that the Contractor's claim be analysed. The response from Employer is awaited. Meanwhile, the Engineer has noted from the site that 3.25 km of land is to be handed over to the Contractor when status as on 31-08-2016 is considered. Although this land is still not handed over to the Contractor, the Plan and Profile (P&P) of the section has been approved as on 31-08-2016. Based on the approved P&P drawings, the Contractor has developed some GADs of the minor structures, however, the Contractor could also have developed the CDPs of the rest of the structures in this non-handed over section.

c) Contractor's contention vide letter SLT/6374 dated 02.07.2016 that work was hindered due to forceful occupation of DFC ROW by IR/IR's contractor is not tenable in terms of the Contractor's various contractual obligations with

reference to coordination I interface management with Other Contractors working at site.

d) *Contractor vide letter SLT/5581 dated 04.03.2016 stated that he has still to receive unencumbered ROW of 4.4 km in package A. Engineer vide letter NKC/1606-29 dated 11.06.2016 advised the Contractor to refer various letters mentioned therein and was clarified that the Employer is under contractual obligation to handover unencumbered possession of ROW required for permanent works only (as per Cl 2.2 of Appendix-1 of ER) and was advised not to misrepresent the contractual provision. However the Contractor had not established how the other obstructions as per the joint statements have affected the progress of the Permanent Work.*

e) *The Engineer's letter no. NKC-SLT-1606-29 Dt. 11-06-2016 may be referred in this regard wherein it is categorically pointed out that the claim w.r.t. hindrances in the handed over section, the Contractor was advised to clearly identify those hindrances which are to be removed by the Employer as per the provisions of the Contract. Further, the PC 2.1 specify that if such delay in handing over does not affect the execution of formation works for laying of tracks, provision under para 2.1 (b) of this sub-clause shall not apply.*

f) *Regarding delay disruption of work due to crossing of IR meter gauge line near Ringus station (IR ch. 148 to IR ch. 149), Engineer vide letter L-NKC-SLT-PMC-1601-101 dated 21-01-2016 requested the Contractor to submit the programme of NTC arrival at this location to expedite the matter with IR and advise appropriate step. Contractor vide letter SLT/2016/5452 & 5539 dated 13,02.16 & 26.02.16 informed the time line w.r.t. completion of construction of civil works and NTC reaching at this location. Engineer vide letter L-NKC-SLT-PMC-1604-10 dated 04-04-2016 again asked the Contractor to submit realistic NTC movement program. Which the Contractor has submitted after elapsed of more than three months vide letter SLT/2016/6453 dated 11-07-2016. Engineer again vide letter L-NKC-SLT-PMC-JP-1607-213 dated 28-07-2016 pointed out some observations on the Contractor's programme and requested to submit the justification on the same. In view of the above, it appears that the Contractor*

has abnormally delayed the submission of NTC movement programme at above mentioned location and after elapsed of seven months, the Contractor could not even able to submit the realistic programme of NTC arrival which was required to expedite the matter with IR and advise appropriately for removal of IR line. However, the Employer had to provide encumbrance free land to the Contractor and the dismantling of the IR line is in the Scope of Employer. Accordingly, the delay is considered on account of the Employer.

3.7.6. In view of the above, the Engineer concludes that:

a) Regarding the land handover issue of 3.25 km in Saradhana-Madar section, the delay is assessed on account of Employer. Assessment of EOT due to this delay in commencement of work in this section is further detailed in Para 4.14.1.

b) The Employer had handed encumbrance free land to the Contractor. It is the responsibility of the Contractor not to allow unauthorized occupation of DFCC ROW after the right of access given by the Employer. Any delay due to unauthorized occupation of DFCC ROW after handing over of land to Contractor shall be on Contractor's account.

c) The Contractor has not substantiated how individual isolated obstructions prevented him proceeding with Permanent Work and affected / delayed the full section. Contractor also failed to demonstrate the effect of this claims events as a comparison between CCP and as-built based on factual records and the linkage between sections on critical path which have caused delay for completion of work.

d) Regarding delay disruption to work due to crossing of IR meter gauge line near Ringus station (IR ch. 148 to lR ch. 149), for the purpose of EOT assessment as on delay upto 31.08.2016, this event of dismantling of IR track is considered to be concluded as on 31-08-2016 and the Earthwork in the IR crossing section which has affected only a length of 50m is considered for EOT.

e) *Also, from the strip chart as on 31.08.2016, it is noted that the work on all the Work Segments is in progress. As such it is adjudged that encumbrances have not affected progress on critical path.*

f) *Nevertheless, 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.*"

(emphasis supplied)

220. It follows from the Engineer's findings that (i) there were obstructions only in isolated locations and work areas were otherwise available to the Claimant to have carried out the project works; (ii) the Claimant was unable to specifically establish how its work progress had been hindered; (iii) the Claimant failed to provide a realistic NTC programme even after a lapse of seven months; (iv) the strip chart as on 31 August 2016 in fact demonstrated that all work segments were in progress; and (v) the critical path analysis revealed a contrary picture, in that *i.e.*, the alleged delays stood absorbed by other concurrent delays caused by the Claimant itself.

221. At the cost of repetition, it must be noted that the Engineer's assessment regarding EOT for the Delay Events was unconditionally consented to by the Claimant *vide* its letter dated 10 October 2017.

222. In relation to the land handover issue for 3.25 kilometres in the Saradhana-Madar section as aforenoted in the Engineer's assessment, its assessment regarding the affected works is reproduced below:

Table 59 — List of Affected Works due to Land Issue and their status as of 31.08.2016

Sl. No.	Description	Status of Affected Works	Assessment
1	P&P	Already approved	No Delay
2	Earthwork	Only 3.25 km affected	Delay assessed
3	MIB	12 MIBs affected	Delay assessed

4	RUB	3 RUBs affected	Delay assessed
5	MJB/Imp Bridges	No MJB/Imp Bridges in SOW in this stretch	No Delay
6	ROB/RFO	No RFO/ROB in SOW in this stretch	No Delay

223. Thus, for the said 3.25-kilometre stretch (in Sl. No. 2), the Engineer had assessed delays (on the critical path as per the CCP provided by the Claimant) with respect to the above 3 items of work—Earthwork, Minor Bridges (MIB), and RUB. Therefore, it was incumbent on the Claimant to raise its cost claims limited to such periods which had been assessed by the Engineer on account of the purported delay event due to non-handing over of unencumbered land/ ROW, upon which the Claimant will be entitled to cost calculated in accordance with Clause 2(1)(b).

224. In the aforementioned context, it is important to note that following the Engineer's assessment, the Respondent promptly clarified *vide* its letter dated 01 September 2017[148] that only a stretch of 1.972 kilometres contained certain hindrances / obstructions in the Saradhana-Madar section. In any event, it is not the Claimant's case that the entirety of its claims is on account of the alleged delays due to unavailability of unencumbered land / ROW but the Claimant has not apportioned its claims with respect to the purported delay event on the unavailability of unencumbered land / ROW in accordance with clause 2.1 of the GCC/ PC. It is therefore not known to how many days the limit of liability of INR 2,000 per km of unencumbered land per day is to be applied to assess the recoverable prolongation cost. They have to segregate how many days of prolongation are due to unavailability of land and how many due to other issues.

E. Whether the delay in shifting of Charted and Uncharted Utilities was attributable to the Claimant

225. The Engineer in its assessment dated 24 August 2017 had concluded that no EOT was applicable on account of the present delay event. This was unconditionally consented to by the Claimant *vide* its letter dated 10 October 2017. In view of the same, no cause

[148] Exhibit R-161.

is made out and the Claimant is not entitled to raise any claim on account of the purported delay due to shifting of charted and uncharted utilities.

226. There were total 155 nos. of uncharted utilities required to be diverted/shifted from Rewari to Iqbalgarh, the statement (RD-2) shows the details of date of identification and notification by the contractor and subsequent communicating approval/ acceptance by the Engineer and the delay in initial submission of proposal and excessive time taken to execute the shifting work, attributable to contractor. It may be noted that there has been an Initial delay ranging between 202 to 1383 days by the contractor to identify and notifying to the Engineer, in most of the cases. The total delay attributable to contractor range between 203 to 2710 days.

227. In any event, and without prejudice to the Respondent's other submissions, any delay due to the actions or inactions on the part of any 'authorities' would constitute a 'delay' within the meaning of clause 8.5 of the GCC and would not provide any entitlement to additional costs in favour of the Claimant.

228. It is apposite to refer to the relevant contractual provisions at this juncture:

Clause 15.2 of the Employer's Requirements – General	"***Topographic Survey*** *Upon review and 'Notice of No Objection' of the DFC Benchmark Establishing Report by the Engineer, the Contractor shall immediately carry out the validation of the data provided by the Employer including additional Topographic Survey, if considered necessary by the Contractor, and meeting all the requirements as specified in Appendix 2 [Validation of Data, Additional Survey and Setting Out] to the Employer's Requirements including verification of the Right of Way (ROW), details of which is provided by the Employer and submit the Site Location I Layout Maps and Structure Setting-out Maps etc., as detailed in Appendix 2 [Validation of Data, Additional Survey an d Setting out], to the Engineer for his review and consent.* *<u>It shall be the Contractor's sole responsibility to ensure that there are no obstructions to in the Right of Way for Permanent Works based on the validation of data and</u>*

additional survey carried out by the Contractor. If any obstructions such as trees, structures or charted / unchartered public utilities etc. exists, the Contractor shall locate the obstructions on the Site Location Maps or Structure Setting-out Maps with the procedure and method statement that addresses the handling of the obstructions, and submit to the Engineer for consent. Such obstructions shall be dealt with as per the provisions of the Contract.

The Contractor shall summarize the results of validation of data and topographic survey and include the same in the Survey Report as required in Appendix 14 [Requirements for Design] to the Employer's Requirements and submit to the Engineer for his consent."

(emphasis supplied)

Clause 3.2 of the Employer's Requirements – Functional

"***Scope of Item-Wise Works***

The Scope of Work is identified including but not limited to the following and is subdivided into item-wise Works to further clarify the Scope of Work.

[...]

(13) ***[Diversion / Relocation of Public Powerline 33kV and Below]*** *Design and construction of the Diversion / Relocation of existing Public Powerline 33kV and Below infringing the Alignment and as identified in the List of Public Powerline 33kV and Below in Attachment 6 herewith including co-ordinating with the utility owning entities*

(16) ***[Other Charted Public Utilities, existing within Right of Way and Requiring Extension / Temporary Diversion and / or to be Supported / Handled / Protected During Construction]*** *Other Charted Public Utilities as identified in Attachment 9 - 'List of Other Charted Public Utilities Existing within Right of Way and Requiring Extension / Temporary Diversion and / or to be Supported / Handled / Protected During Construction' are not envisaged to be diverted permanently by the Employer.*

Accordingly, their extension, protection, handling, supporting and temporary diversion as required during construction including co-ordination / liaisoning with the respective utility

owning entities, as required is part of the Scope of Work of this Package.

(19) *[**Uncharted Public Utilities**]* - *Identification, of the uncharted public utilities including co-ordination with the utility owning entities*"

(emphasis supplied)

Clause 13.4 of the Employer's Requirements – Construction

"*Identification of uncharted public utilities within ROW shall be undertaken by the Contractor by trial trenching and / or using cable locator as consented by the Engineer. The results shall be summarized in 'Uncharted Utility Report' and submit as part of the Technical Design as specified in Appendix 14 [Requirements for Design]. The diversion of the identified un-charted utilities shall be handled as specified in Appendix 15 [Requirements for Construction]*"

(emphasis supplied)

Clause 1.3.3 of Appendix 14 of the Employer's Requirements

"*The Technical Design Submission shall be a coherent and complete set of documents, properly consolidated and indexed and shall fully describe the proposed Technical Design. In particular, and where appropriate, it shall define but not limited to:*

[…]

(8) uncharted utilities to be diverted including those 33 Kv and below Overhead Powerlines which are listed in the Attachment 6 of the Scope of Work included in Employer's Requirements - Functional, along with all the documentation for their physical diversion as per the consented procedure."

Clause 1.3.7 of Appendix 14 of the Employer's Requirements

"*The Technical Design Submission shall be accompanied by the following documents, which shall be considered by the Engineer in his review. Where relevant or required, these documents shall be accompanied by a design note stating clearly how information has been used in the design of the Works.*

[…]

	(5) Uncharted Utility Report *A report giving details of the trial trenching and arrangements and working methods in respect of the existing uncharted utilities. if any, including proposed protection measures, diversions, reinstatements and programme allowances for the same.*"
Clause 3.3 of Appendix 15 of the Employer's Requirements	"*Any other public utility (other than those included in Attachment 6 and Attachment 9 of the Scope of Work included in Employer's Requirements - Functional) which interferes the Works and is required to be relocated and/or diverted and which the Contractor interprets as is not inclusive in the Contract, the Contractor shall notify the Engineer of the details of the public utility. The Contractor shall prepare schedule of such utilities indicating* *(a) utilities requiring diversion including the proposed diversion plan, and* *(b) utilities that remain in place and require use of specific construction methods to complete the work including adequate supporting installations for the utilities during construction.* *Upon consent by the Engineer and approval by the Employer, the Contractor shall carry out the diversion of such utilities as a Variation.*"
Clause 3.6 of Appendix 15 of the Employer's Requirements	"*The Contractor shall take in to account the likely time to be taken for diversion of such uncharted utilities, in the overall construction programme. The Contractor shall inform the Engineer about his programme of works relating to utilities diversion and shall take adequate measures to ensure that these utilities diversion works do not affect the Contractual Construction Programme as consented by the Engineer and as described in Clause 8 of Employer's Requirements - General and Clause 5 of Appendix 5 [Project Programme Requirements] to the Employer's Requirements*." (emphasis supplied)

229. The aforementioned contractual provisions indicate that the identification of charted and uncharted utilities was entirely in the scope of the Claimant. It was also the Claimant's responsibility to ensure that there were no obstructions (charted or

uncharted) infringing the permanent works. In any event, separate Variation Orders were issued for shifting of utilities for which the Claimant was to deploy additional resources, and for which it was additionally compensated (over and above the Contract Price) in accordance with Clause 13.3 of the Contract. Accordingly, the Claimant is precluded from raising any claim for costs even on the assumption that an EOT could have been granted. It is important to note that Clause 13.3 (Variation Procedure) provides that the approval for carrying out variation items shall be issued by the Engineer but that that the approval of the variation proposal including cost estimate would not be a reason or ground to delay the execution of the work while a response from the Engineer is awaited. Consequently, should the Claimant have suffered any delay as a result of it waiting until the variation estimate had been approved, such delay is attributable solely to the Contractor.

230. The Engineer in its assessment dated 24 August 2017 observed the following in relation to the purported delay due to shifting of charted and uncharted utilities:

"*3.8.4. The Engineer has examined the Contractor's claim and it is noted that:*

a) Since the diversion of the Charted and Uncharted utilities are in the SOW of Contractor (ref. Cl. 3.2 (13) & (16) of Scope of Work in ER-Functional and Cl. 3.3 of Appendix-15 of ER) and obtaining all the necessary approvals / clearances from the local authorities with regard to the same is the responsibility of Contractor with reference to Cl. 3.2 (6) of Scope of Work in ER-Functional;

b) Contractor's claimed figures in respect of utilities on hold as above are without any joint verification as on 31-08-2016 and as such the length of obstruction cannot be represented as the situation at site.

c) The Contractor's contention that the 10 nos. of Uncharted Utilities could not be shifted (9 nos. in Ateli-Rewari section & 1 no. in Dabla-Ateli section) due to non-approval of variation order / estimate and demand note not received from SES. In this regard, the Engineer pointed out vide letter L-NKC-SL T-PMC-JP-1507-37 dated 08-07-2015 that Joint verification of uncharted electrical utilities were done in the month of Sep/Oct 2014. A total of 61 uncharted utilities were

identified. Among them, 5 utilities were common in package A and 15 RD detour location. So, a total of 56 (61-5 =56) electrical uncharted utilities were verified to be shifted/relocated. Out of 56 utilities, SLT could manage to shift/relocate only 15 nos of electrical utilities. The variation order for 43 uncharted electrical utilities have been issued by PMC. SLT have recently submitted 6 more estimates of the uncharted utilities to PMC for the issuance of variation order. 7 nos of demand note and estimate is yet to be obtained by SLT from the owner of the utilities.

d) *Further, the Engineer vide letter L-NKC-SLT-PMC-JP-1601-111 dated 18-01-2016 pointed out that the variation order for 55 nos of electric utilities out of total 56 uncharted utilities has been issued by the Engineer/Employer and yet SLT has to provide the estimate of one uncharted utility for the issuance of Variation Order. In view of this, the Contractor's contention that the 10 nos. of Uncharted Utilities could not be shifted (9 nos. in Ateli-Rewari section & 1 no. in Dabla-Ateli section) due to non-approval of variation order / estimate and demand note not received from SES is not correct and accordingly has not been considered for EOT assessment.*

e) *As per Contract Provision, the Contractor is responsible for reporting uncharted utilities as early during Technical Design stage and coordination with the Utility agencies and taking adequate measures to ensure that these utilities diversion works do not affect the Contractual Construction Programme (Refer Cl. 15.2 in Employer's Requirement-General, Cl. 3.2(19) of ER-Functional, Cl. 1.3 & Cl. 13.4 of ER-Construction, Cl 1.3.3 (8) & Cl. 1.3.7(5) of Appendix 14 and Cl. 3.6 of Appendix 15.*

f) *The Contractor's claim of EOT due to hindrance in shifting of Charted / Uncharted utilities is not correct in view of the following:*

i) *The issue of availability of Demand Note from Utility Authorities even after more than 3 years from the Commencement Date clearly points out the Contractor's delay in timely approaching the Utility Authorities for seeking their approval / demand note and is attributable to Contractor.*

ii) Contractor failed to timely identify the actual location of uncharted utilities as required within Coordination Event CT-3 (within 23 Weeks of Commencement date i.e., by 06-02-2014). Refer Cl. 13.4 of ER-Construction and Appendix-12 to ER in this context.

iii) As per Contract Provision, the Contractor is responsible for reporting uncharted utilities as early during Technical Design stage and coordination with the Utility agencies and taking adequate measures to ensure that these utilities diversion works do not affect the Contractual Construction Programme (Refer Cl. 15.2 in Employer's Requirement-General, Cl. 3.2(19) of ER-Functional, Cl. 1.3, Cl 1.3.3 (8) & Cl. 1.3.7(5) of Appendix 14 and Cl. 3.6 of Appendix 15.

g) With regard to so called delay caused by the Utilities Authorities in providing the estimate/demand note, the Contractor did not provide the related information in support of the same (i.e., correspondences with utility owners, meeting minutes) and specific date as to when the Contractor submitted necessary information/proposal and received reply from relevant utility owner/DFCCIL/IR and agreed schedule with them and as-built. Accordingly, the Contractor has failed to establish that he has timely coordinated his own activities with the concerned Authorities I Other Contractors in accordance with FIDIC I PC Cl. 8.5 and 4.6.

h) Also, Contractor has failed to:

i) Substantiate details as to how those utilities have affected the delay for full section of work and failed to demonstrate the claimed events with comparison between CCP and as-built based on factual records and the linkage between sections within critical path which have caused delay for completion of work

ii) In view of the above, the Contractor's said claim of delay due to shifting of utilities has not been considered for EOT. Accordingly, the Engineer concludes that 'No EOT is applicable due to the claimed delay in shifting of Chartered and Unchartered utility'. On the contrary Contractor is expected to submit the variation proposal in respect of pending Uncharted utility (as on 31-08-2016)

and complete the diversion/shifting works of Chartered utilities in its SOW and Uncharted utilities assigned to the Contractor by way of Variation Orders within the extended period of time such that it will not create any hindrance to the Permanent Works."

(emphasis supplied)

231. The following aspects emerge from the above: (i) the diversion of charted and uncharted utilities was in the scope of the Claimant; (ii) the responsibility of obtaining all the necessary approvals / clearances from the local authorities also lay with the Claimant; (iii) it was the Claimant's responsibility to report uncharted utilities as early during the Technical Design stage (within 23 weeks of the Commencement Date) and coordinating with the utility agencies and taking adequate measures to ensure that these utility diversion works do not affect the Contractual Construction Programme; (iv) the Claimant delayed in approaching the utility authorities; and (v) the Claimant was, in any case, unable to establish as to how the utilities had affected the delay for full section of work. Therefore, the Engineer considered the Claimant's claim for EOT on the ground of purported delays on account of shifting of charted and uncharted utilities but rejected the same as there was no ground to grant an EOT for MS-3 works.

232. In the event the Tribunal considers that this is a valid basis for the grant of the 608-day EOT, to the extent delay was caused by late reversion by the authorities, pursuant to Clause 8.5 of the Contract, the Claimant would only be entitled to an extension of time, not to prolongation cost. There is no other contractual provision that would entitle the Claimant to prolongation cost in this regard.

233. Finally, and in any event, the Claimant has not identified how many days' prolongation resulted from this event. In the absence of that identification, it is not possible to calculate the prolongation cost to which the Claimant would be entitled for this delay event.

F. Whether any delays can be said to be caused due to paucity of Cash Flow

234. It is pertinent to note that in its assessment dated 24 August 2017, the Engineer had concluded that no EOT was applicable on account of the instant delay event as the payment stages had been 'pre-defined' in the Contract itself. In fact, the Claimant had unconditionally consented to this *vide* its letter dated 10 October 2017. In view of the same, no cause is made out and the Claimant is not entitled to raise any claim on account of the purported delay due to paucity of cash flow.

235. It is apposite to refer to Schedule 2: Price Schedule of the Contract:

"*1.2 The bidder shall quote lump sum price for the entire works described in Employer's Requirement as per Vol. II supplemented by specifications in Vol. Ill as per Clause 14.1 of GC. The quoted lump sum price shall be applicable to the Contract as a whole. The Bidder shall complete all works under the Contract as per the quoted lump sum price and within the time stipulated in the Bid Documents.*

1.3 The lump sum price shall be for the complete work to design, construct and integrated testing and commissioning of the entire length of double line track Inclusive of works on crossing and junction stations and connections to IR, where defined, under the Contract. It should be inclusive of all costs on validation of data, design, drawings, reports, survey, site facilities, construction equipment, Plant, instruments, labour, supervision, Interfacing, management, materials, erection, testing, Temporary Works, site access, storage, safety, security, defect rectification during the Defects Notification Period, license, inspection fees, profit, duties, taxes, levies, royalties as per applicable law together with all general risks, liabilities and obligations set out or implied in the Contract as on the date 28 days prior to the last date of submission of the Bid. The Contract Price shall not be adjusted to take account any unforeseen difficulties or costs, unless otherwise provided for in the Agreement. Unless otherwise stated in the Contract, the Contract Price covers Contractor's all obligations under the Contract and all things necessary for proper Investigations, design, construction and maintenance and remedying of any Defects in the Works during Defect Notification Period.

1.4 The bidder is deemed to have taken full account of all requirements and obligations, whether expressed or implied, covered by all parts of the contract and to have quoted the Jump sum price accordingly. The quoted lump sum price shall include all incidental and contingent expenses and risks of every kind necessary to design, construct, integrated testing and commissioning, and maintaining the whole of the Works in accordance with the Contract. Payment of all items will be made on a lumpsum price basis in accordance with the Conditions of Contract and as specified herein. The item descriptions, given in the Schedules, in no way limit the Contractor's obligations under the Contract to provide all the Works described in the Employer's Requirements supplemented by Specifications.

[…]

1.5 The entire work has been divided into nine cost centers along with their respective weightage percentages of the Contract Price in this Schedule. The value of each of the cost centre shall be worked out based on lump sum Contract Price and weightage assigned to the cost centre. For further estimating interim payment, each cost centre has been broken into items of works with percentage weightage of the Contract Price for items of the works/stages as indicated in Schedules 4.1 to 4.9.

1.6 The Employer shall make interim payments to the Contractor in accordance with the provisions of Sub-Clause 14.4 of Conditions of Contract,[149] as certified by the Engineer on the basis of the progress achieved for the items of works / stage of the works estimated in accordance with the weightage (in percentage) of the Contract Price assigned to each item of work in accordance with the provisions of Schedules 4.1 to 4.9.

[149] Clause 14.4(d) of the GCC states as follows—
"(d) The Contractor shall base its claim for interim payment for each stage for various items of the work on completion till the end of the month for which the payment is claimed, supported with documents and an up-dated programme in accordance with the Employer's Requirements".

1.7 *The Contractor shall base its claim for interim payment as per GCC Sub-Clause 14.3 for each stage for various items of work on the basis of actual progress of work executed till the end of the month for which the payment is claimed in relation to the Contractor's total estimated quantity, supported with documents and updated programme in accordance with the Employer's Requirements*."

(emphasis supplied)

236. It is clear from the above that the Claimant had agreed to interim payment for items of work / stages of work as provided for in the Contract. In view of the same, the Claimant is not entitled to raise a plea of any purported delays on account of paucity of cash flow as a ground to claim additional costs. The above position regarding payments as per items of works / stages of works executed under the Schedule 2 – Price Schedule and under Clause 14 of the GCC/ PC had been put forth to the Claimant *inter alia* by way of the Engineer's letters dated 19 March 2016, 04 April 2016, 16 April 2016, 17 May 2016, and 28 October 2016.

237. In addition to the above, a sum of approximately INR 670 crores has been released in favor of the Claimant as mobilization advance. This was in accordance with Clause 14.2 of the GCC/PC and the ATB. Clause 14.2 of the ATB provides as follows:

"*Mobilization Advance*

The Employer shall pay on written request by the Contractor interest free Mobilization Advance up to (Ten) 10 per cent of the Accepted Contract Price and is payable in the currencies and proportions in which the Contract Amount is payable. The Advance Payment shall be released in two instalments as under:

(a) *(Five) 5 per cent: On Submission of Performance Security and commencement of mobilization process; and*

(b) *(Five) 5 per cent: On Submission of the Inception Report and details of utilisation of initial Mobilization Advance of 5% to the satisfaction of Engineer*."

238. The sum of INR 670 crores was to be utilised for the works under the Contract. The purpose of paying a mobilisation advance was to ensure that the Claimant had sufficient liquidity and working capital to execute the works. Having accepted the mobilisation advance as well as the terms of the Contract, the Claimant cannot allege that the project works were delayed due to paucity of cash flow.

239. The Respondent denies that there was any instance of non-payment/withholding of IPCs in execution of works. All the payment as claimed in the various IPAs for the work done and eligible for the payment as per the payment procedure specified in the price schedule (4.1 to 4.9) of Part-1, has been made in the monthly IPC

240. The Respondent further submits that if there were any delays due to paucity of cash flow, these would entirely be to the Claimant own account because of poor management or mismanagement of finances, which is an internal matter for the Claimant and not relevant to the scheduled progress of work under the Contract. Furthermore, there has been no breach on the part of the Respondent in making payment for work done until 31 August 2016.

241. The Engineer's assessment dated 24 August 2017 is reproduced below in relevant part:

"*3.9.2. The Engineer has examined the Contractor's claim and it is noted that:*

a) This being DBLS contract, the various Items of Work and their Stages of Payment are pre-defined in the Price Schedule of Contract Agreement. Accordingly, the Contractor shall become eligible for payment only on achievement of specified stage of work and not for the works actually undertaken. Please refer NKC letter no. 1610-79 Dt. 28-10-2016 in this regard.

b) All the payments as due to the Contractor with reference to the completed stages of work has already been certified by the Engineer and paid by the Employer and no payment of the Contractor is pending till 31-08-2016.

c) Contractor's contention that there was delay in rectifying the ambiguities in the stage payment Provision of Major Bridges and track work is not correct.

Contractor is advised to refer to Engineer's letter No. L-NKC-SLT-PMC-1603-89 dated 19.03.2016 and subsequently letters No. L-NKC-SLT-PMC-1604-19 dated 04.04.2016 and L-NKC-SLT-PMC-1604-72 dated 16.04.2016 and L-NKC-DFCC-1605-81, 1605-82 and 1605-83 dated 17.05.2016 with copy to Contractor, where in it was clarified that there is no ambiguity/discrepancy/error in the provision of stage completion. Rather there was inadvertent mistake in the description of items of work due to interdependency of the two stages of work which any way is not affecting the achievement of stage completion.

d) *However, the same was proposed to be rectified by way of proposing the split of the stage of work and was recommended to the Employer vide letter Nos. 1604-72 dated 16.04.2016, 1604-70 dated 13.04.2016, 1604-73 dated 16.04.2016 and 1605-81, 1605-82 and 1605-83 dated 17.05.2016. Also, since the Contractor accepted such pre-identified stages of work in the Contract Agreement, any split of the same are subject to prior approval of the Employer and cannot be claimed as right of the Contractor for making it the basis of claim. Also, Contractor's request for admitting the payment for the work actually undertaken without achieving the specified of stage of work cannot be admitted as it is not in line with the provisions of Contract.*

e) *Further in continuation with the same, the Contractor submitted Method of Measurements in respect of Track Works, RUBs and Major Structures for admitting the part payment of completed work, stage completion for which could not be achieved for reasons not attributable to Contractor. The same were reviewed and consented by the Engineer vide its letter no. 1606170 Dt.27-06-2016, 1607179 Dt.28-07-2016, and no. 1607/80 Dt.28-06-2016 (also ref. para 3.5.3.2 (c) above). Accordingly, the part payment for such stages of work was admitted in respect of Track Work w.e.f. June-2016 and for RUBs and Major Structures w.e.f. July-2016 in line with the provision of FIDIC Cl. 14.6. With this the Contractor's concern of gap of payment in respect of those stages of work which could not be achieved for reasons not attributable to Contractor has been addressed.*

> *In view of the above the Contractor's claim that no payment for the works actually undertaken in the RUB has been admitted till 31.08.2016 and its claim of delay due to so called a gap of payment of Rs. 865 Cr between the value of work done at site and paid in IPC till 31.08.2016 is not tenable*."

(emphasis supplied)

242. The Engineer inter *alia* concluded that (i) the Claimant would only become eligible for payment upon achieving a specified stage of work as pre-defined in the Contract and not for works actually undertaken, and (ii) its request for payment for actual work undertaken without achievement of a specified stage of work was contrary to the contractual provisions. The Engineer further noted that since the Claimant had accepted such pre-identified stages of work, "any split of the same are subject to prior approval of the Employer and cannot be claimed as right of the Contractor for making it the basis of claim". It is therefore clear from the above that the Engineer had duly considered the Claimant's EOT claim on the ground of purported delay due to paucity of cash flow but rejected the same. As the Engineer's assessment regarding grant of EOT had been unconditionally consented by the Claimant, it is not open for the Claimant to claim additional costs on the said purported delay event. The Claimant has failed to respond to any reasons provided by the Engineer in its assessment of EOT for MS-3 works.

243. Finally, and in any event, the Claimant has not identified how many days' prolongation resulted from the paucity of cash-flow as asserted. In the absence of that identification, it is not possible to calculate the prolongation cost to which the Claimant would be entitled for this delay event.

G. Whether the delay in the Track Skeleton of MS-1 and the delay in formation of MS-3 can be said to have impacted the completion of Track Work in MS-3

244. The Respondent submits that MS-1 and MS-3 works were to be executed in parallel and not in a linear fashion. The Claimant was required to progress these works independent of MS-1. Accordingly, the alleged delays in MS-1 would not necessarily

impact MS-3, particularly the Bhagega-Iqbalgarh segment of MS-3, in relation to which the Claimant's has raised its claims.

245. In any case, the track-linking work was also not interrupted because the Claimant had opted to first proceed with track-linking in the direction of Bhagega to Shrimadhopur, and not in the direction of Rewari which fell within MS-1.

246. Without prejudice to the above, the Claimant was required to revise the CCP in terms of Clause 5.3 of Appendix 5 to the Employer's Requirements, which reads as follows:

> "*If, at any time, actual progress is too slow to complete in the Time for Completion, and/or progress has fallen (or will fall) behind the current Contractual Construction Programme, then the Engineer shall instruct the Contractor to submit a revised Contractual Construction Programme and supporting report describing the revised methods and resources which the Contractor proposes to adopt in order to expedite progress and to complete the Work within the Specified Time for Completion as stipulated in Clause 8.6 [Rate of Progress] in the Conditions of Contract.*"
>
> (emphasis supplied)

247. It is a matter of record that despite several instructions of the Engineer / Respondent to revise the CCP on account of the slow progress of work, no such revised CCP had been submitted by the Claimant.

248. Furthermore, the Claimant had planned for such NTC movement at an unrealistic rate of output as high as 87 kilometres per month. This was mentioned in the NTC movement plan as per the CCP, projected average monthly output of NTC as per the NTC movement plan was 87 TKM, which was more than 2.5 times higher than the actual progress that can be made by the NTC machine. The brochure for the Harsco Rail NTC deployed by the Claimant mentioned the NTC capacity as 1.5 kilometres per day. Therefore, even if the NTC operated at its optimum capacity of 1.5 kilometres per day for six days a week, the rate of output would only be 37.5 kilometres per month (considering 25 effective days in a month). Assuming that the NTC operated at 90%

of its optimum capacity, after taking into account breakdown / maintenance of the NTC and public holidays, the rate of monthly output of the NTC would be around 33.5 kilometres per month. It was, therefore, incumbent upon the Claimant to deploy additional resources, including more NTCs, to execute the works as per the programme under the CCP and/or to appropriately revise the CCP.

249. Even insofar the progress of formation works (including earthwork) and structures (including Major Bridges, Minor Bridges, and RUBs) for MS-3 is concerned, there was a significant lag on the part of the Claimant in progressing the works as per the CCP, as has been explained in Section IV above. This can be seen from the Claimant's own Monthly Progress Reports from August 2016 onwards.

250. In any event, wherever such delays were on account of factors beyond the control of the Claimant, EOT for MS-3 works was granted by the Engineer for delay events till 31 August 2016, which was unconditionally consented to by the Claimant *vide* its letter dated 10 October 2017. The Engineer's assessment dated 24 August 2017 is reproduced in relevant part below:

"*5.1 Consideration of Track laying in view of Delay events*

The Contractual Construction Programme (CCP) was constituted based on one track laying machine (NTC). The Track sequence was planned from Bhagega to Rewari and then Bhagega to Madar. After track completion from Rewari to Madar, the NTC was planned to shift to Marwar by IR connection and then start the track laying towards Madar side. After completing the track laying from Marwar to Madar section the track was planned to progress in the last section i.e., from Marwar to Iqbalgarh as indicated in para 2.5 above.

Due to some delay events in section from Bhagega to Dabla, the Track Skelton could not be progressed as envisaged in the approved CCP for the delay events not attributable to Contractor. <u>To reduce the impact of delay events, the Contractor proceeded with track works from Bhagega towards Shrimadhopur as the section Bhagega to Shrimadhopur had been developed in continuity to unhindered progress of Track Skelton work</u>.

Subsequently, after the completion of Track Skelton in Bhagega to Shrimadhopur, the continuity to succeeding section Shrimadhopur to Pacharmalikpur could not be retained due to existence of IR running line in this section. Hence, the Contractor started the work of track skeleton from Bhagega towards Rewari.

After completing the track skeleton from Bhagega to Dabla section, there were some delays assessed in Dabla-Ateli and Ateli-Rewari section not attributable to Contractor which has obstructed the continuity in track skeleton in said section. In view of this, the Engineer in this assessment tried to explore the other possibilities of track laying in other sections to reduce the impact of delay events, but due to delay events pertaining to RUBs and the Contractor's obligation of completion of MS-1 & 2 within the time line provided in the CA, the same could not be established.

Accordingly, the track linking sequence as provided in CCP and as detailed in para 2.5 above is considered in this EOT evaluation. Since, the Contractor has completed the Track Skelton in Bhagega to Shrimadhopur section before the linking of track from Bhagega to Rewari, the impact of delay events for track installation in this section has not been considered on the critical path."

(emphasis supplied)

251. Thus, even as per the Engineer's assessment, the impact of any supposed delay due to formation works did not affect the track-linking between the sections of Bhagega to Shrimadhopur and Bhagega to Dabla, or the critical path under the CCP.

252. The Respondent submits that a delay cannot automatically give rise to an entitlement for additional costs unless such entitlement to additional costs is provided for in the Contract. The Claimant has not identified a contractual basis for its entitlement to prolongation cost as a result of this delay event.

253. Finally, and in any event, the Claimant has not identified how many days' prolongation resulted from this event. In the absence of that identification, it is not possible to

calculate the prolongation cost to which the Claimant would be entitled for this delay event.

VI. CLAIMANT HAS CLAIMED ENTIRE COSTS IN THE EXTENDED PERIOD FOR THE DELAYS FOR THE PERIOD AUGUST 2016 – AND HAS NOT GIVEN CREDIT FOR THE COST RECOVERED FOR THE EXECUTION OF ACTUAL WORK DURING THAT PERIOD

A. Claimant has claimed the prolongation cost for extended period which is wrong

254. The SCL Protocol provides for the following as one of its core principles:

> ***Period of evaluation of compensation***
>
> *Once it is established that compensation for prolongation is due, the evaluation of the sum due is made by reference to the period when the effect of the Employer Risk Event was felt, not by reference to the extended period at the end of the contract (see Guidance Section 1.11.1)* (emphasis added)
>
> *For example, an original project completion of 1 August was delayed by 4 weeks to 29 August due to an earlier 4-week critical delay that occurred in March the same year. The delay event occurred in March not August and therefore it is the loss suffered in March that should be quantified.*[150]

255. Further, Clause 20.1 of the GCC stipulates that - "*the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor*

[150] Keating on Construction Contracts by Sweet & Maxwell states: *"Claims for increased preliminaries are frequently made and for convenience allowed upon a calculation which uses amounts in the contract bills proportioned to the length of the delay compared with the original contract period. For a claim under the contract, such a calculation may be justified by the terms of the contract. It is suggested that for a damage claim it would be wrong in principle, although sometimes not perhaps seriously so in practice. For damages, the calculation should be of the actual additional costs. Such additional costs should be calculated by reference to the period of delay rather than the costs incurred during the period of overrun. Items of the cost in the preliminary bill are at best estimates before the contract is made and are often in practice somewhat arbitrary. A proportionate amount of relevant bill items might or might not be the same as the contractor's actual additional cost in the event. The contractor's actual additional costs ought to be known, recorded and capable of being proved".*

became aware, or should have become aware, of the event or circumstance.", which leaves no room for doubt that prolongation cost / compensation must strictly pertain to and arise out of the delay event / period.

256. The Claimant has failed to provide supporting particulars and contemporaneous records, in terms of Clause 20.1 of GCC, that are "relevant to the event or circumstance" i.e., linked with the Delay Events prior to 31 August 2016. The absence of contemporaneous records and intimations as envisaged by the Contract disentitles the Claimant from being awarded prolongation cost.

257. Furthermore, the Respondent has made payment to the Claimant for work executed during the extended period (10 February 2017 to 30 June 2018). However, in claiming all the time-related cost over this period as prolongation cost, the Claimant has not given credit for such of its cost that it has already recovered through the interim payments received for work done during the extended period. Also, the Claimant has been compensating for any inflation in costs during the extended period by the application of the Price Variation Formula as per Clause 13.8 of GCC/PC. Any claim for prolongation cost for the extended duration without removing the duplication in amounts recovered through work done and inflation adjustment would result in duplication of payment to the Claimant, and thereby result in double-recovery.

258. The Claimant has also not performed any analysis on "cause and effect of delays' to justify the period eligible for the prolongation cost. Without any analysis of "cause and effect of delays', the Claimant cannot claim for prolongation cost by simply calculating all the time-related costs allegedly incurred during the extended period.

259. Furthermore, the Claimant's submitted CCP did not contain any resource planning/resource loaded programme for completion of various activities, so that the resources planned for scheduled completion period could not be assessed. Hence, the Claimant is not able to demonstrate that those resources that continued to be deployed during the extended period were additional to the resources that the Claimant had planned, or ought to have planned (should the resources as planned be shown to be inadequate to enable the Claimant to complete the Works by the scheduled completion date).

260. While the Respondent disputes the Claimant's entitlement to any compensation, it states that if at all the Claimant is entitled to prolongation cost at all, it would be limited to additional costs incurred by it during the delay period (i.e., up to 31 August 2016) and not during the period of extension.

VII. OVER-LAPPING OF COST BETWEEN MS-1/ MS-2 AND CURRENT CLAIMANT'S CLAIMS RELATED TO MS-3

A. The Contract does not enable allocation of Project Cost on a milestone-by-milestone basis

261. The Contract stipulated certain milestones (designated MS-1 to MS-5) which were to be completed in accordance with timelines as referred to in Clause 8.2 PC and Appendix to Bid (ATB) –

Milestone	Stretch	Planned Completion (in days)	Duration Percentage (out of 1456 days)	Milestones Value as per Claimant (INR)	% Weightage as per CV (basis values by the Claimant)
Milestone -1	Dabla to Rewari	840	57.69%	10,574,365,330	15.78%
Milestone -2	Dabla to Rewari	945	64.90%		
Milestone -3	Rewari to Iqbalgarh	1260	86.54%	50,581,366,102	75.50%
Milestone -4	Rewari to Iqbalgarh	1372	94.23%	5,839,268,568	8.72%
Milestone -5	Rewari to Iqbalgarh	1456	100.00%		

Table 6: Weightage of cost of each Milestone

262. Above table shows that there is no linkage between % duration of various milestones with the % weightage claimed by the Claimant in its claim calculations.

263. Further, description of MS 3 says – **"Completion of Track Skelton for entire Package"** and there is no mention about the civil & miscellaneous works such as building works, etc. which are a part of this stretch but not a requisite for completion of Track Skelton. Whereas description of MS 1 says – **"Completion of Civil and Track Skelton works Dabla-Rewari"** thus it includes all civil works in this stretch. Thus, it is not possible to quantify the milestones on the basis of total executed/scope quantities in a stretch.

264. Further, the Claimant has made a generalized assumption that all the Claimant's expenditure i.e., overheads towards the overall Project would be proportionally distributed with the value of the executed work of milestones. This is also a flawed premise because the overheads can be either related to 'work executed' or related to 'time spent'. The Claimant is thus conflating different concepts.

265. The term "overhead" is defined as *"That portion of the Contractor's cost which cannot properly and accurately be allocated to a specific operation on any project."* Therefore, the overhead for the entire Project cannot be distributed among the milestones i.e., MS-3 which is a set of specific activities being executed concurrently along with other Milestones.

266. Therefore, the Claimant's attempt to quantify the milestones and deducting scope under MS 1 from total scope to calculate scope under MS 3 in its cost claims is flawed.

267. Further, it is not possible for the Claimant to segregate the prolongation cost for MS-3 because at any moment, the work of more than one milestone is being performed concurrently. Also, during the extended period for MS-3, the execution of MS-4 and MS-4 are within its scheduled completion time.

268. It has also been alleged that MS1 delays continued to pervade subsequent milestones including MS3. This allegation is equally misconceived. Work in MS3 was not dependent on MS1. The entire stretch of track had to be progressed and developed in parallel after design work was over, except track linking which had to progress after earthwork and majority of structures were complete, for a particular stretch of track.

MS1 and MS2 delays have been separately considered and evaluated, which is any event subsumed in MS3 EOT for delay events up to 31 August 2016. MS1 delays therefore do not have any further 'knock-on' effect and there is no further impact of MS1 delays as alleged.

269. In summary, the Respondent's stand is
    a. Project cost cannot be distributed on the basis of Milestones
    b. Accordingly, the overhead cost cannot be distributed on the basis of milestones.
    c. Moreover, overhead cost is a function of "time" rather than the function of "amount of work".

270. Hence the Claimant's approach to the calculation of prolongation cost is not sustainable. In view of the foregoing paragraphs the following are the shortcomings in the prolongation cost claim raised by the Claimant:
    a. The Claimant has claimed the prolongation cost for the extended period, which is wrong
    b. The Contract does not allow distribution of Project Cost among different milestones
    c. Claimant has wrongly mixed-up disruption claims into prolongation claim
    d. Costs are claimed separately for Consortium members, which is wrong

VIII. PARAGRAPH-WISE RESPONSE TO THE STATEMENT OF CLAIM DATED 30 SEPTEMBER 2022

271. **Reply to paragraph nos. 1 and 2**: The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied.

272. **Reply to paragraph no. 3:** The contents of the paragraph under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. The Respondent submits that the detailed scope of work is provided in the Contract under the head of 'Employer's Requirements' along with the various annexures referred to therein are without prejudice to other provisions of the Contract.

273. **Reply to paragraph nos. 4 and 5:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. The Respondent reiterates that the Claimant's claims in the present arbitration proceedings have been in disregard of the provisions of the Contract as also the contemporaneous documentation. Such claims are not maintainable in fact and in law.

274. **Reply to paragraph no. 6:** The contents of the instant paragraph under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. The Respondent submits the completion of "only 34.48% of the works envisaged in MS-3 […] by 9 February 2017", as contended by the Claimant in the paragraph under reply was owing to the Claimant's poor planning and execution of the project works as demonstrated in the earlier sections of this SOD.

275. **Reply to paragraph nos. 7 to 9:** The contents of the paragraphs under reply in relation to the Claimant's claims in the present arbitration are a matter of record and do not warrant any response. However, anything contrary to the record is denied. It is also denied that the Claimant was prevented from commencing and progressing with MS-3 activities. The Claimant was not able to take up the fronts which were sufficiently available because of the delays and deficiencies on the part of the Claimant. The Claimant's allegation that there were breaches of the Contract by the Respondent is denied. Further, it must be noted that the Engineer's assessment regarding EOT for the Delay Events was unconditionally consented to by the Claimant *vide* its letter dated 10 October 2017. It is also reiterated that the Contractor repeatedly breached requirement of revising the CCP as per the Contract, despite the advice of the Engineer.

276. **Reply to paragraph nos. 10 to 12:** The contents of the paragraphs under reply insofar as they are a matter of record need no response. However, anything contrary to the record is denied. It is pertinent to mention that clause 20.1 of the GCC/PC mandates that the Claimant "keep such contemporary records as may be necessary to substantiate any claim, either on the site or at another location acceptable to the Engineer". In the present case, however, the Respondent has not maintained any contemporary records

to substantiate its claim amount. For that reason, among others, the claim amount is speculative and arbitrary.

277. **Reply to paragraph nos. 13 to 21:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. Specifically, with regard to the contents of paragraph no. 19, it is denied that the payments under the Contract are made by the Respondent to the Consortium. It is clarified herewith that the payment by the Respondent is made to the individual constituent members of Consortium and not to the Consortium.

278. **Reply to paragraph nos. 22 and 23:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. With regard to the scope defined by the Claimant in paragraph 23, it is clarified that Sojitz was to execute 51% of the Accepted Contract Price works as lead partner of the consortium which includes the construction of part of Minor Structures and Track works. L&T was required to execute 49% of the Accepted Contract Price works which includes the construction of Balance Scope of Work under the Contract.

279. **Reply to paragraph nos. 25 to 36:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. It is clarified that the Contract between the parties is a "Design Build Lump Sum Contract" and hence the scope is not defined in terms of quantities. The resources specified by the Claimant have not been verified or proposed / paid for by the Respondent separately from the price payable for execution of the Works.

280. **Reply to paragraph nos. 37 to 40:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. It is clarified that the NTC machine was the contractual requirement based on which the Contractor qualified to bid for the works. The Claimant under paragraph no. 40 has stated that "activities including earthwork, major, and minor structures up to formation level" can be collectively referred as 'formation' is not accurate. 'Formation' comprises of earthwork, sub-grade, and blanket layer only. The bridges/structures, minor or major, do not form part of the formation. In this

regard, RDSO-GE-0004 ‘Comprehensive Guidelines and Specifications for Railway Formation’ under Terminology paragraph no. 1.0 defines ‘formation’ as “the layers comprising blanket, prepared subgrade/Subgrade” and is the support for track structure consisting of ballast and sleepers, rails *etc*. Further, while it is correct that for track-laying to commence for a particular length of track, the earthworks and major and minor structures (to the extent necessary for track laying) on that particular length of track have to be complete, however, for construction of formation / earthworks itself there is no requirement of continuity as this activity can be carried out across different stretches simultaneously. Even if one stretch/length of a section is not available for any reason, earthwork can progress elsewhere. Hence, non-availability of land in a particular stretch could not be a cause for delay of earthwork / formation completion in other stretches / lengths of the project.

281. **Reply to paragraph no. 41:** The contents of the paragraph under reply are denied for being wrong and incorrect. It is clarified that the sleepers required for track work are precast items, manufactured in casting yards. Sleepers can either be manufactured on site by contractor or procured from suppliers established on the IR system. The production and storage of sleepers for the project required is proportionate to the progress of track laying, which means that a fraction of the total is required at a time, with the requirement dependent on the progress per month/day.

282. **Reply to paragraph nos. 42 to 46**: The contents of the paragraphs under reply in relation to the timeline for completion of works are a matter of record and do not warrant any response. However, anything contrary to the record is denied. As has already been set out in paragraph nos. 18 to 23 above, the Claimant’s categorization of the project as a ‘linear’ one is incorrect. The Respondent submits that time for the execution of the project works in the Contract was not proportionately divided for completion of the individual Milestones. Nothing precluded the Claimant from carrying out works simultaneously to ensure timely completion; indeed, the approved CCP demonstrated parallel-working in several areas for several activities.

With respect to para no. 42, the Respondent submits the fact that the impression sought to be created as to track laying being Major Activity is refuted as track laying could have been around only 12% of the Contract Value.

283. **Reply to paragraph nos. 47 to 53:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. With regard to the contents of paragraph no. 48, it is submitted that the completion of the work within a period of 208 weeks by the Claimant, on the basis of the bid formulated, contract entered into, and the CCP approved was the obligation and risk of the Claimant. The contents of paragraph no. 49 that the Claimant's bid proposal was premised on certain factors is denied for want of knowledge. The Respondent reiterates that it has performed all its obligation in accordance with the Contract. With respect to para no. 49 (b), the Respondent does not agree with the Claimant's statement as these assumptions are made with reference to the Bid Document and are not revised later as required as per the actual site conditions leading to breach of the Contract. Also, for para no. 49 (c), the Respondent states that this had no reference to potential cash flow to the Claimant in view of its various Contractual obligations.

284. Furthermore, the Claimant at paragraph no. 52 admits that as per its Technical Proposal, two base depots were to be set up but suppresses the fact that under the same paragraph of the same Technical Proposal, it had proposed two NTCs as well. The Respondent submits that it was meaningless to set up two base depots for feeding the NTCs without two NTCs also working simultaneously. This was a requirement that the Claimant failed to comply with in a timely manner. For this reason, there were significant delays in completion of the project. Therefore, the Claimant is not entitled to claim any cost during the period of delay that resulted from its failure to mobilize the second NTC.

285. **Reply to paragraph nos. 54 to 57:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied.

286. **Reply to paragraph nos. 58 to 61:** The contents of the paragraphs under reply in relation to the Claimant's assertions that any delay in MS-1 would have a knock-on impact on MS-3 are incorrect and denied. It is clarified that the claims raised by the Claimant pertains to the additional cost from Bhagega to Iqbalgarh *i.e.,* the stretch

under MS-3 minus MS-1. It is also reiterated and clarified that the track laying is not the prime activity of the project; track-linking was just one element of the work and the Claimant's attempt to conflate separate elements of work must fail. The Respondent reiterates that several works could have been carried out simultaneously across all milestones by the Claimant. Furthermore, nothing precluded the Claimant from deploying more than one NTC for laying of tracks simultaneously across different milestones. The Contract contemplated at least two NTCs to be fed by two depots—at Bhagega and at Marwar. This meant that work of track linking could proceed in parallel on at least two fronts, and on more than two fronts if additional NTCs were deployed. Therefore, track linking was not merely a 'forward linear' activity as projected by the Claimant. The sequence of track laying as per the CCP would indicate that the Claimant in Sequence 1 (Bhagega to Rewari) and Sequence 3 (Marwar to Madar) envisaged to lay and link the tracks in a reverse direction. Therefore, the assertion of the Claimant that any delay in MS-1 would have a knock-on impact on MS-3 is incorrect.

287. As per Clause 8.2 of ATB, the scope of work under MS-1 was specific to the stretch from Dabla to Rewari. Pertinently, the stretch from Dabla to Bhagega did not form part of MS-1. Although the scope of MS-1 was extended by the Claimant in the CCP, there was no contractual extension of scope of work that had been granted by the Engineer. The Claimant, based on its own convenience, selected the track depot at Bhagega *i.e.*, outside the ambit of MS-1 and hence the completion of MS-1 enjoined the completion of the stretch from Dabla to Bhagega.

288. The Respondent further submits that track laying was not the "prime activity for the achievement of MS-3" as has been sought to be portrayed by the Claimant in paragraph no. 59. The cost contribution of track-laying and related works is only 38.59% of the total cost of the project. The completion of track works was dependent on the completion of civil works such as earthwork in formation, minor bridges, major bridges, and RUBs, ROBs *etc.*, which constituted approximately 61% of the total costs. Track-linking was the last item of work and not the primary item.

289. The deployment of only one NTC despite the assurance of two NTCs crippled the Claimant from being able to progress its work expeditiously in return for the savings

it made in not providing the second NTC. With two NTCs, the track-linking work could be achieved both from Bhagega to Rewari (towards MS-1) and Iqbalgarh (toward MS-3). There was no correlation between completion of track work for MS-3 and for MS-1. In fact, due to serious delays in completing the civil works (and major bridges specifically) in the Bhagega–Dabla stretch, the track work from Bhagega towards MS-3 was taken up earlier than MS-1.

290. Furthermore, the completion of the civil works such as minor and major bridges, RUB/ROB *etc*. was not required for taking the NTC machine on the alignment. This is because appurtenant structures of bridges could even be executed after passing the material train and NTC at a slow speed across such uncompleted structures. In fact, this was actually practiced at few places in the project stretch. Hence, the Claimant's assertions in the paragraphs under reply are incorrect.

291. **Reply to paragraph no.** 62: The contents of the paragraph under reply are incorrect and denied. An Engineer had always been in place throughout the relevant period under the Contract. Pursuant to clauses 1.1.2.4 and 3.1 of the GCC, the Respondent had the right to appoint an Engineer of its choice. The Respondent had started negotiations with NK Consortium for engaging the latter as an Engineer but in the interregnum *vide* letters dated 19 August 2013, and 01 October 2013, the Respondent had *inter alia* informed the Claimant that the CPMs of Jaipur and Ajmer would act as the Engineer for their respective jurisdictions until such time that the Engineer was in a position to carry out its functions. This was done so that there was no delay in the commencement of the project while negotiations were ongoing with NK Consortium. Subsequently, on 11 April 2014, NK Consortium was formally appointed as the Engineer. Therefore, the Claimant is wrong to assert that no Engineer was appointed by the Respondent until 23 April 2014 when the Respondent had appointed the CPMs of Jaipur and Ajmer as Engineers on 01 October 2013.

292. **Reply to paragraph nos. 63 to 72:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. The Respondent submits that the Claimant failed to highlight other important provisions of the Contract in relation to the CCP. For instance, while emphasizing on paragraph no. 5 of Appendix 5, Volume II of the ER, the Claimant has

not mentioned certain crucial stipulations for the revision of the CCP, which are material to the present dispute. In this regard, paragraph nos. 5.3 and 5.4 of Appendix 5, Volume II of the ER and Clause 8.3 of PCC and 8.6 of the GCC of the Contract, are relevant.

293. As explained above, the CCP was supposed to be dynamic and adaptable to change as per the changing circumstances and the ground realities at site, with the objective of achieving completion within the time stipulated. The Respondent submits that the Claimant ought to have foreseen that in a railway project of this magnitude, there were bound to be changes brought about by various factors, and that the CCP would accordingly require adjustment. Without any justifiable reasons or cause and despite being alerted to the slow progress of its activities—and even after receiving multiple EOTs as well as instructions for revising the programme—the Claimant failed to revise the CCP as per the agreed extended timelines, and despite the Engineer's notifications that the CCP should be revised and updated. Moreover, the revised programmes that were submitted by the Claimant were not in line with the revised completion dates for various milestones and hence were not acceptable.

294. In response to para no. 67 (c), without prejudice to the Respondent's argument, it is reiterated that, if any such obligation is found in the Contract on the basis of reciprocal promises; the various events and timelines of the approved CCP would be equally applicable on the Claimant and they would be subject to the same treatment as alleged with respect to the Respondent's nonperformance or delayed performance.

295. **Reply to paragraph nos. 73 to 77:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. That the Claimant did not properly carry out its 'detailed planning' for the execution of the project works can be seen from the Claimant's slow progress unexplained by any matters for which the Respondent is liable.

296. Furthermore, the Respondent submits that the Claimant did not considered material details in its own planning. The plan framed by the Claimant with an assumed output for the proposed NTC machine with complimentary machines like railway wagons for carrying welded rails and sleepers, loading-unloading facilities, and matching the

production of sleepers was impractical considering the timeline for completion of the work. Furthermore, that the Claimant would deploy only one NTC machine instead of the two as proposed in its Tender for the entire stretch divided into four packages having two track depots highlights the unrealistic approach of the Claimant.[151] This has already been detailed by the Respondent hereinabove in para nos. 147 to 164 and 244. In any event, the approval of the CCP by the Engineer did not absolve the Claimant of its contractual obligations.

297. Further in response to para no. 76, the Respondent notes that the the word "Formation" has been used inappropriately, to include construction of bridges as part of formation. Formation only means earthwork in embankment/cutting, sub-grade and blanket layer above earthwork/embankment fill. The construction of the bridge itself is considered as construction of "structures".

298. Also, the track skeleton can be linked without completing the miscellaneous bridge/structure works like, protection works, river training works, approach roads, etc. but the formation work (including for the structures) needs to be completed for receiving ballast, track laying etc. The ancillary works like drains, retaining walls may be executed after or along with track linking works.

299. In response to para no. 77, the Respondent reiterates the fact that in all the four packages/sections namely A, B, C, and D, the works were to be started simultaneously and executed in parallel.

300. **Reply to paragraph nos. 78 to 80:** The contents of the paragraphs under reply are incorrect and are denied. The Respondent has demonstrated in the earlier sections as to how the Claimant was not in a state of readiness to be able to execute the works in a timely manner. For instance, the Engineer in its letter dated 24 August 2017 determined that the "poor quality of the Contractor's design and Contractor's failure of design submissions in compliance with the requirement of Employer Requirements (ER) and relevant Codes and Standards were the major cause of delay". Furthermore,

[151] This is evident from paragraph no. 5.2 of I-B-3 'Basic Programme for Works' of Part-6 'Contractor's Technical Proposal @ p. 2909, Exhibit C-2, CD-12 of the SOC. This document formed an integral part of the Contract as per Clause 2(r)(iii) of the Contract.

because of the Claimant's delays in procuring and assembling the NTC Track machine the Claimant started linking the track from Bhagega towards End of Section-A instead of Bhagega towards Rewari and actually progressed in this direction only, which was as per the dates of start for track linking works for Bhagega-End of Section-A. This also shows that the delay in completing MS-1 had no effect on the progress of balance length of MS-3.

301. In response to para no. 79, it is to be noted that the Claimant is setting out a general statement without any supporting contemporary records of mobilisation and showing adequacy of each plant and machinery etc. The detailed time programme submission (CCP) was required to be resource-loaded as stated out in Appendix-5 of ER (Part-2) in relation to the requirements of the project programme.

302. **Reply to paragraph nos. 81 to 84:** The contents of the paragraphs under reply with reference to the specific delay events as alleged by the Claimant are incorrect and denied. It is submitted that the Engineer has already provided its determination on the said alleged delay events, several of which were rejected on grounds of being non-tenable. Specific and detailed replies to each of the heads of the delays alleged under paragraph no. 82 have been set out in the para nos. 171 to 249 of this SOD by the Respondent. The same are not being repeated here for the sake of brevity and may be read as part of the instant paragraph. It is pertinent to note herewith that the progress of only 34.48% as stated by the Claimant was result of Claimant's own delays (concurrent with the delays for which the Claimant has been granted an EOT).

303. In the present case, it is important to note that the Claimant has failed to correlate any of its claims for additional costs for completion of MS-3 to any of the seven alleged delay events accrued till 31 August 2016. Instead, the additional costs claimed by the Claimant for delay events up to 31 August 2016 have been purported to be attributed to all of the said seven delay events, apart from alleged delays stated in Section D of the SOC. Further, the Claimant has not particularized any components of its monetary claims to any particular delay events or any such period of delay. This fails the test of causation required for a successful grant of prolongation costs.

304. **Reply to paragraph nos. 85 to 89:** The contents of the paragraphs under reply are incorrect and denied. The Respondent submits that the purported delay on account of the Engineer's consent / NONO cannot be utilized by the Claimant as a ground to justify its claims in its SOC. The Respondent's position on this ground has already been detailed by the Respondent in paragraph nos. 173 to 180 of the present Reply and the Claimant's position is factually as well as contractually incorrect. Without prejudice to the above, the Respondent submits that the Claimant's averment relating to purported delay on the part of the Respondent to appoint the Engineer, and the purportedly unilateral decision of the Respondent to function as Engineer, is of no consequence or relevance to the matters in dispute. It is also submitted that the averments of the Claimant with regard to the delay in Technical Design is also incorrect. It is clarified that the submission of the Technical Design was conditional upon completion of Survey and Geo Technical Investigation which the Claimant failed to perform in accordance with the CCP.

305. Clause 5.2 of the GCC also provides for deemed approval *i.e.*, the Engineer shall be deemed to have approved the "Contractor's Documents" upon the expiry of any of these review periods. However, the Claimant has failed to demonstrate that it had been hindered in any way from proceeding on the basis of any such deemed approval whenever there had been any such purported delay on the part of the Engineer / Respondent.

306. The Claimant has asserted that there was a delay in getting the Engineer's NONO and the Engineer's comments of the review were issued in piecemeal with several additions made to the ER. This assertion is factually incorrect and denied. The reason why the Engineer could not give its NONO was because the drawing and designs submitted along with the CCP by the Respondent were found to be deficient and not in accordance with the ER.

307. The Claimant's assertion that it had "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" is imprecise and therefore cannot be responded to with any precision. It is denied that these delay events "continued for a very long period". The Respondent reiterates that clause 8.5, which is applicable in the current scenario,

relates only to an extension of time for completion, and does not entitle the Claimant to any costs or damages/compensation associated with any extension granted. The Claimant has not been able to establish its specific entitlement to cost under any other provision of the Contract.

308. **Reply to paragraph nos. 90 to 98:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has claimed that there was a 'change in law' after the base date of the Contract *i.e.*, 21 January 2013, which mandated an EC prior to the issue of a license for mining minerals. According to the Claimant, the requirement of prior EC was a new requirement and the delay in obtaining the requisite ECs for minor minerals delayed the project works. This, the Claimant alleges, constituted a delay event which was not attributable to it and which led to additional costs for the MS-3 works. Accordingly, the Claimant has invoked clauses 8.4, 8.5 and 13.7 of the GCC / PC.

309. The Respondent submits that the restriction imposed in the State of Rajasthan on the grant of mining lease for minor minerals for areas of less than 5 ha. and the subsequent stay granted by the NGT cannot amount to a change in legislation as per clause 13.7 of the GCC read with the PC. The Supreme Court on 27 February 2012 in ***Deepak Kumar v. State of Haryana*** (supra) specifically directed that all leases pertaining to minor minerals, including renewal for areas of less than 5 ha., will only be granted after getting the EC clearance by the MoEF. Hence, there was a mandate much before the base date that all leases, including those in relation to minor minerals, would require prior EC. Therefore, the Claimant did know, or ought to have known with reasonable due diligence, that there was a requirement of obtaining prior EC for extraction of minor minerals. Accordingly, the Claimant's assertion that there was a "change" in the law is incorrect.

310. On the contrary, the Claimant neglected in obtaining the EC as mandated by law before the commencement of the project works. This is what led to the delays in the project. These delays were to the Claimant's account and cannot be the basis of any claim under sub-clause 13.7 GCC/PC or clauses 8.5 read with 8.4 of the GCC/PC. If the Claimant failed to comply with this legal requirement, it is entirely responsible for the same.

311. It is pertinent to highlight that the Respondent had, in fact, brought the judgment in ***Deepak Kumar v. State of Haryana*** (supra) to the Claimant's attention *vide* letter dated 24 December 2013. The Respondent had further clarified by stating that the MoEF's notification dated 09 September 2013 was neither a new law nor had there been a repeal or modification of an existing law entailing any increase in cost after the base date of the Contract in terms of clause 13.7 of the GCC/PC. In its response dated 20 January 2014, the Claimant refused to accept its negligence in failing to obtain the EC. The Respondent issued a response to the Claimant's letter *vide* its letter dated 05 February 2014. The Respondent reiterated the fact that the Notification dated 09 September 2013 did not constitute a new piece of legislation, as the OM dated 18 May 2012 clearly laid down the requirement of prior EC for all mining projects, in compliance with the direction of Supreme Court in the aforenoted judgment. The Claimant responded *vide* letter dated 04 March 2014 reiterating its earlier position.

312. Importantly, the Claimant has also sought to suggest that their application for EC was pending consideration before SEIAA in June 2014 (per paragraph no. 94(iii) of the SOC). Without prejudice to the submission that none of the interim orders stayed the grant of EC where an application was pending, it is submitted that the Claimant has provided no explanation of the efforts taken by it from the base date i.e., 22 January 2013 onwards, which was much prior to the stay order passed by the NGT *i.e.*, 06 June 2014. The Claimant's claim for the present delay event is unfounded and is not tenable under clauses 13.7, 8.4, or 8.5 of the GCC/PC.

313. Without prejudice to the above, the restriction imposed by the State of Rajasthan was by way of an MoEF notification dated 09 September 2013. This was merely an executive action. Therefore, it cannot be called a change in law as there is nothing on record to show that any changes were made to an existing piece of legislation such as the Environmental Protection Act,1986. In any case, the Claimant has also failed to identify the number of days' delay as a consequence of the alleged 'change in law'.

314. Furthermore, the Claimant has not explained why it could not progress works in the other sections outside of Rajasthan is concerned inasmuch as the administrative actions within the State of Rajasthan could not possibly have affected any activities in the

States of Haryana and Gujarat, which formed part of the locations where the Works were to be carried out.

315. **Reply to paragraph nos. 99 to 104:** The contents of the paragraphs under reply are wrong and denied. It is to be noted that in accordance with clause 2.3 of Appendix 10 of the ER, it was the Claimant who was primarily responsible for coordinating with the IR for seeking various kinds of approvals. In any event, and without prejudice to the foregoing arguments, even if there was a delay in granting approval by the IR or a delay by the IR in constructing the RUBs on the IR tracks, an EOT had been granted by the Engineer *vide* letter dated 24 August 2017. The grant of EOT, however, did not entitle the Claimant to claim costs from the Respondent as there is no provision in the Contract that entitles the Claimant to recover Cost as a result of such delays.

316. The Claimant had made an assertion under paragraph no. 102 of the SOC that the letter dated 05 November 2014 was a variation order issued by the Respondent as per clause 13 of the GCC. The Respondent submits that the act of requesting coordination with the IR in respect of the RUBs was in line with the ER and requirements of the Contract and the same cannot be considered as a variation. There was neither any change in the number of RUBs to be constructed (305 RUBs) nor any extra obligation that the Claimant had to undertake. The only consequence of the said instructions was that the Claimant was to plan the progress of its works in such a manner that the IR had sufficient time to provide its approval to the concerned GADs. Therefore, the assertion that the letter dated 05 November 2014 was a variation order in terms of clause 13 of the GCC is incorrect and denied.

317. Furthermore, the Claimant has failed to indicate any clause of the Contract which entitles it to cost merely on the basis of EOT, particularly since the Claimant has already been compensated for increase in costs of materials, labour, equipment *etc*. under the price adjustment provisions of the Contract. Such delays were in any event foreseeable for an experienced contractor like the Claimant and would not entitle the Claimant for any cost claims.

318. **Reply to paragraph nos. 105 to 111:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has failed to substantiate how individual isolated

obstructions prevented the Claimant from proceeding with the permanent work and how they delayed the entire stretch of MS-3 works. Furthermore, the Engineer in its EOT assessment noted that even if there were encumbrances, they did not affect progress on the critical path. In any event, pursuant to Clause 2.1(b) as amended by the PC, the Claimant's entitlement to cost as a result of delayed provision of unencumbered land is limited to the amount set out therein.

319. In any event, and without prejudice to the above, clause 2.1 of the GCC/PC requires the Claimant to provide the particulars of any such delay regarding the non-handing over of unencumbered land/ ROW to the Engineer. The Claimant has not raised any such particularised claims specifically stating as to the unavailability of any encumbered land / ROW that affected its work in terms of clause 2.1 of the GCC/PC.

320. Pertinently, while the Claimant has referred to its EOT application dated 28 November 2016 under paragraph no. 110 of the SOC, it has failed to mention any of the Engineer's findings on this delay event. The Engineer *inter alia* concluded that (i) there were obstructions only in isolated locations and work areas were otherwise available to the Claimant to have carried out the project works; (ii) the Claimant was unable to specifically establish how its work progress had been hindered; (iii) the Claimant failed to provide a realistic NTC programme even after a lapse of seven months; (iv) the strip chart as on 31 August 2016 in fact demonstrated that all work segments were in progress; and (v) the critical path analysis revealed a contrary picture, in that *i.e.*, the alleged delays stood absorbed by other concurrent delays caused by the Claimant itself.

321. Therefore, the claims raised by the Claimant on account of the said purported delay event are not tenable.

322. **Reply to paragraph nos. 112 to 117:** The contents of the paragraphs are incorrect and denied. As per the contractual provisions (which have been reproduced hereinabove in para no. 224), the diversion of charted and uncharted utilities and obtaining all the necessary approvals/clearance from the local authorities with regard to the same was the responsibility of the Claimant. Furthermore, the identification of uncharted utilities was entirely within the Claimant's scope of work and had to be done with 23 weeks of commencement, which the Claimant failed to do.

323. The Engineer in its EOT assessment indicated that the Claimant delayed in obtaining appropriate approvals and clearances from the requisite authorities in respect of the charted/uncharted utilities. Furthermore, Claimant Contractor also delayed in the identification of uncharted utilities. Importantly, the Claimant has failed to respond to any reasons provided by the Engineer in its assessment of EOT for MS-3 works. Therefore, the Claimant cannot claim costs for the delay in shifting charted and uncharted utilities.

324. Without prejudice to the above, it is relevant to note that the Claimant has failed to identify and quantify the specific loss caused to it because of the purported delay on account of shifting of charted and uncharted utilities, and which part or portion of its claims are a consequence of the said alleged delays. Therefore, as such, the purported delay on account of shifting of charted and uncharted utilities cannot be relied on by the Claimant as a ground to justify its claims. Additionally, it is also important to note that any delay due to the actions / inactions on the part of authorities (in this case, the Claimant has referred to "Authority delay in consenting the utilities to be shifted" and "delay by relevant Authority in raising debit note for shifting the Chartered utility" under paragraph no. 113) would not entitle the Claimant to additional costs under the Contract (no provision of cost recovery is provided for under Clause 8.5), and may only give rise to a claim for EOT under Clause 8.4(b) of the GCC/PC. Like its other claims, the Claimant has failed to highlight any provision in the Contract under which it is entitled to costs under this head. In any event, even when appropriate variation orders were issued by the Respondent for the Claimant to deploy additional resources, the Claimant was suitably compensated as per clause 13.3 of the GCC.

325. **Reply to paragraph nos. 118 to 122:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has alleged that payments should have been made on the basis of the actual progress of work executed up to the billing month and not when the work is completed to the extent stated under 'stage payment' in the Contract. This is contrary to the agreed position under the Contract, which is a lumpsum price contract, where the various items of work and their stages of payment were pre-defined in 'Schedule 2: Price Schedule' of the Contract. Accordingly, the Contractor shall

become eligible for payment only on achievement of the specified stage of work and not for the works actually done.

326. The Engineer had highlighted this *vide* NKC letter no. 1610-79 dated 28 October 2016 to the Claimant by referring to Clause 14.4 of GCC read with clause 1.7 of 'Schedule 2: Price Schedule' in the Contract.[152] Furthermore, the Engineer it its EOT assessment had categorically held that the "Contractor's request for admitting the payment for the work actually undertaken without achieving the specified of stage of work cannot be admitted as it is not in line with the provisions of Contract" and that all payments due to the Contractor for the stages of work completed and certified by the Engineer had been paid by the Employer and no payment was pending till 31 August 2016. This assessment of the Engineer had been unconditionally consented to by the Claimant by way of the Claimant's letter dated 10 October 2017.

327. Furthermore, (i) the Claimant has, in any case, failed to demonstrate in its SOC if there was any breach on the part of the Respondent in making payment in accordance with the Contract for work done till 31 August 2016 and which had caused any impact to the performance or execution of the MS-3 works; (ii) the Claimant has failed to respond to any reasons provided by the Engineer in its assessment of EOT for MS-3 works; (iii) failed to identify and quantify the specific loss caused to it because of the purported delay on account of the alleged paucity of cash flow, and which part or portion of its claims are a consequence of the said alleged delays; and (iv) the Claimant's reference to the award in ICC Case No. 23923/HTG is misplaced as it related to an entirely different milestone and different facts and circumstances. *Wi*th regard to the contents of paragraph no. 120, it is clarified that the arbitral award passed in ICC Case No. 23923/HTG has been challenged by the Respondent before the Hon'ble High Court of Delhi. The matter is sub-judice before the Hon'ble Court.

328. At this juncture, it is also relevant to highlight that the Claimant's reference to the arbitral award in ICC Case No. 23923/HTG is in abrogation of Section 42A of the Arbitration and Conciliation Act, 1996. Section 42A is reproduced hereunder:

[152] *See also* letters dated the Engineer's earlier letters dated 19 March 2016, 04 April 2016, 16 April 2016, and 17 May 2016.

"*42A. Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain confidentiality of all arbitral proceedings except where its disclosure is necessary for the purpose of implementation and enforcement of award*."

(emphasis supplied)

329. In addition to the clear text of the provision necessitating that parties to the arbitration agreement maintain confidentiality of "all arbitration proceedings", it is also necessary to point out the significance of Section 42A inasmuch as it begins with a *non-obstante* clause. This indicates that the provision will prevail over any other law for the time being in force, thereby making it mandatory for parties to abide by such provision.

330. In view of the above, the Claimant's argument that there was delay due to paucity of cash flow is denied.

331. Moreover, it is also submitted that all the payment as claimed in the various IPAs for the work done and eligible for the payment as per the payment procedure specified in the price schedule, has been made by the Respondent in the monthly IPC.

332. **Reply to paragraph nos. 123 to 129:** The contents of the paragraphs under reply are incorrect and denied. The delay in MS-1 should not have had a delay effect on the work in MS-3 because the work in both MS-1 and MS-3 was supposed to be executed in parallel and not sequentially, as discussed in detail in the earlier sections of this SOD. Even if some works were to be carried out sequentially, other works could have been executed in parallel with respect to completion of the structures, earthwork, track-linking from Rewari to Dabla and from Dabla to Iqbalgarh, respectively, *etc*. It is further clarified that the section Dabla to Rewari was required to be completed by 17 December 2015 as against claimed 05 August 2015. Furthermore, without going into the reasons of delay in the completion of MS-1, any knock-on impact on whole project could have been avoided had the Claimant progressed the track work from 2 fronts

using 2 NTCs as proposed by it and accepted by the Respondent at the Technical bid stage.

333. It is evident from the para no. 155 to 199 that, the Contractor was not ready to commence track linking towards Bhagega-Dabla as planned in the CCP since the pre-requisites for the same were delayed by the Claimant.

334. The Engineer's EOT assessment dated 24 August 2017 also clarifies that the impact of any supposed delay due to formation works did not affect the linking of track between the sections Bhagega to Shrimadhopur and Bhagega to Dabla, or the critical path under the CCP.

335. In any event, wherever such delays were on account of factors beyond the control of the Claimant, EOT for MS-3 had already been granted for the Delay Events. The Respondent reiterates that this had been unconditionally consented to by the Claimant *vide* its letter dated 10 October 2017. At the cost of repetition, it is further submitted that any such delays would not automatically entitle the Claimant for additional costs, unless such entitlement to additional costs is provided for in the Contract. In this regard, neither has the Claimant shown any reason as to why the works of MS-1 and MS-3 could not have happened in parallel, nor has it associated any such purported delay caused to any activity to any provision of the Contract which entitles the Claimant to raise a claim for additional costs. The assertions of the Claimant that it could not commence the track work from Shrimadhopur to Iqbalgarh till 31 August 2016 is also incorrect. The section from Shrimadhopur to the end of section B could not be commenced by the Contractor as the NTC machine was pre-occupied with track linking work in MS-1.

336. **Reply to paragraph nos. 130 to 133:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. It is pertinent to mention that the Claimant had, on 10 October 2017, unconditionally consented to the Engineer's assessment dated 24 August 2017.

337. **Reply to paragraph nos. 134 to 135:** The contents of the paragraphs under reply are incorrect and denied. It is pertinent to mention that the Claimant had, on 10 October 2017, unconditionally consented to the Engineer's assessment dated 24 August 2017.

338. **Reply to paragraph nos. 136 to 137:** It is denied that the Engineer's EOT assessment did not reflect the actual site conditions. The Engineer in its EOT assessment made an independent detailed analysis in relation to each delay alleged by the Claimant and granted an EOT after taking into account the actual site conditions that were existing at the contemporaneous time. It is pertinent to reiterate that the grant of EOT to the Claimant by the Engineer does not imply that the delay was solely attributable to the Respondent or that the Claimant is entitled to additional costs. In reply to paragraph no. 136 of the SOC, the Respondent submits that -

a) In the Claimant's EOT application dated 2 March 2017, only Respondent' s delay events were pleaded. There was no mention of Claimant's own delays.
b) The Engineer, while determining the EOT, considered only tenable delay events out of the alleged delays relied on by the Claimant, and the same has been accepted by the Claimant on 10 October 2017.
c) The Engineer's reference to the "concurrent" delays in its EOT determination was a reference to other delays attributable to the Respondent which were considered to not have any critical delaying event in light of the other dominant delays attributable to the Respondent. There was no analysis of which of the Claimant's delays may have been concurrent with the Respondent's delays.
d) A concurrency analysis considering the delay events of the Claimant was conducted later and was shared with the Claimant on 5 May 2020.

339. **Reply to paragraph nos. 138 to 140:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied.

340. **Reply to paragraph no. 141:** The contents of the paragraph under reply are baseless and false and are denied by the Respondent. The Claimant's contention that "the issues in the present proceedings pertain to claim for additions 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" is misconceived. In fact, the Engineer *vide* its letter dated 25 January 2019 stated that the Claimant's claims for cost could not be considered eligible as only delay events up to 31 August 2016 had been considered while assessing EOT up to 11 October 2018, whereas the Claimant's claim for cost was for the period from 09 February 2017 up to 30 June 2018. The 'Respondent's Submissions on Preliminary Objections to Jurisdiction and Admissibility of the Claimant's Claims' submitted before the present Arbitral Tribunal on 08 September 2022 detail all relevant facts and contractual provisions in this regard. The Claimant has chosen to disregard the contractual provisions as well as the findings of the DAB and initiate the present arbitration proceedings.

341. **Reply to paragraph nos. 142 to 149:** The contents of the paragraphs under reply are incorrect and denied. The Respondent submits that it was the Claimant's own delays (concurrent delays) that led to slow progress and delay in completion of MS-3 within the period envisaged in the CCP. The Claimant has failed to update and revise the CCP contemporaneously.

342. The Respondent reiterates that the Claimant cannot claim costs for the extended period i.e., from 10 February 2017 to 30 June 2018 because any events that occurred in this period cannot form part of the present arbitration proceedings; and secondly, the relevant period for the assessment of prolongation cost is during the period prior to 31 August 2016. Furthermore, any variation order that was issued during the period 10 February 2017 to 30 June 2018 would have duly compensated the Claimant as per clause 13 of the GCC/PC, and in order to avoid double recovery, the Claimant would have to carve out those of its prolongation costs which have not already been made part of the compensation for variations. Notably, the Claimant did not challenge such variation orders during the contemporaneous period.

343. **Reply to paragraph no. 150:** The contents of the paragraph under reply are incorrect and denied. The Claimant has made an assertion that the Engineer made an 'erroneous determination' by rejecting the Claimant's claims for additional costs / damages sustained during the extended period till 30 June 2018. In this regard, it must be noted that the Engineer rejected the Claimant's claims on 25 January 2019 because the

Claimant had failed to furnish any detail of the additional cost incurred by it up to 31 August 2016 *i.e.*, the cut-off date for period during which the delay events claimed formed the basis of the EOT assessed by the Engineer. In fact, the Engineer categorically recorded in the said letter that "the Contractor is required to submit detailed claim in respect of additional payments, including dull supporting particulars of the basis of the claim […] It is noticed that the claim is for cost incurred from 09. February 2017 up to 30 June 2018. Additional cost incurred, if any, during the period(s) of delay up to 31 August 2016, limited to the number of days for which extension of time has been assessed by Engineer, in this case 608 days, has not been indicated".

344. **Reply to paragraph nos. 151 to 154:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. It is also relevant to note the following observations of the DAB:

"*The DAB now proceeds to discuss item wise the issues raised above and give our final decision thereon. Before we discuss any further, we would, however, like to place on record that the dispute has come before DAB in a half-baked condition when it really had not turned into dispute. The DAB notes that whereas the determination of EOT was done rigorously and strictly in accordance with clause 3.5, the same was not the case in regard to the determination of cost.*

The Contractor has claimed cost for the period up to 30/06/2018. The scheduled completion date of MS3 is 09/02/2017. The Engineer has stated that the cost has to be only for the period of delay events up to 31/08/2016. The Contractor has not deployed any additional resources during the original period of completion. The Engineer has opined that as per clause 20.1, the Contractor is entitled to the actual cost and he is required to submit details of the same with full supporting particulars of the same. This is also outlined in 'Society of Construction Law – Delay and Disruption Protocol' 2002, according to which the Contractor is entitled to the actual cost during the period of delay and not by reference to the extended period at the end of completion period […]

The DAB is unable to appreciate the argument of Contractor and is entirely in agreement with the Engineer and the Respondent. The Contractor is entitled to only the actual extra cost and not notional cost as claimed by him for the period far exceeding the period for which delay is analysed and agreed by the parties. The Contractor has not given any supporting details for the period of delay as asked for by the Engineer. In absence of any details, we cannot consider the claim. Even the Engineer also could not examine since the Contractor never supplied these details to him and instead rushed to DAB. Surely, the DAB cannot be the first level of examination […]

The Engineer while determining the extension of 608 days considered only those delays for which Contractor was not responsible with the sole purpose of ascertaining delays not attributable to Contractor so that he has not imposed L.D under 8.7 He did not at all consider the concurrent delays which he would have surely considered, had the Contractor claimed cost simultaneously while applying for EOT. The intent of Engineer is very clear from the reading of an extract of his determination […]

Thus, the Engineer did intend to discuss about concurrent delays while determining costs under 3.5. In absence of any analysis and consultations between the Engineer and Contractor as was required under 3.5, the DAB cannot quantify the number of days for which Contractor would be entitled for cost for delay events up to 31/08/2016 in respect of MS 3. As already stated, the DAB cannot become the first level of examination of claim. We can only rule at this stage that the Contractor is entitled to cost on account of delays to the extent of 608 minus concurrent delays."

(emphasis supplied)

345. Thus, the DAB, too, noted that the Claimant would be entitled to cost only for delay events up to 31 August 2016 and not thereafter, also noting that the Claimant had not given any supporting details of costs for the said period. Further submissions relevant to the facts and documents pleaded in Section D of the SOC are detailed below, in response to paragraph nos. 184 to 265. The Respondent neither admits the allegations

made in respect of New Delay Events, nor the entitlement of the Claimant to any associated cost claims.

346. **Reply to paragraph nos. 155 to 159:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. The Respondent reiterates its submissions on Preliminary Objections submitted before the present Arbitral Tribunal on 08 September 2022, and the same are not being repeated herein for the sake of brevity. Furthermore, the Claimant did not provide any documents to substantiate its claims for additional costs before the Engineer as directed by the DAB. It was only subsequently that the Claimant criticized the Engineer's impact analysis dated 16 March 2020. The period between March and May-2020 is explained owing to the COVID Pandemic.

347. Further, in response to the para no. 159, the Respondent had waited for the response from the Claimant but did not get any response even after 17 months, therefore, a reminder was issued to the Claimant.

348. **Reply to paragraph nos. 160 to 163:** The contents of the paragraphs under reply are incorrect and denied. The Engineer's assessment of the Claimant's concurrent delay was based on the data provided by the Claimant itself, as discussed in the meeting held on 12 February 2020. An agreement as well as a timeline was agreed on regarding a course of action for determining concurrent delay. Despite the methodology recorded in the minutes of meeting dated 12 February 2020, the Claimant has challenged the reliability of the findings of the Engineer. On 16 March 2020, the Engineer shared the impact analysis of the Claimant's delay, amounting to 911 days, with the Respondent. However, the Respondent submits that it was the Claimant who delayed in providing its comments to the Engineer's assessment of concurrent delays as requested in Engineer's letter dated 5 May 2020. The Engineer's assessment was communicated to the Claimant by the Respondent *vide* letter and e-mail, both dated 05 May 2020. Over one year passed without any substantive response from the Claimant. Neither did the Claimant provide its comments to the Engineer's assessment of concurrent delays, nor did it provide any documents to substantiate its claims for additional costs before the Engineer. The Claimant instead of submitting itself to the Contractual regime has chosen to walk away from the same and is now seeking to project the engineer in poor

light. The Claimant by his conduct defeated the provisions in the Contract as to resolving of dispute through non-adversarial methods

349. **Reply to paragraph no. 164:** The contents of the paragraphs under reply are wrong and denied. The Respondent submits that the Claimant has failed to comply with the mandatory pre-arbitration procedure stipulated in the Contract. Therefore, it cannot invoke the arbitration clause without complying with such steps. The Respondent reiterates the submissions on Preliminary Objections dated 08 September 2022, and the same are not being repeated herein for the sake of brevity.

350. The SOC does not contain paragraph nos. 165 to 183.

351. **NOTE:** Before responding to Section D (paragraph nos. 184 to 265) and Section E (paragraph nos. 266 to 299) of the SOC, some important aspects must be noted. The Claimant has claimed costs for the period from 10 February 2017 to 30 June 2018 by relying on the Delay Events. The Respondent reiterates that these claims are not maintainable before the present Arbitral Tribunal and should be rejected by it for the following reasons:

(i) The Claimant has not raised the issue of the New Delay Events neither before the Engineer nor before the DAB. This claim is being raised for the first time before the Arbitral Tribunal. Clause 20 of the GCC/PC provides for a mandatory multi-tier dispute resolution process before raising a claim before an arbitral tribunal.

(ii) The Claimant can only claim costs for the Delay Events i.e., up to 31 August 2016 and not during the extension period. In its decision dated 31 December 2019, the DAB agreed with the Engineer's observation in this regard and *inter alia* noted that the Claimant could only be held entitled to the actual extra cost and not notional cost for the period far exceeding the period for which delay had been analysed and agreed by the Parties *i.e.*, up to 31 August 2016. The SCL Protocol provides for the following as one of its core principles:[153]

[153] Core Principle no. 22 of the SCL Protocol.

"***Period for evaluation of compensation***

Once it is established that compensation for prolongation is due, the evaluation of the sum due is made by reference to the period when the effect of the Employer Risk Event was felt, not by reference to the extended period at the end of the contract."

(emphasis supplied)

In the present case, the Claimant had cited the delay events occurring till 31 August 2016 before the Engineer as well as the DAB, however, it was seeking costs for the extended period *i.e.*, from 10 February 2017 to 30 June 2018. Possibly to deal with the criticism as to the period for which it is claiming prolongation cost, the Claimant has is seeking to rely on New Delay Events that it says occurred in or continued during the period for which it is claiming prolongation cost. However, as explained earlier in the SOD, these events are outside the reference and the Tribunal does not have jurisdiction to consider these New Delay Events.

(iii) In any event, and without prejudice to the above argument, payment for the work executed during the extended period (*i.e.*, for EOT granted) were made to the Contractor at the rates applicable for the extended period. Further, any inflation in costs during the extended period was also compensated by applying the Price Variation Formula as per clause 13.8 of the GCC/PC. Any claim for extra cost for the same work which forms part of the Contract without a carving out of what amounts have already been recovered under other provisions of the Contract would amount to a duplication of the payment already made in favour of the Claimant, and result in a double-recovery.

(iv) The Respondent has already stated in its Preliminary Objections dated 08 September 2022 that claims in respect of New Delay Events are not maintainable / not admissible and barred under the Contract. The Respondent further submits that the Claimant's entitlement (assuming but not admitting that there is any entitlement) would be restricted to the period of the Delay Events and not in respect of the extended period, as claimed by it. It is clarified that the Respondent neither admits the allegations made in respect of the New Delay Events, nor the entitlement of the Claimant to any associated cost claims.

(v) In any event, the Claimant has failed to showcase a link between the costs claimed by it and the New Delay Events as they are merely a repetition of the Delay Events that occurred till 31 August 2016.

Accordingly, the Respondent's responses to the Claimant's reliance on the New Delay Events is made without prejudice to the aforenoted stand taken by the Respondent.

352. **Reply to paragraph nos. 184 to 186:** The contents of the paragraphs under reply are incorrect and denied. The Claimant before the Engineer and the DAB had made the untenable assertion that because of the delay events that had occurred till 31 August 2016, it was claiming costs for the extended period. To support its claims for seeking costs before this Arbitral Tribunal, the Claimant in its SOC has brought in the New Delay Events by alleging that they were a continuation or a 'knock-on' of the Delay Events, which had allegedly had a cascading effect thereby resulting in the New Delay Events. However, the prolongation cost which is to be assessed must be in relation to the effect of events that occurred prior to 31 August 2016; if there was a continuing effect, that must be made the subject of a claim with a cut-off date later than 31 August 2016. In any event, as regards the New Delay Events, the Claimant has failed to comply with the mandatory pre-arbitration procedure stipulated in the Contract, and cannot invoke the arbitration clause without complying with such steps. In this regard, the Respondent reiterates its submissions on Preliminary Objections dated 08 September 2022, and the same are not being repeated herein for the sake of brevity.

353. **Reply to paragraph nos. 187 to 220**: The contents of the paragraphs under reply are wrong and denied**.** It is pertinent to note that to support its claim that there was execution of part RUBs in the period "beyond [the] revised date of completion", the Claimant has relied on documents which do not support its allegations of delay. Furthermore, it is pertinent for the Arbitral Tribunal to consider that the Claimant has under 'Section D' of its SOC sought to raise new allegations of delay which it had never raised before the Engineer or the DAB. This is not admissible even as per the multi-tier dispute resolution clause, being Clause 20, of the GCC/PC. The following may be considered:

(i) Exhibit C-31 (Colly) referred to in paragraph no. 205 of the SOC includes "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 the IR tracks". These documents pertain to the New Delay Events.

(ii) Exhibit C-34 (Colly) referred to in paragraph no. 208 of the SOC includes a "[c]ompilation 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)". Once again, these documents pertain to the New Delay Events.

(iii) Exhibit C-35 (Colly), Exhibit C-36, Exhibit C-37, and Exhibit C-38 (Colly) referred to in paragraph no. 208 of the SOC are letters including Field Change Notices, again, pertaining entirely to the New Delay Events. In fact, many of these notices were issued in respect of events occurring after the DAB decision dated 31 December 2019. Accordingly, they cannot conceivably form part of the subject matter of these present arbitration proceedings.

354. From a bare perusal of paragraph nos. 208, 209, 215 and 216 of the SOC, among others, the Claimant's allegations pertain to the New Delay Events. These New Delay Events were note before the Engineer or the DAB when they made their respective determinations which led to this reference, and have been raised in this arbitration for the first time. Accordingly, such allegations cannot be the subject matter of the present arbitration proceedings.

355. The Claimant has further alleged that a variation order was issued by the Respondent on 05 November 2014. This assertion is incorrect and denied. As discussed in detail hereinabove in para nos. 206 to 209 and 312 to 313, the letter dated 05 November 2014 was not a variation order as the requirements so stipulated were in line with the ER under the Contract. There was neither any change in the number of RUBs to be constructed (305 RUBs) nor any extra obligation that the Claimant had to undertake. The only consequence of the said instructions was that the Claimant was to plan the progress of its works in such a manner that the IR had sufficient time to provide its

approval to the concerned GADs. On the contrary, it is clear from the specific terms of the ER that coordination with the IR with respect to RUBs, at both stages of design and construction, had always been contemplated between the parties. In any event, and without prejudice to the foregoing submission, even if there was a delay caused on account of approval to certain GADs which in turn ultimately led to delay in completion of RUB, the Claimant would be entitled to EOT in accordance with clause 8.5 of the GCC read with Clause 8.4(b) of the GCC/PC but not for any cost as there is no provision for recovery of cost for delays caused by authorities. The Respondent highlights that there was only 1 RUB (LC-29) in MS-3 which required completion of RUBs on the IR track by IR ahead of or simultaneously.

356. As per Clause 13, the Claimant had to fully integrate the design and the construction of the works with other contractors, interfacing parties and related bodies, parties and entities including but not limited to IR, Railway Board, RDSO etc. As per Clause 2.3, the detailed co-ordination of the design, manufacturing, installation, construction, testing and commissioning activities and the management of the coordination process with Indian Railways was the Claimant's responsibility. The Claimant failed to follow the stipulations of the Contract regarding the design interface with IR which includes approval of conjoint GADs by IR.

357. Further, in response to para no. 202, the Respondent would like to mention the fact that the assertions made by the Claimant are factually incorrect. The Indian Railways/NHAI are an Independent Authorities and respondent has no Jurisdiction or Control over the functioning of Indian Railways/NHAI. The Respondent cannot respond to the Claimant's assertions that IR did not have funds and did not float the tender as IR/NHAI are separate authorities having their own financial budgets and systems of execution to which the Respondent is not privy.

358. Also, in response to para no. 206, the Respondent would like to highlight the matter that despite the non-fulfilment of the contractual obligations by the Claimant, the Respondent, with a view to mitigate the delays by Authorities, agreed to the proposal as submitted by the Claimant and has already been compensated for the same as variation to the Contract.

359. In line with the response to the para no. 217, the Respondent submits that for laying of track skeleton to achieve MS-3, there was no requirement of 100% completion of RUBs. The remaining activities of Part B, C and D of the RUBs could be executed in parallel within the time of completion of MS-4 & MS-5, since the time gap between completion of MS-3 and MS-5 as provided in the Contract was 28 weeks. It is evident from the pictures below that the track skeleton works could be completed without 100 % completion of the RUBs:

360. **Reply to paragraph nos. 221 to 238:** The contents of the paragraphs under reply are wrong and denied. At the outset it is pertinent to note that the present claim is a New Delay Event which cannot be raised in the present arbitration proceedings.

361. In response to para no. 223, the Respondent submits that the Handing over of land was to be as per the relevant Term stated in the ATB under Clause 2.1 of the Contract. As

already submitted by the Respondent, there is no contractual basis for creating liabilities on the Employer on the basis of timelines provided in the CCP.

362. The Claimant in paragraph no. 229 of the SOC has referred to alleged obstructions in the land handed over by the Respondent and has relied on various documents to support its claim. For instance, the Claimant has relied on documents referred to the paragraph no. 238 of the SOC and annexed as Exhibit C-48 (Colly), which contains various notices issued by the Claimant to the Engineer. Out of the said notices, the following notices pertain to New Delay Events:

Date of Notice from Claimant to Engineer in Exhibit C-48 (Colly)	Relevant page in SOC
10 November 2016	31165
22 December 2016	31166
22 September 2017	31170
23 December 2017	31179
12 January 2018	31201
22 February 2018	31224
19 March 2018	31238
11 June 2018	31241
20 June 2018	31243
11 July 2018	31247
21 September 2018	31249
13 November 2018	31251

363. The aforesaid notices cannot be a part of the proceedings insofar as they relate to New Delay Events, or delay events that occurred after 31 August 2016. Similarly, even under paragraph nos. 235 and 236, the Claimant has sought to claim costs by referring to time period from 2017 and 2018.

364. In any event and without prejudice to the above arguments, the allegations made by the Claimant from paragraph no. 221 to 238 are unmeritorious. It is submitted that the Claimant has failed to identify and quantify the specific loss caused to it on account of

non-handing over of unencumbered possession of land and ROW, and which part or portion of its claims are a consequence of the said alleged delays. Therefore, as such, the purported delay on account of non-handing over of unencumbered land and ROW, cannot form the basis for its claims as raised in its Statement of Claims. Even otherwise, the Engineer in its EOT assessment dated 12 September 2019 made the following observations, once again establishing the Claimant's failures:

4.1 Bhagega to Dabla Section

4.1.2 Earthwork

[…]

c) *With reference to the present claim of EOT for MS-3 for the delays accrued upto 30-11-2017, there is no delay assessed which affects the earthwork in this section. However, regarding existing obstructions at Site, as explained in para 3.6.5 to 3.6.7 above, the Contractor has not established how the obstructions have affected the progress of the earth work. Since NTC has already passed and Track Skelton has already been laid in this section, such isolated obstruction has not considered to have obstructed the earthwork. Also, 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.*

d) *As such earth work for Bhagega-Dabla section has not been considered eligible for further extension beyond the previously re-adjusted date of 21-09-2015*

4.2 Dabla – Ateli Section

4.2.1 Earthwork

[…]

d) In the present case for delays accrued upto 30-11-2017, no delay in completion of earthwork has considered valid for EOT for this section beyond 20-02-2015. However, regarding existing obstructions at Site, as explained in para 3.6.5 to 3.6.7 above, the Contractor has not established how the obstructions have affected the progress of the earth work. Since NTC has already passed and Track Skelton has already been laid in this section (except one small portion in Narnaul area near Ateli station), such isolated obstruction has not considered to have obstructed the earthwork. Also, 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.

4.3 Ateli – Rewari Section & Hisar Connecting Line

4.3.2 Earthwork

[…]

c) Previously, while assessing the Contractor's claims of EOT for MS-3 for delays accrued upto 31-08-2016, there was no delay eligible for consideration of EOT and as such completion date as envisaged in CCP (28-04-2015) was applicable. Para 4.3.2 of Engineer's letter at sl. No. 7 (dated 24-08-2017) above refer to.

d) Accordingly, in the present case for delays accrued upto 30-11-2017, any delay in completion of earthwork beyond 28-04-2015 is considered unauthorized for completion date of Ateli- Rewari main line and Hisar Connecting line.

[…]

4.4 Bhagega – Sri Madhopur Section

4.4.1 Earthwork

[…]

c) However, regarding existing obstruction at site explained in para 3.6 above, the Contractor has not established as to how obstructions have affected the progress of the earth work. Also, 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.

d) As such earth work for this section has not been considered eligible for further extension beyond the previously re-adjusted date of 04.02.2016.

365. The Engineer had made similar observations with respect to the other sections as well, except Sakun to Kishangarh and Saradhna to Madar where EOT had been granted.

366. Considering the delay up to 30 November 2017 (which falls within the extended period granted for delay period up to 31 August 2016), it is clear that the impact on earthwork was only in relation to the two above mentioned Sections *i.e.*, Sakun to Kishangarh and Saradhna to Madar. It is reasonable to assume that the resources retained, if any, would have been considerably less compared to the required resources for the earthwork of the entire MS-3 stretch. However, the Claimant has not provided specific details of the cost incurred against the retention of resources along with necessary particulars linked to this delay event. Since the Claimant has failed to apportion its claims concerning the specific delay event/instances on account of the unavailability of unencumbered land / ROW in accordance with clauses 2.1 and 20.1 of the GCC/PC, it cannot be held entitled to any monetary claim.

367. **Reply to paragraph nos. 239 to 244:** The contents of the paragraphs under reply are incorrect and denied. It is the Claimant's assertion that several Variations were ordered by the Engineer as per the requirement of the Respondent. This resulted in delay in the completion of the works. The Claimant has further asserted that the CCP does not factor in Variation and clause 13 of the GCC does not factor in the time-related cost due to Variations. However, these assertions are incorrect for the following reasons:

(i) The Claimant has relied on Variations ordered by the Engineer which can be divided into three chronological periods:

(a) Variations ordered up to 31 August 2016, tabulated at Exhibit C-49.

(b) Variations ordered from 01 September 2016 to 09 February 2017, tabulated at Exhibit C-50.

(c) Variations ordered from 10 February 2017 to 30 June 2018, tabulated at Exhibit C-51.

The allegations in respect of (b) and (c) above pertain to the New Delay Events which cannot be the subject matter of the present arbitration proceedings. Even with respect to (a) above, insofar as the case of the Claimant is that ordering these Variations led to delay in the period after 31 August 2016, these constitute New Delay Events which, again, cannot be the subject matter of the present arbitration proceedings. Thus, insofar as the Claimant's claims pertain to the New Delay Events under this heading, they are accordingly barred / not admissible in the present arbitration proceedings.

(ii) Without prejudice to the above argument, the Variations are an integral part of the Contract between the Claimant and Respondent and not a separate contract as the Claimant is making it out to be. A 'Variation' has been defined under sub-clause 1.1.6.9 of the PC as "any change to the scope of works, design criteria and specifications, and criteria for the testing and performance of the completed works specified in the Employer's Requirements".

(iii) During the execution of work the Claimant is under the obligation to revise the CCP to account for mitigation measures for timely completion of work, which Claimant never submitted. Further for the varied works, separate input resources including overhead and profit as per GC/PC Cl. 13.3 have been allowed. The varied works are to be executed parallel with the main works. It is also a fact that the Claimant never claimed any additional time for execution of the varied work up to 31-08-2016, which indicates that the same did not cause any critical delay.

368. Clause 13.1 of the GCC *i.e.,* 'Right to Vary' clarifies that a Variation is to be initiated by the Engineer, and that the same shall bind the Contractor. It reads as follows –

"***13.1 Right to Vary***

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request for the Contractor to submit a proposal. A Variation shall not comprise the omission of any work which is to be carried out by others.

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that (i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works, or (iii) it will have an adverse impact on the achievement of the Schedule of Guarantees confirm meaning. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction."

(emphasis supplied)

369. Clause 13.3 of the GCC/PC, contains the procedure for Variation, and also spells out the Contractor's additional entitlement to time and/or cost & profit, as the case may be. It reads as follows –

"***13.3 Variation Procedure***

If the Engineer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:

(a) a description of the proposed design and/or work to be performed and a programme for its execution,
(b) the Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [Programme] and to the Time for Completion, and
(c) the Contractor's proposal for adjustment to the Contract Price.

The Engineer shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [Value Engineering] or otherwise), respond with approval,

disapproval or comments. The Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs, shall be issued by the Engineer to the Contractor, who shall acknowledge receipt.

Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine adjustments to the Contract Price and the Schedule of Payments. These adjustments shall include reasonable profit, and shall take account of the Contractor's submissions under Sub-Clause 13.2 (Value Engineering] if applicable.

For varied works of items due to variation as per Sub-Clause 1.1.6.9 determination of adjustment to the Contract Price shall be based on the following:

a. All inputs of man-days, machine hours and quantities of materials;
(i) Prevailing market rates for Materials, hiring of equipment;
(ii) Rates being paid by the Contractor for unskilled, semi-skilled and skilled worker as per the records maintained by the Contractor in accordance with the Laws;
b. Contractor's overheads and profit at the rate of 15 (fifteen) per cent of the cost arrived at on the basis of (a) and (b) above and;
c. Applicable taxes.

No price adjustment shall apply.

The approval for Variation shall state the period of extension of time, if any, allowed for the Variation. If no extension of time is allowed, the same shall be stated."

(emphasis supplied)

370. Therefore, under clause 13 of the GCC/PC, Variations include both cost and profit in favor of the Contractor. Accordingly, the Claimant's assertion that time-related cost due to Variations is not covered under clause 13 of the GCC/PC is misconceived.

371. Further, if the Claimant was aggrieved by the Engineer's Determination under clause 3.5 of the GCC on the aspect of cost and/or time for a given Variation, it would have to follow the dispute resolution procedure under clause 20 of the GCC/PC and raise a dispute before the DAB for adjudication. From the averments made in the SOC, there is nothing to suggest that the Claimant had raised any dispute with respect to any Variation Order, either in respect of the time allocated for performance of work under the Variation, or cost and profit payable under any Variation.

372. During the course of the execution of the Contract, several Variation Orders were issued by the Engineer. These Variation Orders specified the time for performance as well as the cost/profit to be paid to the Claimant. As the Claimant did not raise any dispute in accordance with the contractual provisions, it cannot raise any (a) claim for entitlement towards cost incurred due to the performance of work under a Variation, whether in the extended period or otherwise, nor (b) claim any entitlement towards the time for performance of the work under the Variation in the present arbitration proceedings.

373. Furthermore, the Claimant in its SOC has cited Exhibits C-49, C-50, and C-51, where it asserts that these records demonstrate significant Variation Orders for the periods up to 31 August 2016, from 01 September 2016 to 09 February 2017, and from 10 February 2017 to 30 June 2018, respectively. However, a perusal of these documents shows that none of the actual submissions/proposals of the Claimant or Variation Orders issued by Engineer have been filed with the SOC. Therefore, the amounts claimed by the Claimant and the amounts ordered to be paid under the Variation Orders, are not before the Tribunal. The Construction of the changed sizes of the bridges are within the Scope of Work of the Claimant as per the specified design criteria and applicable codes and standards.

374. It is pertinent to note that the Engineer, in the assessment of cost for the Variation Orders, had considered the cost and profit of deploying extra resources (including

labour, equipment, and materials) needed to complete the Variation Orders in addition to the other works covered by the Contract. The Variation Orders were assessed in terms of clause 13.3 of the GCC/PC.[154] A perusal of the Variation Orders up to 31 August 2016 and from 01 September 2016 to 30 June 2018 would indicate that the Claimant had received additional payments totaling a sizable sum of money for the deployment of additional resources under the Variation Orders.

375. It is apposite to note at this juncture that the contractual provisions require that the Contractor use additional resources (manpower, materials, and equipment) to perform/complete the Variation work[155], for which it is fully rewarded under the Variation Order itself. Furthermore, the Contractor is not permitted to employ the same resources that were used to carry out the other Contract Works. It, however, appears from the SOC that the Claimant has premised its claim on the basis that the same resources were utilized for Variations as well as execution other works under the Contract. This not only amounts to a breach of the Contract; it also indicates that any delay occasioned in meeting the prescribed timelines for completion of the works was entirely to the Claimant's account as it utilized the same resources for Variation as well as for the other Contract works.

376. Without prejudice to the above, it must be noted that the Claimant had subsequently claimed for and was granted EOT for this delay event by the Engineer. The following observations of the Engineer contained in Appendix-1 to the letter dated 14 September 2020, whereby EOT for delay events up to 30 September 2019 was granted, is relevant:

"***3.6 Analysis of the claimed delay due to Additions/Alterations/Variation to the Contract.***

[154] 13.3—"For varied works of items due to variation as per Sub-Clause 1.1.6.9 determination of adjustment to the Contract Price shall be based on the following:
All inputs of man-days, machine hours and quantities of materials;
(i) Prevailing i.e., current market rates for Materials, hiring of equipment at the time of the VO;
(ii) Rates being paid by the Contractor for unskilled, semi-skilled and skilled worker as per the records maintained by the Contractor in accordance with the Laws;
b. Contractor's overheads and profit at the rate of 15 (fifteen) per cent of the cost arrived at on the basis of (a) and (b) above and;
c. Applicable taxes."
[155] Exhibit R-1, Part-1

3.6.1 Contractor's Claim under this head of claim:

Contractor has claimed that works in MS 3 were subject to substantial Variation from that envisaged in the Contract. Major variations to which MS3 was subject to, between period 01.12.2017 to 30.09.2019 has reckoned is summarized as under:

A: Alterations/Modifications:

Under this head, the Contractor has claimed there was substantial variation between the RUB actually constructed and that envisaged in the Contract. These variations were pursuant to change in locations, site conditions and requirement of the Engineer/Employer/IR not attributable to the Contractor

B: Additions: Under this head, the Contractor has claimed that Contractor was directed to construct 15 additional RUBs of which 2 additions were in the period 01.12.2017 to 30.09.2019 as a variation to the Contract.

Contractor has claimed that the above Variation to the Contract has impacted delay to the time for completion of MS 1 and in terms of FIDIC/PC Cl. 13 and 8.4, the Contractor has claimed further EOT for completion of MS-1.

3.6.2 Assessment of the Engineer

Contractor's claim under head Alterations/Modifications has already been considered in previous EOT assessments of MS-1 and M.S-3 respectively and necessary Extension of Time has been assessed. There are no delays under this sub head of claim during period of delay events accrued from 01-12-2017 to 30-09-2019.

Under subhead Additions as Variation to the Contract, out of 15 additional RUBs as claimed by the Contractor, 13 RUBs has already been considered in previous EOT assessments of MS-1 and M.S-3 respectively for delays accrued up to 30.11.2017 and necessary Extension of Time has been assessed. 2 additional RUB's i.e. RUB at LC-03 and RUB at Thotwal, which have been added in the period 01.12.2017 to 30.09.2019, has already been analyzed in

previous EOT assessments of MS-1 for delays accrued from 01.12.2017 to 31.12.2018 and has not been considered eligible."

377. It is clear from the above that the Claimant has raised this very delay event as a ground for claiming EOT for the period beyond 11 October 2018. It is likely that the Claimant will separately raise a consolidated cost claim (as in the present case) which will also include all other delay events forming the basis of the EOT assessment by the Engineer dated 12 September 2019 and 14 September 2020. Thus, the Claimant is trying to derive a double recovery based on the same delay event. In light of the above submissions, the Claimant's claim that it incurred additional costs as a result of the performance of the work under the Variation Orders is unmeritorious.

378. **Reply to paragraph nos. 245 to 258**: The contents of the paragraphs under reply are incorrect and denied.

379. The sole basis on which the Claimant has based this claim is on the decision regarding revised dates of completion taken in the Minutes of Meeting dated 08 February 2017 which was formally communicated to the Claimant *vide* letter dated 16 August 2017. Admittedly, none these facts formed the subject matter of the dispute before the Engineer or DAB. As a direct corollary, these cannot be the subject matter of the present arbitration in terms of clause 20 of the GCC/PC.

380. Furthermore, a reading of paragraph nos. 245 to 258 of the SOC shows that none of the paragraphs pertain to any delay event up to 31 August 2016. The allegations made pertain entirely to the New Delay Events. Therefore, the Claimant's claims are barred/not admissible insofar as they pertain to the New Delay Events.

381. In any event, and without prejudice to the above arguments, the contents of paragraph nos. 245 to 258 of the SOC are erroneous and misconceived. It is submitted that the Claimant's insistence on the work being undertaken as per the original CCP is flawed and contrary to the contractual provisions. The Respondent reiterates that the CCP ought to have been revised based on the contractual stipulations and the changed circumstances and ground realities of the project. Despite repeated requests, the

Claimant failed to revise the CCP in a proper and timely manner and is now basing its purported claims on an outdated document.

382. In response to the para no. 246, the Respondent submits that the various dates stated for certain stretches with respect to the orders from the Ministry of Railways (it is however to be noted that there are no sections mentioned in the Contract) are beyond the extended dates granted to the Claimant. As per the EOT determination, the Engineer had assessed the completion of Marwar-Iqbalgarh section to be completed as on 12 January 2019 (i.e., completion of MS-4). As such, the targets dates for commissioning of the sections were beyond the extended/revised completion.

383. It is further relevant to appreciate that instructions by the Engineer to prioritize and expedite the project works were issued in terms of clause 8.6 of the GCC/PC on account of the slow rate of progress by the Claimant. A perusal of the Minutes of Monthly Progress meetings from 2014 onwards as well as other documents highlights the continuous slow progress of work and the Claimant's failure to take corrective action.

384. **Reply to paragraph nos. 259 to 265:** The contents of the paragraphs under reply are incorrect and denied. The events narrated under this heading pertain not only to the periods beyond 31 August 2016 and up to 30 June 2018[156] but even beyond 30 June 2018.[157] Hence, the allegations made under this head pertain entirely to the New Delay Events and cannot be the subject matter of the present arbitration proceedings. Accordingly, the Claimant's claims are barred / not admissible insofar as they pertain to the New Delay Events.

385. Without prejudice to above, it is submitted that the contents of paragraph nos. 259 to 265 of the SOC are erroneous and misconceived. While the Claimant had contemplated raising claims for EOT, cost, payment, and compensation against the alleged continuing delay events beyond 31 August 2016[158] through several letters and

[156] Paragraph no. 259 of the SOC.
[157] Paragraph nos. 261 & 263 of the SOC.
[158] Paragraph no. 262 of the SOC.

sought further EOT against the same delay events,[159] it is placing reliance on the same delay events for its claims under the present arbitration.

386. It is further submitted that while analysing the continuing delay events up to 30 November 2017, the Engineer in its EOT assessment dated 12 September 2019 concluded that most of such delay events were minor in nature and did not affect the critical path of the project.

387. Accordingly, none of the events described in Section D of the SOC can form the subject matter of this arbitration. The claims based on the same are not maintainable and are liable to be rejected. The Respondent reserves its rights to contest these delay events and associated cost claims at the appropriate time and before the appropriate forum.

388. **Reply to paragraph nos. 266 to 267:** The contents of the paragraphs under reply are incorrect and denied. The Respondent denies that there was an "unbroken and ceaseless chain of critical delay[s]" as the works in MS-1 and MS-3 were to be executed in parallel and not in a linear manner. The Claimant was required to progress MS-3 works independent of MS-1. Accordingly, the alleged delays in MS-1 would not necessarily impact MS-3, particularly the Bhagega-Iqbalgarh segment of MS-3. It is pertinent to note that scope under MS-1 (*i.e.*, the 79.18-km stretch) was much less than the scope under MS-3 (being a 648.57-km stretch). Therefore, the delays to MS-1 would not have had any impact on delays to MS-3 works falling outside the scope of works under the MS-1 stretch.

389. **Reply to paragraph nos. 268 to 270:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has failed to substantiate its statement that "the alleged Claimant's delays that the Engineer has identified in relation to MS-3 are non-critical" with any critical-path analysis. The Respondent has clarified that the 'excusable period' and the 'compensable period' is entirely different and therefore the assessment requires separate analysis. It is submitted that an analysis of concurrent delays is required as part of the assessment of the periods for which prolongation costs

[159] Paragraph no. 264 of the SOC.

may be awarded (the compensable period). Accordingly, the Claimant's allegation that "the Employer's later allegation of concurrent delay [is] *void ab initio*" and that "the awarded interim periods of extension of time for MS-1 has been held to be fully compensable periods" has no relevance.

390. Notably, the Engineer, while assessing the Claimant's cost claims on 25 January 2019 clearly mentioned that "the delays attributable to the Contractor (concurrent to the determined EOT of 608 days) shall not be eligible for any claim."

391. In response to the contents of paragraph no. 270, it is pertinent to note that the Respondent has not agreed that the 608 days extended period was compensable. The Engineer's EOT assessment dated 24 August 2017 was based only on the delays alleged by the Claimant. The said letter noted that there were several delays on the part of the Claimant, which had not been quantified at that stage. Further, the consent accorded by the Respondent to the EOT for the delay events up to 31 August 2016 constitutes neither an admission of liability for cost claims, nor an admission that the Claimant was not liable for its own delays. In any case, the entitlement to an EOT does not automatically lead to an entitlement to compensation.[160] Thus, the Respondent's acceptance of EOT of 608 days as recommended in the Engineer's letter dated 24 August 2017 would not preclude it from raising the issue of the Claimant's delay, which was the subject of the assessment of Concurrent Delays by the Engineer thereafter. In any event, the Engineer had clearly stated that the Claimant would not

[160] Core Principle no. 12 of the SCL Protocol. *See also* Keating on Construction Contracts, Sweet & Maxwell, @ p. 245 [8-044]: "Associated loss and expense entitlement: There is normally no automatic entitlement to payment for loss and expense simply because an entitlement to an extension of time has been established. Although there is often considerable overlap between the relevant events/matters that a building contract identifies as the factual basis triggering such entitlements and in practice an award of an extension of time may inexorably lead to the award of associated loss and expense, the extension of time and loss and expense regimes (and the entitlement to relief thereunder) should be considered independently of each other"; SCL Protocol, Guidance on Core Principles, paragraph no. 12.1: "It is a common misconception in the construction industry that if the Contractor is entitled to an EOT, then it is also automatically entitled to be compensated for the additional time that it has taken to complete the contract."; SCL Protocol, Guidance on Core Principles, paragraph no. 12.1: "Where an Employer Delay to Completion and a Contractor Delay to Completion are concurrent, the Contractor may not recover compensation in respect of the Employer Risk Event unless it can separate the loss and/or expense that flows from the Employer Risk Event from that which flows from the Contractor Risk Event. If it would have incurred the additional costs in any event as a result of concurrent Contractor Delay, the Contractor will not be entitled to recover those additional costs. In most cases this will mean that the Contractor will be entitled to compensation only for any period by which the Employer Delay exceeds the duration of the Contractor Delay."

be entitled to costs to the extent it was responsible for the delay. Furthermore, the Respondent had also raised the issue of the Claimant's delays during the DAB process.

392. **Reply to paragraph nos. 271 to 272**: The contents of the paragraphs under reply are incorrect and denied. The Claimant has also alleged under paragraph no. 271 of the SOC that the acceptance of recommendation for EOT without imposition of delay damages and with price adjustment negates the Respondent's case of the Contractor's delay. The above said interpretation by the Claimant of the Engineer's letter and recommendation dated 24 August 2017 and the Employer's acceptance of the same is misconstrued. The non-imposition of liquidated damages and continuation of benefit of cost adjustment by the Engineer derives from the fact that certain events were considered 'excusable'. It nowhere implies that there were no other delay events which were attributable to the Claimant. The Claimant's assumption of considering the 'excusable period' as the 'compensable period' without any justification is untenable. Nowhere did the Engineer or the Respondent stated that an EOT would *ipso facto* translate into a 'compensable period'. In fact, the DAB had ruled that the Claimant could only have claimed cost compensation after deducting the period/duration of its own delays from the 608 days' extension. Therefore, the Claimant's claim for cost entitlement for the extended period is unsupported and therefore untenable.

393. **Reply to paragraph nos. 273 to 277**: The contents of the paragraphs under reply are incorrect and denied. The Respondent denies that the Claimant's allegation that the costs incurred and losses sustained by it up to 11 October 2018 are a 'direct effect' of the alleged Delay Events.[161] The Respondent's position is that the extension in MS-3 was granted by the Engineer but it does not imply that the slow progress in MS-3 works was attributable to the Respondent. The Respondent has already demonstrated in the foregoing paragraphs (para nos. 177 to 249) that the Claimant's own delays / deficiencies at the available work fronts were the driving factors for the delay in MS-3 completion. Therefore, the Claimant would have incurred additional cost / loss due to its own delays / deficiencies, even in the absence of the accepted excusable delays. Additionally, since the entitlement to the compensability is not demonstrated by the Claimant, the Claimant's cost claims are not tenable.

[161] Paragraph no. 274 of the SOC.

394. **Reply to paragraph nos. 278 to 284**: The contents of the paragraphs under reply are incorrect and denied in its entirety. The Claimant's allegation that there were non-compliances / breaches by the Respondent which led to a deviation in the scheme approved in the CCP is denied. The following points are to be noted in this regard:

395. The Claimant failed to submit a revised CCP which could be deemed acceptable in terms of clause 8.3 even after the several requests by the Engineer.

a. There were various events/factors which resulted in the deviation in the timelines approved in the CCP. The Engineer granted EOT for MS-3 against the accepted excusable delay events. This, however, did not imply that there were no other delay events (attributable to the Claimant), which were concurrently impacting the progress of the project works.

b. The Engineer, in its concurrency analysis, demonstrated that the delay attributable to the Contractor was greater than the EOT granted in its favour. Thus, the current delays overshadowed the accepted excusable delays. The Respondent submits that the Claimant was not prevented from commencing or completing any of the MS-3 activities as the Respondent's alleged breaches/non-compliances were not a critical factor to the Claimant's progress.

c. The Respondent has already demonstrated in the earlier sections of this SOD that the Claimant's own delays / deficiencies in carrying out works at the available work fronts were delaying the progress of the project. The Respondent has set out graphs and tables to demonstrates that the Claimant's progress in executing parts of the project works (earthwork, major structures, minor structures, track works) was lagging far behind the actual land availability.

d. The Claimant failed to mobilize sufficient resources and this shortcoming was contemporaneously recorded by the Engineer at various occasions.

396. Therefore, insofar as the Claimant has contended that it allegedly incurred additional costs in executing the project works, the concurrent delays on its part must be assessed and excluded. This same principle was also highlighted by the DAB in its findings.

397. **Reply to paragraph nos. 285 to 286:** The contents of paragraphs under reply are denied in its entirety. It is incorrect that execution of works was affected due to handing over of unencumbered land, variations of the Contract *etc*. Paragraph no. 285 merely reiterates the Claimant's allegations which have already dealt with comprehensively in the other sections of the SOD.

398. Further, it is clarified that the Respondent had fulfilled its obligations and had taken all necessary efforts to ensure the timely completion of the project works. In this regard, reliance may be placed on the letters relied upon by the Respondent advising the Claimant to take mitigating measures by deploying additional resources, revising the CCP *etc*. It is submitted that neither did the Respondent disrupt any work, nor did it prevent the Claimant from executing any work. Instead, the delays on the Claimant's part inasmuch as it did not deploy sufficient additional resources and did not rectify the slow progress of work. A detailed analysis to establish delay and slow progress has been provided by the Respondent in the foregoing sections, specifically para nos. 67 to 201 of the present SOD. It is further denied that the Respondent has showed disregard to the CCP. It is reiterated the Claimant was asked on several occasions to revise the CCP and take mitigating measures.

399. **Reply to paragraph nos. 287 to 288:** The content of the paragraphs under reply are incorrect and denied. The Respondent has demonstrated in para nos. 155 to 159 and 265 to 272 that the delays in the track-linking and track skeleton work were solely attributable to the Claimant, and the same are not repeated herein for the sake of brevity. The Respondent has established that sufficient land was made available to the Claimant to execute the work and that it was *inter alia* due to the inadequacy of the resources deployed by the Claimant that the work was delayed.

400. **Reply to paragraph nos. 289:** The Respondent has already submitted that the Engineer in its EOT Determination has considered all tenable delays alleged by the Claimant. The resources were retained by the Claimant due to its own delays

/deficiencies though it has already been submitted by the Respondent in earlier paragraphs that there were deficiencies and delays in deployment of resources even in extended period.

a. The Respondent denies that work outstanding as on 9 February 2017 was delayed only due to the Respondent's delays. Delays due to the Claimant were not analysed along with EOT assessment which were later submitted as concurrency analysis by the Engineer.

b. The works following RUB were not a part of MS-3 and could be done in parallel with other ongoing activities for later milestones. Moreover, the Respondent has already acknowledged this delay in subsequent works to MS-3 while granting extension of time for MS-4 (589 days) & MS-5 (577 days), as has the Engineer in its EOT determination.

c. It is already submitted by the Engineer/ Respondent that the Claimant failed to demonstrate delays due to encumbrances in handed over land along with EOT submission. Moreover, all such delays were absorbed by other concurrent (dominant) delays as stated in EOT determination.

d. The Respondent submits that targets fixed were derived from revised completion date for MS-3 was 11 October 2018 which was agreed by the Claimant so work should have been completed accordingly. The revised date for achievement of MS-4 (Completion of all Civil & Track Works for commencement of integrated testing & commissioning) was 12 January 2019. The Ministry of Railways instructed the Respondent to achieve this milestone by February 2019 which was beyond the revised completion date for MS-4. Thus, Claimant's statement is incorrect and denied.

e. Variations beyond 31 August 2016 and outside the cut-off date of the present dispute and are not be considered as elaborated in previous paragraphs. The Respondent, though has already submitted that all Variations have been approved in a timely manner.

f. Continuing delay events are beyond cut-off date of current arbitration as elaborated in previous paragraphs.

401. **Reply to paragraph nos. 290 to 292:** The Respondent denies the Claimant's allegation that the cost of resources (manpower, machinery, overheads) is a result of extension granted to the Claimant.

a. The Respondent has responded to the resource cost claim (being idling/ under-utilization) in other section of SOD, and clarified that how the Claimant incorrectly calculated with these costs which are direct cost to the project, and hence, are not properly part of a claim for prolongation costs.

b. The Respondent also responded that these claims are in the nature of a 'global claim' which has been presented without identifying the actual cause and effect of events of delay that are said to have resulted in prolongation costs. In any event, the Claimant has not identified or particularized the specific 'additional' resources that were deployed by it in respect of the alleged delay events.

c. The Claimant would have incurred additional cost/ loss due to its own delays/ deficiencies; even in the absence of the accepted excusable delays.

402. **Reply to paragraph nos. 293 to 296:** The contents of the paragraphs under reply are incorrect and denied. There were substantial delays as well as breaches in the performance of the contractual obligations on the part of the Claimant. Furthermore, the Claimant's submissions in the paragraphs under reply are vague insofar as they refer to reciprocal promises and the applicable law. It is submitted that the any allegation of the breach of the Contract leading to delay or slow progress required assessment. In this regard, reliance may be placed on the determination of the Engineer attributing a delay of 911 days on the Claimant as well as the revised delay analysis prepared by the Respondent. The analysis demonstrates that it is the Respondent that suffered damages owing to the substantial delays attributable to the Claimant. As such, it is denied that the Respondent breached any obligations under the Contract which resulted in damages to the Claimant.

403. **Reply to paragraph nos. 297 to 299:** That the contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied.

404. **Reply to paragraph nos. 300 to 302:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied. At the cost of repetition, it is pertinent to note that the EOT was granted by the Engineer for 608 days while taking into account the delay events accruing up to 31 August 2016. The Claimant, however, has sought to raise claims for additional cost to the tune of INR 906,16,65,257 for the extension period from 10 February 2017 to 30 June 2018, which is beyond the period until which the events of delay led to the grant of the EOT that has been agreed between the parties.

405. This is further borne out from a plain reading of clause 20.1 of the GCC which contemplates contemporaneous determination of the Contractor's claims in connection with the event or circumstance giving rise to such a claim. Clause 20.1 stipulates that "the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance." Hence, the prolongation cost / compensation must strictly pertain to, and arise out of, the delay event or the delay period.

406. The said cost claims were first raised by the Claimant before the Engineer *vide* its letter dated 30 October 2018. The Engineer *vide* letter dated 25 January 2019 communicated its observations on the said claims. The Engineer noted that the claims pertained to the alleged loss suffered during the extended period and not to the actual loss suffered (if any) during the actual period of delay *i.e.*, up to 31 August 2016. The Engineer accordingly directed the Claimant to submit details of additional direct costs for the period of actual delay in order to enable the Engineer to determine the Claimant's cost claims. However, instead of providing any further details, the Claimant disputed the observations made by the Engineer and invoked Clause 20.4 of the GCC/PC for referring the dispute to the DAB.

407. The Respondent has already referred to the decision of the DAB, the Core Principles of the SCL Protocol, and the relevant contractual provisions in this regard. The Respondent further submits that the Claimant has not provided any analysis on the cause and effect of delays to justify the period eligible for the prolongation cost. The Claimant has claimed prolongation cost by simply calculating the costs allegedly incurred by it during the extended period between 10 February 2017 and 30 June 2018. This is an improper basis of calculating prolongation costs in relation to delay events that occurred prior to 31 August 2016.

408. **Reply to paragraph no. 303:** The contents of the paragraphs under reply insofar as they are a matter of record do not warrant any response. However, anything contrary to the record is denied.

409. **Reply to paragraph nos. 304 to 308:** The contents of the paragraphs under reply are incorrect and denied. The total scope of work of MS-3 cannot be quantified by deducting the scope of MS-1. It is pertinent to note that the five project milestones were only time-related and were inserted in the Contract with the sole objective of ensuring completion of the entirety of the project works. The reasoning put forth by the Claimant to justify the valuation cannot be accepted as the milestones are not discrete sections that can be taken over by the Respondent as and when complete.

410. In this regard, the Respondent reiterates that the Contract does not envisage "taking over of sections" or partial taking over of the Works. No 'sections' for the purpose of sub-clauses 1.1.5.6 or 1.1.3.3 of the GCC are defined in the ATB. The completion of a milestone neither entitled the Claimant to any specified payment. On the other hand, the designation of milestones was important for the purpose of interfacing and coordination and commencement of works of the other contract packages, such as electrical works (EMP-4) and signalling and telecom works (STP-5). Other contractors could not have commenced their contract packages until CTP-1 and CTP-2 had reached a certain level of completion.

411. Furthermore, as per the ATB itself, the MS-3 works were for 'Completion of Track Skeleton for entire Package'. On the other hand, the MS-1 works were in relation to 'Completion of Civil and Track Skeleton works Dabla-Rewari'. Therefore, MS-1

works included all civil works in this stretch whereas MS-3 did not mention any civil and miscellaneous works such as building works *etc*. which were part of that stretch but not material for completion of track skeleton works. Accordingly, it is not possible to quantify the milestones on the basis of deductions as has been sought to be done by the Claimant under paragraph nos. 305 and 308 of the SOC.

412. In any event, the quantification by the Claimant operates under a simplistic assumption that all the Claimant's expenditure *i.e.*, overheads towards the overall project would have been proportionally distributed against the value of the executed work of milestones. This premise is also flawed because the overheads can either be related to the 'work executed', or the 'time spent'. The Claimant has conflated both concepts.

413. The Respondent submits that overheads for the entire project could not have been distributed among the different milestones. The Claimant cannot segregate the prolongation cost for MS-3 because the works of more than one milestone were being performed concurrently. Further, the execution of works required to achieve MS-4 and MS-5 was during the time for completion of MS-3, both as originally scheduled and revised. Therefore, the Claimant's attempt to quantify the milestones by deducting the scope under MS-1 from total scope to calculate the scope under MS-3 is incorrect.

414. **Reply to paragraph no. 309:** The contents of the paragraph under reply are incorrect and denied. It is pertinent to note that the Claimant's claims in the present arbitration proceedings, which are for the extended period from 10 February 2017 to 30 June 2018, consist of cost and/or compensation for losses under the following seven heads:

S. No.	Heads of Cost and compensation for losses sustained by the Claimant from 10 February 2017 to 30 June 2018	Type of Claim	Type of Cost	Net Amount Claimed in this Arbitration (INR)	Weightage of claim against total claim value
1	Onsite overhead	Prolongation	Indirect	2,401,287,679	30.93%
2	Offsite overhead	Prolongation	Indirect		
3	Plant and Equipment Cost	Idling/ under-utilization	Direct	2,112,894,812	27.22%
4	Labour Cost	Idling/ under-utilization	Direct	621,418,816	8.01%
5	Additional cost on Fuel	Idling/ under-utilization	Direct	292,964,738	3.77%
6	Interest on additional funds	Prolongation	Direct/Indirect	326,914,710	4.21%
7	Loss of Opportunity and Profit	Prolongation	Indirect	2,007,378,322	25.86%
Total Cost incurred and compensation for losses sustained by the Claimant up to 30 June 2018				**7,762,859,077**	**100.00%**

415. It is evident from the above table that 39% of claims out of total claim value arise from idling/ under-utilization. It is submitted that the cost claims raised under several heads

by the Claimant before the Tribunal are not related to the alleged delays; rather the same relate to the alleged idling/ under-utilization or loss of productivity. For the Claimant to support its argument of idling/ under-utilization, it must provide a disruption analysis which it has not done. Hence, the following cost claim heads are not only unsubstantiated but are incorrectly claimed as prolongation cost:[162]

a) Cost claims for plant and equipment during the prolonged period;
b) Cost claims for labour during the prolonged period;
c) Cost claims for additional fuel costs during the prolonged period; and
d) Cost claims for interest incurred on the arrangement of additional funds during the prolonged period.

416. **Reply to paragraph nos. 310 to 315:** The contents of the paragraphs under reply insofar are they are not a matter of record are denied for want of knowledge. The Respondent does not admit, acknowledge, or accept of the veracity, credibility, or genuineness of the documents record filed through, maintained, or stored in the Enterprise Resource Planning ('**ERP**') system or software purportedly maintained by the Claimant. The Claimant alleges that the accounting data provided by it is based on the ERP system, however, the summary sheets do not show whether the said data has been extracted from any ERP system.

417. The Respondent further submits that the Claimant has wrongfully claimed separate costs for each member of the Claimant Consortium. The Claimant *i.e.,* the Contractor for the Project in the present dispute is 'Sojitz - L&T Consortium' which is an independent entity, separate from the individual identities of both its members. The Contract Agreement was signed by Mr Osayasu Sano on behalf of the "Sojitz-L&T Consortium". Consequently, any claim for additional expenditure should be made

[162] Prolongation cost or delay claims are generally used to describe a monetary claim which follows from a delay to project completion. These claims should be distinguished from a disruption claim, which is generally used to describe a monetary claim in circumstances where a part of the works has been disrupted with or without affecting the completion date of the project. *See also* Keating on Construction Contracts, Sweet & Maxwell [9-046]: In relation to claims for delay and disruption, "a distinction should be made between prolongation claims (involving costs and losses incurred as a result of delays to the activity in question or the works as a whole which have led to critical delay to the contract completion date) and disruption claims (which involve those additional costs and losses incurred during extended or disrupted periods of activities usually without any effect on the completion date for the works)." *See also* Keating on Construction Contracts, Sweet & Maxwell, [9-048].

against the costs allegedly incurred by the Consortium, and not the costs incurred by its members separately.

418. Furthermore, the Claimant has failed: (i) to differentiate between 'direct cost' and 'indirect cost', and (ii) to consider that only indirect time-related costs can he held to be admissible under a prolongation cost claim. The SCL Protocol defines the prolongation cost as below:

"*20. Basis of calculation of compensation for prolongation*

20.1. Delay causes prolongation. Prolongation causes increased cost. The recoverability of compensation for prolongation depends on the terms of the contract and the cause of the prolongation. Obviously, any prolongation costs resulting from contractor risk events must be borne by the contractor. Compensation for prolongation resulting from employer risk events will primarily comprise the contractor's extended use of time-related resources, notably its site overheads."[163]

419. The reason for why 'time-related costs' are compensable as prolongation costs is because the contractor incurs such costs with the passage of the time and independently from the quantum of work performed. A typical example is the cost of the rent of a camp establishment. The longer the work is under execution, the higher will be the cost to be paid. Therefore, the Claimant should have removed all direct costs and other costs that were not time-related from its claim, which it has not.

420. **Reply to paragraph nos. 316 to 332:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has computed costs on onsite overheads as per the actual cost incurred by the Claimant in the extended period from 10 February 2017 to 30 June 2018. Further, the Claimant has computed the claim value separately for its partners, which have separate identities irrelevant for the purposes of the present arbitration proceedings. The claim sought is for costs of INR 3,77,61,933 incurred by M/s Sojitz Corporation and INR 1,59,37,73,820 incurred by Larsen & Toubro Limited,

[163] Guidance on Core Principles, paragraph no. 20.1 of the SCL Protocol.

totalling to INR 163,15,35,753. In any event, these claims are untenable as it is not possible to segregate the prolongation cost for MS-3 as the project works for more than one milestone were being performed simultaneously. Furthermore, owing to the absence of a proper linking between the cost statement[164] and the invoices/payment proofs provided by the Claimant Exhibit 65, it is difficult for the Respondent to verify the same. It can also not be established that the certain costs that have been claimed, for instance, travelling charges under Exhibit C-65, consist only of indirect costs and not also direct costs.

421. The Respondent further submits that the assumptions and methodology adopted by the Claimant for calculating its claims, explanations with respect to its contractual entitlement for such claims, and linkages to supporting documents with quantification are all flawed. The Claimant has also attached a certificate by Bureau Veritas Certification Holding SAS-UK certifying Larsen & Toubro Limited's Information Security Management Systems for the period from 03 November 2017 to 02 November 2020 whereas the Claimant's claims are for the extended period from 10 February 2017 to 30 June 2018.

422. **Reply to paragraph nos. 333 to 350:** The contents of the paragraphs under reply are incorrect and denied. As discussed hereinabove in para nos. 250 to 256, a cost claim raised for the recovery of alleged costs incurred during the extended period from 10 February 2017 to 30 June 2018 is improperly claimed. Accordingly, there exists no basis for the Claimant to raise a claim for onsite overhead.

423. The Respondent denies that there were any contractual breaches on its part which prevented the Claimant from performing its contractual obligations. Rather, it was the Claimant whose conduct was found to be lacking by the Engineer throughout the execution of the Contract.[165] Moreover, the Engineer's impact analysis dated 16 March 2020 itself indicated a 911-day delay on the part of the Claimant. The Respondent further reiterates that considering the nature of the Contract, the project works for all milestones had to be executed in parallel, and, since the entire project (till MS-5) is

[164] Exhibit C-65 @ p. 32823 of the SOC.
[165] See, for instance, letters dated 09 May 2014, 31 July 2014, and 14 October 2015 addressed to the Claimant.

not yet complete, it is not possible to calculate loss of contribution to overheads for MS-3.

424. The Respondent further submits that the assumptions and methodology adopted by the Claimant for calculating its claims, explanations with respect to its contractual entitlement for such claims, and linkages to supporting documents with quantification are flawed. In this regard, the following 'Guidance on Core Principles' of the SCL Protocol are relevant:

"*1.27 Section 2 of Part C regarding head office overheads explains the difference between 'dedicated' and 'unabsorbed' overheads. 'Dedicated' overhead costs may be capable of being substantiated by specific records. These would include staff time sheet bookings, together with any staff travel expenses, directly or indirectly relating to the Employer Risk Event. In the case of 'unabsorbed' costs, which are incurred regardless of the Contractor's volume of work, the retained records should include those relating to rent, rates, heating, directors' salaries, wages of support staff, pension fund contributions and auditors' fees.*

1.28 If the Contractor intends to rely on the application of a formula for the assessment of lost profits and unabsorbed head office overheads, it will first need to produce evidence that it was unable to undertake other work that was available to it because of the Employer Delay. These records may include the Contractor's business plans prior to the Employer Delay, the Contractor's tendering history and records of acceptance or rejection of tender opportunities depending upon resource availability. Also, relevant will be minutes of any meetings to review future tendering opportunities and staff availability. The Contractor will also need to produce the records that support the inputs into the formula used, in particular the Contractor's company accounts for the periods immediately preceding and succeeding the Employer Delay as well as for the period when the Employer Delay occurred"

425. It is understood from the above that 'unabsorbed costs' are the costs incurred regardless of the volume of the work. The Claimant has calculated the present claim against the proportional value of MS-3 works to the total contract price. As the project

works were ongoing during the extended period of MS-3, unabsorbed costs cannot be linked with MS-3 (being an interim milestone) as these costs would also have been incurred against the other milestones running concurrently to the MS-3. In addition, the following aspects may also be noted:

(i) The Claimant has provided no break-up and back-up calculations for such dedicated and unabsorbed costs.

(ii) The Claimant has not provided any evidence of inability to undertake other works during the extended period of time for MS-3.

(iii) The Claimant has purportedly included a Certified Public Account's certificate in support of the amounts claimed under Exhibits C-84 and C-85 in which the expenses incurred by M/s Sojitz Corporation have been certified. However, in the absence of any supporting documentary evidence, there is no clarity whether these alleged expenses exclude onsite expenses. Hence, the Claimant's calculations are based on theoretical assumptions and no proof of payment has been submitted by the Claimant for the cost allegedly incurred.

(iv) Without prejudice to the aforementioned contentions, the Claimant has not provided details of the other projects which M/s Sojitz Corporation and Larsen & Toubro Limited could have won and from which it could have recovered these alleged costs/losses had it not been for the prolongation.

426. Therefore, the Claimant's calculation is disputed as not reflecting any actual loss suffered by the Claimant.

427. **Reply to paragraph nos. 351 to 377:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has claimed the cost of plant and machinery in the extended period from 10 February 2017 to 30 June 2018 under the following three categories:

a) Own plant and equipment: INR 61,45,26,661
b) Hired equipment: 116,88,21,576
c) Equipment deployed by Piece Rate Workers: INR 41,39,02,516

428. The Claimant has averred that at the time of submission of bid for the project works, it had not envisaged that the plant and machinery would be retained for a prolonged period. It is also the case of the Claimant that the plant and machinery remained underutilized during the original period of completion of MS-3. In order to complete MS-3, the Claimant had to retain such plant and equipment at site during the extended period which resulting in time-related costs over and above the costs envisaged in the Contract Price.[166] In this regard, the Respondent submits that leaving aside the question of liability, as regards quantification, the Plant and equipment costs being claimed by the Claimant are a task-related direct cost rather than a time-related indirect cost and for the direct equipment only.[167] The Respondent also submits that a claim for direct costs or a task-related cost claim without an analysis to demonstrate cause & effect of claimed idling/ under-utilization would be impermissible as a global claim. In the present case, the Claimant has failed to demonstrate any idling/ loss of productivity as no disruption analysis has been provided by the Claimant. Without such an analysis, the Claimant's averments are not tenable.

429. Without prejudice to the Respondent's other submissions, the Claimant has not indicated the planned plant and machinery which was required to complete the project works as per the schedule timeline. It has not put on record any details of the quantum of plant and machinery during the prolonged period, which was in addition to the planned plant and machinery estimated in the ideal conditions. In this regard, the SCL Protocol states that "it is up to the Contractor to demonstrate that it has actually suffered loss and/or expense before it becomes entitled to compensation".[168] It is also important to note that the Claimant had not established that the plant and machinery

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[166] Paragraph no. 352 of the SOC.

[167] SCL Protocol, Guidance on Core Principles, paragraph no. 1.26—

"Costs are classified into the following broad headings:

(a) direct costs (labour, task-specific equipment, materials, and subcontracted work); and

(b) indirect costs (on-site overheads and head office overheads), whether time-related or otherwise."

SCL Protocol, Core Principle no. 20—

"Unless expressly provided for otherwise in the contract, compensation for prolongation should not be paid for anything other than work actually done, time actually taken up or loss and/or expense actually suffered. In other words, the compensation for prolongation caused other than by variations is based on the actual additional cost incurred by the Contractor. The objective is to put the Contractor in the same financial position it would have been if the Employer Risk Event had not occurred."

[168] Guidance on Core Principles, paragraph no. 20.3 of the SCL Protocol.

for which costs have been claimed was dedicated only to MS-3 and not to MS-4 and/or MS-5 works which were in the scheduled completion period.

430. Moreover, in view of the delays attributable to the Claimant, plant, machinery, and equipment used exclusively for the un-affected cost centers are irrelevant for the claim raised by the Claimant.

431. The Respondent further submits that track machines are only used on railway systems. The 'Indian Railways Track Machine Manual' prescribes the method of calculating rental charges of such machines. This standard ought to have been adopted by the Claimant. Hence, the principle adopted for the calculating additional cost for retention/idling of the track machines is inappropriate and denied.

432. It is further submitted without prejudice that the hired equipment should have been de-mobilized and re-mobilized by the Claimant as per the site requirements during the extended period to avoid additional expenditure.

433. The Claimant has also staked a claim for the equipment deployed by Piece Rate Workers'. In this regard, it is submitted that the sub-contractor is paid for the work done by it at the unit rates provided in contract between the contractor (the Claimant in the present case) and the sub-contractor. The agreement typically envisages the quantity of work to be executed. If no work is done, the sub-contractor is not required to be paid except for some minimum retainer money which is in-built in the contract.

434. In any case, the Respondent has already paid the Claimant for the work executed during the extended period (*i.e.*, for EOT granted) at the agreed rates. Additionally, any inflation in cost during the extended period was also compensated by the applying Price Variation Formula as per clause 13.8 of the GCC/PC. Accordingly, it is submitted that the award of any claim for extra cost for the same work which forms part of the Contract would amount to duplication of payments already made to the Claimant which, without a carving out from the claimed prolongation cost, would amount to an impermissible double-recovery.

435. **Reply to paragraph nos. 378 to 386:** The contents of the paragraphs under reply are incorrect and denied. The Claimant has alleged that it could not fully utilize the labour employed for the MS-3 works as per its original schedule due to the Delay Events. Consequently, it could not complete the MS-3 works as per the approved CCP and was constrained to retain labour in the extended period to ensure completion of MS-3. This prolonged retention of labour was not catered for in the Contract Price and, therefore, caused the Claimant to incur costs on labour over and above the Contract Price. The same constituted a 'direct cost' to the Claimant.

436. The Respondent submits that this claim is theoretical and not acceptable as the labour in the present works had been obtained through labour supply subcontractors and not directly employed by the Claimant. These labour supply subcontractors should have been demobilized if not required in original contract period. It is also pertinent to note that the labour is paid on daily minimum rate basis and not on any regular employment contract. In other words, if there is no/less work, such labour is not required to be paid. If the labour employed was not utilized by the Claimant in the extended period, it would not have had any liability to pay for the labour. It is to be noted that there is no location indicated as to where the labour sub-contractor worked; the only description given is "Construction and developing of Civil, Building and Railway Track works (WDFC-Package 1&2). The copy of wage register maintained by the labour sub-contractor does not indicate whether the said work was for MS-3 or any other MS-1, MS-2, MS-4 or MS-5 of CTP-1&2.

437. Additionally, the Claimant has failed to demonstrate any idling/ loss of productivity in the present case as no disruption analysis has been provided by the Claimant. The Claimant has not indicated the planned manpower which was required to complete the project works as per the schedule timeline. Accordingly, it has not put on record any details regarding the manpower requirement during the extended period, which was in addition to the planned manpower estimated in the ideal conditions.

438. The Respondent reiterates that costs being claimed by the Claimant are task-related direct costs rather than time-related indirect costs. It is also appropriate to state that "[t]he objective of a disruption analysis is to demonstrate the loss of productivity and

hence additional loss and expense over and above that which would have been incurred were it not for the disruption events for which the Employer is responsible."[169] Without such an analysis, the Claimant's averments are not tenable.

439. Furthermore, the Claimant had not established that the labour costs being claimed was exclusive to MS-3 works and not to MS-4 and/or MS-5 works which were in the scheduled completion period. Hence, the Claimant has not shown that the cost for which it is making a claim is not already recovered through works certified for the other milestones.

440. **Reply to paragraph nos. 387 to 397:** The contents of the paragraphs under reply are incorrect and denied. The Respondent submits that the Claimant is not entitled to any cost allegedly incurred by it during the extended period from 10 February 2017 to 30 June 2018. In this regard, the contents of para nos. 250 to 256 may be read as forming part of the present paragraph.

441. Without prejudice, the Respondent submits that the Claimant cannot simply claim cost of fuel against execution of the project works during the extended period. Illustratively, if any work activity was stalled or could not be commenced on account of a certain delay event, the plant, machinery, equipment and/or labour would be idling during such period. While it might be legitimate for the Claimant to seek actual cost towards the idling of such resources, no fuel and power costs would have been incurred as the resources were idling. Accordingly, the Claimant cannot claim any cost against the said components.

442. The Claimant has incorrectly alleged that the cost incurred on fuel and power in the extended period was not recompensed by way of Adjustment for Changes in Cost even when diesel was considered as the representative cost of the component group 'Fuel and Power'. It, therefore, incurred additional cost on diesel by undertaking the project

[169] Core Principle no. 18.1 of the SCL Protocol: "Disruption (as distinct from delay) is a disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular work activities. Because of the disruption, these work activities are not able to be carried out as efficiently as reasonably planned (or as possible). The loss and expense resulting from that loss of productivity may be compensable where it was caused by disruption events for which the other party is contractually responsible"

works for the present cost claim in the extended period. In this regard, it is pertinent to note that the original schedule date for completion of all project works was on or before 24 August 2017. The Claimant was therefore prohibited from claiming additional costs or adjustments during such period. Further, the adjustments for changes in cost have been calculated by the Claimant on the basis of the prevailing market rates even though the Contract mandates the use of cost indices for the Adjustments for Changes in Cost and prohibits the use of current prices.[170]

443. The Claimant has also claimed 'fuel' under onsite overheads in Exhibit C-65 Part-1, serial no. 9 and 34. This amounts to duplication of claims which may lead to double-recovery by the Claimant at the expense of the Respondent. Further, the Claimant has not demonstrated that fuel costs being claimed are only in respect of the machinery utilised for MS-3 works, and if so, which pieces of machinery. In any event, the Respondent reiterates that costs for fuel being claimed by the Claimant are task-related direct costs rather than time-related indirect costs and cannot be claimed as 'prolongation costs'.

444. **Reply to paragraph nos. 398 to 408:** The contents of the paragraphs under reply are incorrect and denied. The Respondent denies the Claimant's calculation of its interest cost as the basis of the Claimant's claim (based on the extended period) is flawed and inaccurate. As per the Contract, a determination by the Engineer was a prerequisite for a party to bring a claim. In fact, the Claimant has not indicated the corresponding contractual provision under which the present claim has been brought. Further, the Claimant has already claimed overheads and profits for the funds which were purportedly utilized by the Claimant for the project works during the extended period.

445. In any case, the Claimant has failed to set out the corresponding Contract provisions for claiming such cost(s). Moreover, the funds which were used by Claimant on the project have already been claimed by it and it has also claimed profits and Overheads. This amounts to double recovery.

[170] Clause 13.8 of the GCC: "The adjustment […] shall be determined from formulae for each of the currencies in which the Contract Price is payable. No adjustment is to be applied to work valued on the basis of Cost at current prices."

446. The Respondent also places reliance on the SCL Protocol for the quantification of interest as damages or finance charges:

> "*It is the position in most areas of business that interest payable on bank borrowings (to replace the money due) or the lost opportunity to earn interest on bank deposits, is quantifiable as damages where the Claimant can show:*
>
> *a. that such loss has actually been suffered; and*
>
> b. *that this loss was within the reasonable contemplation of the parties at the time of contracting.*"[171]

447. The aforenoted two conditions are not met in the case set up by the Claimant. Furthermore, the Claimant has used expected and actual payments as the metric, rather than cost. The Claimant ought to have provided evidence of interest charges which were levied by the bank *i.e.*, its actual cost incurred. As such, the present claim is also liable to be dismissed.

448. **Reply to paragraph nos. 409 to 416:** The contents of the paragraphs under reply are incorrect and denied. Clause 17.6 of the GCC provides that neither party shall be liable for "loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract". The Claimant's claim is barred by Clause 17.6.

449. The Respondent reiterates that the claim raised by the Claimant pertains to the loss of opportunity and profit in the extended period for which no claim can lie without a determination by the Engineer.

450. In any event, the formula employed by the Claimant to calculate profit is incorrect. The Claimant has also not shared any back-up / basis for the actual profit percentage. The Respondent denies the Claimant's claim for a profit of 10%, which it states is based on the Contract.

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[171] Guidance Part C: Other Financial Heads of Claim, paragraph no. 1.4 of the SCL Protocol.

451. While a loss of profit claim is recognised as a valid head of claim for delay-related matters (subject to any contractual restrictions against its recovery, which in the present case is set out in Clause 17.6), in terms of the proof needed to recover such loss of profit, the SCL Protocol states as follows:

> "*In order to succeed in such a claim, the contractor must demonstrate that there was other revenue and profit earning work available which, in the absence of the Employer Delay, would have been secured by the Contractor*."[172]

> "*[…] The burden of proving that it has unabsorbed overheads and lost profit always rests with the Contractor. A formula just serves as a tool for the quantification of the loss.*"[173]

452. Hence, the Claimant ought to have indicated that, but for the prolongation, it could have secured some other project/work through which it could have earned profits. Such evidence has not been produced by the Claimant.

453. **Reply to paragraph nos. 417 to 421:** The contents of the paragraphs under reply are incorrect and denied. They are merely a summarization of the Claimant's submissions and claims, which has been responded to in the abovementioned paragraphs.

454. **Reply to paragraph nos. 422 to 427:** The contents of the paragraphs under reply are incorrect and denied. It is submitted that the contractual provision for the grant of interest is triggered only when there is a delay in the due and payable amount. In this regard, it is submitted that for an amount of interest to be payable, there must be a principal amount due and payable on the part of the Respondent, which does not exist in the present case. There is nothing on record to show that the Claimant was entitled for any amount during the extended period.

455. **Reply to paragraph nos. 428 to 432:** The contents of the paragraphs under reply, insofar as they are not a matter of record, are denied.

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[172] Guidance Part C: Other Financial Heads of Claim, paragraph no. 2.7 of the SCL Protocol.
[173] Guidance Part C: Other Financial Heads of Claim, paragraph no. 2.8 of the SCL Protocol.

456. **Reply to paragraph nos. 433 and 434:** The contents of the paragraphs under reply are incorrect and denied. The Respondent submits that the prior disputes between the parties are not relevant for the present determination. Further, the Respondent reiterates its contentions hereinabove as well its submissions on Preliminary Objections submitted before the present Arbitral Tribunal on 08 September 2022.

457. **Reply to paragraph nos. 435 to 437:** The contents of the paragraphs under reply are denied and need no response as such.

458. **Reply to paragraph no. 438:** The contents of the paragraphs under reply are incorrect and denied. The Respondent requests the Arbitral tribunal to dismiss the Claimant's claims in their entirety and order the Claimant to pay all arbitration costs and expenses incurred by the Respondent, and/or any other relief(s) that the Tribunal deems appropriate.

IX. RESPONDENT'S COUNTERCLAIM:

459. The Respondent has presented its case in its Statement of Defence wherein, the Respondent has elaborated upon the breaches and delays by the Claimant in the execution of the Project works. The same may be read as a part of the present section on the Respondent's Counter Claim section.

460. The breaches and delays on the part of the Claimant caused the following loss and damage to the Respondent.

a. Due to the Project being delayed, the Respondent had to incur additional costs towards the PMC.

b. Also, the Respondent had to keep mobilized its staff at the Project site and offices during the delay period, and the same has led to incurrence of huge costs on various counts along with site and overhead expenses.

c. Furthermore, it is submitted that due to the delay/ non-completion of the Project Milestones within the agreed Contract period, the Respondent was deprived of

Track Access Charges, which the Respondent suffered on account of delayed commencement of the operation of the DFC tracks.

A. Counter Claim 1: Delay Damages Under Clause 8.7 of GCC/PC (FIDIC Yellow Book 1999 Ed.) of the Contract: Declaration that the Respondent/Counter Claimant has Rightfully Imposed the Delay Damages Because of Delays Attributable to the Claimant in Completion of MS-3 Works Amounting to INR 3,349,750,000/-

461. As explained above, the Claimant's concurrent delay period of 303 days were solely attributable to the Claimant. The recommendations and approvals of extension of time, letters of the PMC and the Respondent have been finely elaborated upon and referenced in the SOD, and the same are not being reproduced herein for the sake of brevity. The detailed description of the concurrent delays by the Claimant has been elaborately highlighted in the above parts and the same may be read as a part and parcel of the present paragraph.

462. In light of such glaring delays by the Claimant, in terms of GCC sub-clause 8.7 (as amended by PCC sub-clause 8.7) and read in conjunction with the Appendix to Tender, the applicable delay damages for the non-achievement of the Contract Milestones as follows:

Sr. No.	Description	Amount of Delay damages
1	MS 1	0.25% of the Contract Price per week of delay or part thereof
2	MS 2	0.50% of the Contract Price per week of delay or part thereof
3	**MS 3**	**0.25% of the Contract Price per week of delay or part thereof**
4	MS 4	0.50% of the Contract Price per week of delay or part thereof
5	MS 5	0.50% of the Contract Price per week of delay or part thereof

Table 7: Delay Damages as per Milestones

463. The Contract further states that maximum limit of the delay damages is 5 (Five) percent of the accepted Contract Price in Indian currency. The damage for MS-3 as per Clause 8.7 of ATB is 0.25% of the Contract Price per week of delay.

464. The delay in achievement of MS-3 considering all types of delays (i.e., including excusable/ concurrent delays) till cut-off date of 31 August 2016 has been assessed, as below:

a) Concurrent Delay in completion of MS- 3 by the Claimant = 911 days

b) EOT granted for accepted excusable delays for completion of MS- 3 = 608 days

c) Delay solely attributable to the Claimant in achievement of MS-3 which are beyond EOT granted = **303 days** (= 911 – 608)

465. In other words, the delay by the Claimant in MS-3 achievement is 43.286 weeks (=303/7).

466. The amount of delay damages against the delay of 303 days for MS-3 achievement in each of respective currency portion is calculated in **Exhibit R-256.**

467. Since, the amount of delay damages in each of respective currency portion is more than limit of delay damages as per the accepted Contract currencies, the payable delay damages by the Claimant is limited to **INR 3,349,750,000.**

B. Counter Claim 2: Claim Towards Cost Incurred Due to Claimant's Delays in Project Management Consultant (PMC) Contract– INR 282,629,632.68/-

468. The Contract between the Claimant and the Respondent was executed on 06 August 2013 and the stipulated date for completion of the Milestone-3 works was 09 February 2017.

469. M/s NK Consortium was appointed as the PMC for the Project with effect from 11 April 2014[174].The contract was for a period of 6 years from the date of award of consultancy contract including 4 years of construction period and 2 years of defect notification period (DNP). Copy of the contract agreement between PMC and DFCCIL dated 27 March 2014 is annexed herewith as **Exhibit R-1.**

[174] Exhibit R-2: Engineer letter no. L-NKC-SLT-PMC-1404-22 dated 28 April 2014

470. As evident, the PMC contract was for a specified period, however due to continued delay by the Claimant, the PMC was compelled to stay at site, during the delay affected days. It is pertinent to note that the payment to PMC had been agreed in terms of the utilization of its manpower based on deployed man-months.

471. Further, it is pertinent to mention that this PMC which was engaged for CTP 1&2, was also responsible for supervision of Civil and track works[175] for other packages including CTP 3R, CTP 3AR, EMP4, STP 5. Since, the bifurcation of fee payable to the PMC under these packages was not provided under the Contract, so the weightage contribution of all packages is calculated based on contract value of each package. Accordingly, the weightage of CTP 1&2 is computed as 40.24% as detailed in **Exhibit R-257.**

472. The detailed working and calculation for additional amount incurred by the Respondent towards stay of the PMC at site during delay affected days is attached herewith as **Exhibit R-257.**

473. The Respondent calculated the cost of PMC by calculating the per day cost from total expenditure of PMC from the appointment of the Engineer to the Cut-off date (31 August 2016). For calculation, per day cost is multiplied with delay affected days i.e., 303 days to obtain the cost of the PMC for CTP 1&2 package.

Step-1: Per day cost of PMC for all packages =

(Total amount incurred all packages) / (Total no. of days till cut-off date i.e., 874 days)

= 2,026,072,931.98 / 874 days

= **INR 2,318,161.25/-**

Step-2: Cost of PMC for 303 days = (Per day cost of PMC) x (303 days)

= INR 2,318,161.25* 303 days

[175] Exhibit R-3.

= **INR 702,402,858.57/-**

Thus, cost incurred due to the Claimant's delays in the PMC Contract is **INR 702,402,858.57**

Step- 3: Amount dedicated to CTP 1&2 = 40.24% of the cost of PMC for 303 days

= 40.24% * INR 702,402,858.57

= **INR 282,629,632.68/-**

474. The total cost incurred by the Respondent towards expenses incurred in PMC Contract for CTP 1&2 package comes to **INR 282,629,632.68/-**

475. Based on the above, the Respondent has incurred the additional cost in CTP 1&2 package on account of engagement of the PMC during delay affected days. The Respondent prays that above-mentioned amount should be awarded to the Respondent.

C. Counter Claim 3: Claim Towards Loss of Track Access Charges (TAC) Due to Delayed Commissioning of the Rewari —Iqbalgarh Section - INR 1140,08,00,000.

476. It is submitted that DFCCIL has been mandated to build and operate the Dedicated Freight Corridors ("DFCs") in the "golden quadrilateral' which shall endeavour to move more than 60% of the total freight traffic transported by Indian Railways ("IR").

477. DFCCIL is intended to be an independent organisation which can help to facilitate the development of competition in the rail market and fund investment in the network — separated from IR's wider obligations and constraints. The DFCs will offer significantly improved rail freight capacity and capability with higher axle loads, higher speeds and without conflicts between passenger and freight trains which operate at different speeds. The DFCs are expected to provide a major increase in the track capacity in India to accommodate rising freight transport demand.

478. The relationship between MOR and DFCCIL is currently defined through the Concession Agreement (CA) dated February 28,2014 followed by an amendment on

31 March 2021. As per the agreement, DFCCIL is under a concession from MOR to design, build, operate and maintain the rail infrastructure for the DFCs which will be accessed by IR to operate freight trains.

479. As per clause 5.9 of Concession Agreement on Payment of Track Access Charge (TAC), the Ministry of Railways shall utilize DFCCIL network and, in return, shall pay Track Access Charge (TAC). Track Charging Principle has been explained in clause 4.1 of Track Access Agreement. As per this clause, Ministry of Railways shall provide adequate revenue to DFCCIL in the form of TAC, so that it becomes a commercially sustainable company.

480. Based upon the 'Proposal for fixing TAC when IR is the sole operator submitted by DFCCIL[176], Railway Board has granted an In-Principal Approval[177] to Track Access Charge for DFCCIL. Following TAC components have been mentioned in the Railway Board " IPA" letter:

(i) O&M Expenses

(ii) Depreciation

(iii) Interest on Loan

(iv) Land lease charges @Re 1 /-

481. As per approved principles, the Revenue Requirement formula can be stated as below:

Revenue Requirement = O&M Expenses + Depreciation + Interest on loan + Land Lease charges

482. For Madar - New Rewari section of WDFC, certificate of completion was issued by the Engineer on 28 December 2020. The Railway Board communicated the approval for opening of Madar - New Rewari section of WDFC on 06 January 2021[178] and train operations has started in Madar - New Rewari section from 07 January 2021.

[176] Respondent's letter No. HQ/OP&BD/Business Plan/Pt.6(TAC)-IV dated 22 May 2018.
[177] In-principle approval of Track Access Charge issued vide Railway Board's letter No.2011/Infra/6/1 O/Pt.3 dated 03 December 2018.
[178] Railway Board letter no. 2020/Infra/6/ 13

483. A detailed calculation of TAC for the FY 2020-21 is shown in **Exhibit R-258** for the section New Rewari - Madar. The TAC has been calculated taking into account the depreciation on 30 years useful life of the assets. Period of cost components have been taken from 28 December 2020 to 31 March 2021 (94 days) for New Rewari- Madar section.

484. The Respondent had already computed TAC for the New Rewari to Madar section based on the actual cost incurred by the Respondent in the period from 28 December 2020 to 31 March 2021 i.e., for 94 days which was computed as INR 144.16 Crores (for 268.998 Km) as attached in Annexure C.

a. Thus, the Respondent derived per day per km cost for the track access charges as INR 57,012.

b. The track to be laid in the stretch of 659.971 KM (Main Line = 625.02 + Connecting Line = 34.951) under CTP-1&2 Contract. (As per Annexure D)

c. Accordingly, loss borne by the Respondent for delay of 303 days on account of TAC is Rs.1140.08 Crores (INR 57,012 x 303 days x 659.971 Km).

485. The Respondent/Counter Claimant humbly prays that the aforementioned amount of **INR 1140,08,00,000** on account of Loss of TAC by the Respondent/Counter Claimant because of the delay attributable to the Claimant should be awarded in favour of the Respondent/Counter Claimant.

D. Counter Claim 4: Claim Towards Cost Incurred on Retention of DFCC Staff (Salary and Benefits) INR 975,936,778.85/-

486. As detailed in above paragraphs of the submission pertaining to the concurrent delays attributable to the Claimant, the Project was significantly delayed beyond control of the Respondent.

487. Subsequently, the Respondent was constrained to mobilize its resources at the Site beyond the original completion date until the actual completion of the Project.

Accordingly, the Respondent is entitled to receive compensation under the Contract Agreement.

488. In the Respondent's Overheads cost estimation, the Respondent's Establishment/Staff cost for the Contract Package was 7% of the total cost for the completed works based on the time by which it would and should have been completed, i.e., within 1456 days (208 weeks). Till the cut-off date of the present dispute under Arbitration, the Respondent had to incur additional cost for 303 days of the delays on the part of the Claimant.

489. By utilizing the details mentioned above, the computation for the same is provided below in a tabulated manner:

Sr. No.	Description	Annotation	Amount (INR)
1	Total cost of the Project	A	66,995,000,000.15
2	Percentage towards DFCC cost for Staff's Salary and Benefits	B	7%
3	Total Cost incurred by the Respondent towards Staff's Salary and Benefits	C = (A x B)	4,689,650,000.01
4	Total Duration of the Project (Days)	D	1456
5	Per day Cost by the Respondent towards Staff's Salary and Benefits	E = (C/D)	3,220,913.46
6	Delay on the part of the Claimant (Days)	F	303
7	Retention Cost towards DFCC staff for Salary and Benefits	G = (E x F)	975,936,778.85

490. Accordingly, the Respondent's counterclaim towards the retention cost towards DFCC's staff cost is **INR 975,936,778.85**/- to recover its loss of overhead expenses during the 303 days of concurrent delays by the Claimant.

E. Counter Claim No. 5: Interest on the Claimed Amount

491. Payment by the Claimant of interest at the rate of 18% per annum on all of the above amounts as of the date these amounts were due, until the date of their effective payment.

F. Counter Claim No. 6: Cost Incurred Towards the Arbitration

492. As detailed above, the Respondent has been constrained to incur costs associated with the present arbitration proceedings on account of gross delays to the Project caused by the Claimant and the Respondent is therefore entitled to recover the same. The Respondent reserves its right to update the present claim to include the cost of the arbitration proceedings.

G. Summary of Counterclaim

493. Summary of the counterclaim presented by the Respondent is produced below:

Sr. No.	Details of Counter Claim	Amount (INR)
Counter Claim 1	Delay damages under clause 8.7 of GCC/PCC (FIDIC yellow book 1999 ed.) of the Contract	3,349,750,000.00
Counter Claim 2	Claim towards cost incurred due to Claimant's delays in Project Management Consultant (PMC) Contract	282,629,632.68
Counter Claim 3	Claim towards loss of track access charges (TAC) due to delayed commissioning of the Rewari —Iqbalgarh section	11,400,800,000.00
Counter Claim 4	Claim towards cost incurred on retention of DFCC staff (salary and benefits)	975,936,778.85
Counter Claim 5	Interest on the claimed amount	To be Calculated
Counter Claim 6	Cost incurred towards the Arbitration	To be Calculated
	TOTAL	**16,009,116,411.53**

Table 8: Summary of Counterclaim

494. Without prejudice to the Respondent's case that the case of the Claimant is devoid of any merit and deserved to be dismissed in view of the Respondent's submission, the Respondent herein is and would be entitled to the set-off of its Counterclaims awarded, against the amounts to which the Claimants are found entitled (if any, or at all), by the Tribunal.

X. RELIEFS

495. In view of the above-stated facts and circumstances, the Respondent prays that this Tribunal be pleased to:

a. hold and declare that the claims raised by the Claimant in the SoC are untenable in law and facts;

b. award the Counterclaims prayed for by the Respondent; and

c. direct such other relief(s) as this Tribunal may deem fit and appropriate in the facts and circumstances of the present case.

For Respondent

Date: 27 December 2022 **AKS Partners**