

Bharat Bhushan Makkar, Sole Arbitrator
B E (Civil), MBA
Former Spl. Director General, CPWD

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**BEFORE THE ARBITRAL TRIBUNAL OF BHARAT BHUSHAN MAKKAR
SOLE ARBITRATOR**

IN THE MATTER OF ARBITRATION BETWEEN

NCC Ltd.

----- Claimant

and

Sikkim University

----- Respondent

Name of Work: Construction of Sikkim University Campus, Phase-I (Package-I) at Yangang, South Sikkim SH: Admin Building, Faculty Building and Library Building with necessary internal water supply, Electrical, External development works like Site cutting and filling, Retaining walls, Entrance Gates, Roads, Utility crossings etc.

Agreement No: SU/2016/REG-03/TDC

Case No: ARB/BBM/SIKKIM/09

Notice under Section 31 (5) of the Arbitration and Conciliation Act, 1996

1. I was appointed as the sole arbitrator by the Registrar, Sikkim University, Sikkim vide his letter no. SU/REG/ENGG/F2/03/2018/VOL IV/50 dated 25.04.2023. I accepted the appointment and entered upon reference vide case no. ARB/BBM/SIKKIM/09 dated 27.04.2023
2. The parties may kindly take notice that I have made and signed the award in the aforesaid arbitration proceedings today on 30th September, 2024 on non-judicial stamp paper of Rs. 500 submitted by the claimant.
3. I have retained with me the documents and pleadings together with the original award. The same will be filed in the court of competent jurisdiction, if so directed.
4. I send herewith a copy of award each to the claimant and to the respondent.

Enclosure: Award dated 30.09.2024

New Delhi, dated: 30.09.2024


(Bharat Bhushan Makkar)
Sole Arbitrator

To (By Speed Post)

1. M/s NCC Ltd., C/o Regional Office, 5th Floor, Block 4A, Ecospace Business Park, New Town, Kolkata-700156
2. Registrar, Sikkim University, Kanchendzonga Administrative Block (Old Youth Hostel), 6th Mile, Sandur, Tadong, Gangtok, Sikkim-737102

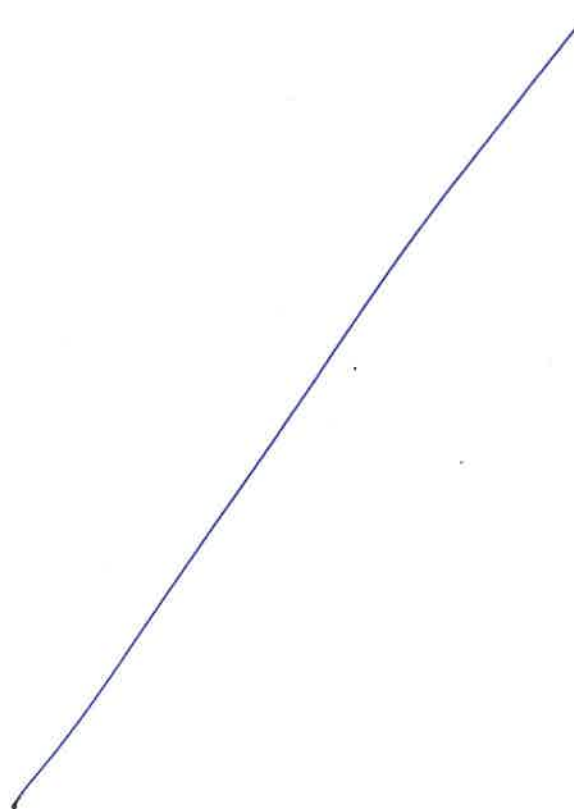


पाँच सय रुपियाँ

SI. No. C 055480

NON-JUDICIAL

₹ 500



CASE NO: ARB/BBM/SIKKIM/09

New Delhi, Dated: 30.09.2024

BEFORE THE ARBITRAL TRIBUNAL OF BHARAT BHUSHAN MAKKAR,
SOLE ARBITRATOR
IN THE MATTER OF ARBITRATION BETWEEN

NCC Ltd.

----- Claimant

Sikkim University

and

----- Respondent

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BEFORE THE ARBITRAL TRIBUNAL OF BHARAT BHUSHAN MAKKAR
SOLE ARBITRATOR
E 19, SECOND FLOOR, KALKAJI
NEW DELHI 110019

IN THE MATTER OF ARBITRATION BETWEEN

NCC Ltd.

----- Claimant

and

Sikkim University

----- Respondent

Name of Work: Construction of Sikkim University Campus, Phase-I (Package-I) at Yangang, South Sikkim SH: Admin Building, Faculty Building and Library Building with necessary internal water supply, Electrical, External development works like Site cutting and filling, Retaining walls, Entrance Gates, Roads, Utility crossings etc.

Agreement No: SU/2016/REG-03/TDC

Case No: ARB/BBM/SIKKIM/09

I. PREAMBLE:

- 1.0 In the matter of arbitration for the above mentioned work, I, Bharat Bhushan Makkar, former Spl DG, CPWD was appointed as the Sole Arbitrator by Registrar, Sikkim University, Sikkim vide his letter no. SU/REG/ENGG/F2/03/2018/VOL IV/50 dated 25.04.2023 to decide and make award regarding the claims /disputes by the contractor, if any, as shown in the statement enclosed (statement contained 10 claims) under clause 25 of the agreement.
- 2.0 I entered upon reference on 27.04.2023 with a declaration under section 12(1) of the Arbitration and Conciliation Act, 1996 that there are no circumstances likely to give rise to justifiable doubts as to my independence and impartiality and held a preliminary meeting with both parties on 03.05.2023 to decide the procedure and the parties agreed to file their pleadings as per time schedule as under:
- (a) Claimant to file Statement of Claims (SoC) by 25.06.2023.
 - (b) Respondent to file copy of agreement within 30 days and Statement of Defence (SoD) by 25.07.2023.



(c) Claimant to file rejoinder on Statement of Defence and reply to counter claims by 15.08.2023

- 3.0 Claimant filed Statement of Claims after second extension on 26.07.2023 along with Exhibits marked C-1 to C-49 and Annexure A to D.
- 4.0 Respondent filed statement of Defence (SoD) on all claims, after third extension of time, on 20.11.2023 along with Exhibits R-1 to R-41.
- 5.0 Respondent filed statement of Counter Claims (SoCC) on 10 counter claims, on 20.11.2023 along with Exhibits CC-1 to CC-5.
- 6.0 Claimant filed Rejoinder to the statement of defence and reply to Counter Claims filed by respondent on 06.12.2023
- 7.0 Claimant and Respondent filed Affidavit of Admission / Denial of documents filed by other party on 07.01.2024 and 22.12.2023 respectively.
- 8.0 Respondent filed copy of Contract Agreement.
- 9.0 In all, 6 oral hearings were held and summary record of all proceedings was issued to both parties.
- 10.0 With consent of the parties, oral arguments were concluded on 27.05.2024. Both parties were allowed to submit additional document, if any, up to 05.06.2024. Both parties stated that they were given full and equal opportunity to present and argue their case.
- 11.0 The respondent submitted additional documents on 04.06.2024.
- 12.0 In all, 10 claims of the Claimant and 11 counter claims of respondent have been referred to AT for adjudication.

12.1 **Claims of Claimant:**

Claim No	Brief Statement / Description of Claim	Amount as referred by Registrar (in Rs)	Amount as per SoC (in Rs.)
1	Claim for payment of escalation as billed marked as RA Bill No. 13 dated 04/05/2019 to RA Bill No. 22 dated 31/03/2021.	8,33,28,553/-	8,33,28,553/-
2	Claim for release of amount on hold allegedly for non-submission of 'No Claim Certificate'	27,26,225/-	27,26,225/-

3	Claim for release of amount incorrectly put on hold on alleged claim against defects stated to have been identified during taking over of worksite.	17,92,332/-	17,92,332/-
4	Claim for release of amount incorrectly put on hold alleged as 'Staff penalty'	65,62,600/-	65,62,600/-
5	Claim for additional expenses due to prolongation of contract on Overheads and site Establishment, deployment of manpower, etc. beyond the stipulated date of completion.	2,84,22,107/-	6,19,57,726/-
6	Claim for additional expenses due to prolongation of contract on deployment of plant, machinery, tools, etc. beyond the stipulated date of completion	6,01,56,163/-	6,01,56,163/-
7	Claim for locked up deposit Bank Guarantees and expenses on renewal of Bank Guarantees in the extended period.	13,94,521/-	59,00,733/-
8	Claim for Interest @ 15% per annum on claim amounts against claim no 1 to 7 above with effect from the date the amount was actually due for payment till date of award.	As to be accrued.	As to be accrued.
9	Claim for reimbursement of GST payable on the award amount.	As to be accrued.	As to be accrued.
10	Claim for cost of arbitration	As to be accrued	As to be accrued

12.2 Counter Claims of Respondent:

Counter Claim No	Description of Counter Claim	Amount as per SoCC (in Rs.)
1	Reimbursement of loss attributable to the Respondent due to delay in execution of de-scoped works and for awarding said works to a new contractor i.e.ITDC India Ltd. at higher rates under " <i>Construction of Various Buildings for Sikkim University –Package 2</i> "	2,53,00,000/-
2	Reimbursement of loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.1.	15,00,000/-
3	Reimbursement of loss towards extra expenditure incurred due to rent and miscellaneous overheads, etc. for the period beyond 01.03.2019 upto 30.06.2021.	18,96,00,000/-
4	Reimbursement of Loss incurred due to delay in award of future tender of the Sikkim University namely " <i>Construction of Various Buildings for Sikkim University – Package 2</i> " to ITDC India Ltd. on account of delay in completion of work of the initial Project by Respondent Contractor.	5,25,00,000/-
5	Reimbursement of Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.4.	32,00,000/-
6	Loss incurred due to delay in execution of damaged works.	4,00,000/-
7	Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.6.	20,000/-
8	Payment of penalty imposed on Respondent/Contractor i.e. M/s NCC Limited by the Counter-Claimant due to unjustified extensions by the Respondent/Contractor.	8,33,28,533/-



9	Interest on loss incurred on amounts as mentioned under Counter-Claim Nos. 1 to 8.	12,45,39,994/-
10	Reimbursement of expenditure incurred on account of cost of arbitration	

13.0 The arbitral proceedings have been conducted as per the Arbitration and Conciliation Act, 1996.

14.0 Factual matrix of the contract:

(a) Estimated cost put to tender: Rs 1,03,97,02,159/-

(b) Contract amount: Rs 1,06,45,26,587/-

(c) Time allowed for completion: 18 months

(d) Stipulated date of start: 10.11.2016

(e) Stipulated date of completion: 09.05.2018

(f) Actual date of completion: 31.03.2021(as per claimant) & 30.06.2021(as per respondent)

(g) Extension of time granted without levy of compensation: No

(h) Final bill paid on: 05.10.2021

(i) Arbitration invoked by the claimant on: 19.12.2022

15.0 In the course of proceedings, further documents and submissions were filed by the parties. The list of pleadings, other submissions and documents filed by the parties are as under:

BY CLAIMANT

Document Marked	Content	Pages	Date of Filing
CD-1	Statement of Claims (SoC)	1-47	26.07.2023
CD-2	Exhibits C-1 to C-49	48-347	26.07.2023
CD-3	Annexure A to D	348-507	26.07.2023
CD-4	Rejoinder to the Statement of Defence	508-545	06.12.2023
	Reply to statement of counter claims	546-558	

CD-5	Affidavit of Admission and Denial of Documents	1-6	07.01.2024
CD-6	Draft issues by claimant	not paginated	31.01.2024
CD-7	Compliance of Para 4 of order no.12 dated 29.02.2024 (Exh. R-50 to R-53)	not paginated	11.03.2024
CD-8	Law Cases (5 on 11.03.24 & 3 on 13.03.2024)	not paginated	11.03.2024 & 13.03.2024
CD-9	Compliance of Order No. 13 dated 11.03.2024	not paginated	14.04.2024
CD-10	Comments of claimant on submission of respondent by email dated 23.05.2024	not paginated	23.05.2024
CD-11	Cost of Arbitration by claimant	not paginated	07.06.2024

BY RESPONDENT

Document Marked	Content	Pages	Date of Filing
RD-1 (Vol-I)	Statement of Defence (SoD) Annexure R-1 to R-4	1 to 64 65 to 117	20.11.2023
RD-2 (Vol-II)	Annexure R-5	118 to 765	20.11.2023
RD-3 (Vol-III)	Annexure R-6 to R-28	766 to 952	20.11.2023
RD-4 (Vol-IV)	Annexure R29 to R-41	953 to 1361	20.11.2023
RD-5	Statement of Counter Claims Annexure CC-1 to CC-5	1 to 22 23 to 70	20.11.2023



RD-6	Admission and Denial of documents filed by the Claimant	1 to 12	22.12.2023
RD-7	Proposed points of determination on claims Proposed points of determination on counter claims	1 to 3 1 to 3	22.12.2023
RD-8	One law case by respondent	Not paginated	15.04.2024
RD-9	Details on compliance of Para 6 of record of proceedings of hearing no. 4 & 5 dated 16.04.2024	Not paginated	23.05.2024
RD-10 (Vol-I to III)	Compliance by respondent of Para 6(ii) of order dated 16.04.2024	Only Vol-II paginated	28.05.2024
RD-11 (Vol-I & II)	Compliance by respondent of Para 6(iv) of order dated 16.04.2024	Not paginated	28.05.2024
RD-12	Additional Documents by respondent	Not paginated	04.06.2024
RD-13	Details against claim 10 Legal Counsel Certificate for legal fee dt: 04.07.2024 Certificate of payment to Arbitrator dt: 03.07.2024 Expenses on booking of venue & related expenses Dt:03.07.24		07.07.2024

Documents are marked as CD-1 to CD-11 and RD-1 to RD-13 by AT.

II. ADJUDICATION

16.0 I have perused the pleadings, closely studied all the documents produced by the parties and exhibited on record, heard the learned counsels/ representatives of the parties, and



have considered all the submissions & arguments and accordingly I have adjudicated the disputes/ claims by recording my findings thereon hereinafter.

17.0 Before taking up adjudication of individual claim /counter claim, I consider it essential and expedient to first decide on the preliminary objections raised by the parties. The same are discussed in the paras that follow.

18.0 **Preliminary Objections:**

18.1 Respondent in its preliminary submissions (para 1 to 9, page 1 to 5) has raised many objections. The claimant has rebutted all these objections as per its rejoinder. I have perused and examined the respective submissions of the parties and find that all the preliminary objections of the respondent are without any elaboration as to the reason and grounds on which basis the objections have been raised. In fact, the objections have been raised in a routine and general way and do not merit any consideration. The claimant has rightly replied all these objections of respondent and the replies are convincing and acceptable. It is accordingly decided that all the claims and counter claims qualify for adjudication on merit.

19.0 **Whether the respondent has committed breach and is responsible for the prolongation of the contract as contended by the claimant or it is otherwise as contended by the respondent and what is justified period of Extension of Time (EoT).**

The stipulated date of completion was 09.05.2018. For several reasons work prolonged and actually completed on 31.03.2021 as per version of claimant and on 30.06.2021 as per version of respondent. First application for EoT was submitted by claimant on 11.11.2017 (**Exh C-27** but without details for EoT) for extension of time up to 31.12.2018 (for 236 days) but respondent granted 1st EoT (**Exh C-28**) up to 23.10.2018 (for 166 days). Meanwhile claimant submitted 2nd application for EoT on 28.09.2018 for EoT for 585 days (**Exh C-29** along with details of EoT) against which respondent granted 2nd EoT up to 23.11.2018 (**Exh C-30**). Dissatisfied with the decision of respondent, claimant again requested for EoT up to 31.12.2019. The respondent granted 3rd EoT up to 28.02.2019. Both parties have claimed that the other party is in breach and responsible for the delay and hence it is entitled to compensation on this account from the other party.

19.1 First, I take up the contention of the claimant who has cited certain reasons for the delay as follow, which, according to the claimant, are attributable to the respondent.

19.1.1 Mobilisation Advance

(a) Claimant's Case:

1st Mobilization advance (applied on 13.12.2016) was released by the respondent, by way of 2 installments after an inordinate delay, i.e., Rs. 5,19,40,000/- on 07/02/2017 and Rs. 31,80,000/- on 03/07/2017. The procurement action as planned was delayed substantially which frustrated a significant part of the short working season. The claimant requested on 06.04.2017 along with details of utilization certificate of the amount received against 1st Mobilization Advance by then to release of 2nd installment of Mobilization Advance. However, the 2nd Installment of Mobilization Advance was denied by the respondent and not released. The denial to release the 2nd Mobilization Advance affected the planned cash flow of the claimant.

(b) Respondent's Case:

First Mobilization Advance of 5% of contract value was released on 07.02.2017 as Rs.5,19,40,000/- after the deduction of IT TDS. The component of Rs.31,80,000/- was Service Tax @ 5% on the 1st Mobilization Advance which was raised on a later date by the Claimant and was accordingly released on 03.07.2017. 2nd Mobilization Advance was not released due to non-compliance of various contractual requirements by the Claimant which as informed on 15.11.2017. As per Clause 10B(ii) of the GCC of CPWD, the Claimant was required to submit a utilization certificate which was delayed by the Claimant and hence, accordingly, the 2nd Mobilization Advance was never released to the Claimant.

c) My Findings:

Having regard to the relevant facts and the provisions of the agreement, I am in agreement with the contention of the respondent. Moreover, the claimant never raised this issue in any of its three applications for EoT (Exh C-27, C-29 & C-31). I therefore do not accept the contention of the claimant.

19.1.2 Delayed Payments

(a) Claimant's Case



There were substantial delays in release of payments by the respondent which caused difficulty in planned progress in the work. The tabulation of RA Bills submission versus the actual payments is at **Exhibit C-5**.

(b) Respondent's Case

As per Clause 7 of the GCC of CPWD, the bills have to be settled within 45 days of the issuance of the bill failing which, the claimant is liable to get appropriate interest, however, the Claimant have made no such claim regarding the delayed payments during the course of the Project as all the R.A. Bills were settled by the Respondent within the requirement of contractual parameters. The Respondent admits that only those bills which required additional clarifications and additional documents from the Claimant may have been delayed; however, it was important to seek the said clarifications/documents from the Claimant to assess the *bona fide* of the Claimant which was apprised to the Claimant from time to time.

c) My Findings:

Having regard to the relevant facts and the provisions of the agreement, I am in agreement with the contention of the respondent. Moreover, the claimant never raised this issue in any of its three applications for EoT (Exh C-27, C-29 & C-31). I therefore do not accept the contention of the claimant.

19.1.3 Faculty Building

(a) Claimant's Case

The Structural details and drawings (GFC drawings) of Faculty Building were received on 08 Dec 2016 (**Exhibit C-6A**) and the IIT-Guwahati vetted drawings were received on 20 Dec 2016. As a result of this delay, Claimant contractor was prevented from commencing the excavation works which further delayed subsequent works such as in reinforcement fabrication, Formworks, Staging and concreting works. The drawings were further revised and submitted on 30.03.2017 (**Exhibit C-6B**). As per baseline program excavation for Faculty Building was to start on 21/12/2016 with PCC in footing commencing simultaneously from 10/01/2017. However, delay in receiving GFC drawings for verification of bearing capacity of soil at founding level which had already been tested by the respondent earlier resulted in delay of actual commencement of work (**Exhibit C-7**). The design & drawings for Post Tension Beams were sent to the Design Consultant on 19/06/2017 and the vetting was completed on 18/07/2017. This delayed the execution of works. However, request for sanction of delay for 26 days



in this regard was denied by the respondent without assigning any reason. The RFI-36 regarding provision of staircase was delay from 03/08/2017 to 17/06 2017 but denied by the respondent. The RFI-36 was considered as a delay while the concurrent delay from RFI-34 and RFI-35 was considered overlapped.

(b) Respondent's Case

As per contract all working drawings were to be released in a phased manner within 90 days after the award of work. GFC Drawings were issued on 08.12.2016 i.e., within 60 days after the award of work in a phased manner. However, respondent already granted 45 days of extension of time. Further, the reinforcement work i.e. shuttering, staging and concreting work was on hold due to the clearance from the Design Consultants of the Project and extension of time of 16 days were granted to the Claimant in first Extension of Time and one (1) more day was granted in third Extension of Time. PMC vide email dated 23.12.2016 requested the Claimant to conduct the soil investigation of the required locations as stipulated in the Contract. However, the excavation work was never kept on hold for the same and the records are available to support the contention. Further, the claim from 21.01.2017 is not justified as the Claimant's batching plant was functional only from 28.01.2017 and the excavation work was never on hold. The PCC work was on hold to freeze the excavation level and therefore, the appropriate extensions of time were granted to the Claimant.

c) My Findings:

I am of the view that it was fundamental obligation of the respondent to issue the requisite design and drawings, immediately after the stipulated date of start, if not immediately after the agreement was drawn. Moreover, the respondent has also considered this delay on this account and included this period while granting Extension of Time three times. To sum up, the respondent is held responsible for the delay caused due to delay in issue of GFC drawings and other issues on which work was held up. Quantum of justified delay has been worked in subsequent para.

19.1.4 **Administrative Building**

(a) Claimant's Case

The GFC drawings were issued on 13/01/2017 (**Exhibit C-8**). Due to this delay excavation works for foundation started late. The base line program for commencement of excavation was projected as 21/11/2016 and completion of the earthwork on 18/02/2017 with PCC in footing commencing simultaneously from 11/12/2016. There

was an initial delay in finalizing the safe bearing capacity of soil at the founding level. The said test was pending from 10/01/2017 (date of issue of letter from respondent) to 03/03/2017. Genuine hindrance of 36 days from 10 Nov 2016 to 13 Jan 2017 in commencement of actual excavation work was denied by the Respondent. The excavation of foundation was again hindered as foundation level was finalized on 18/04/2017 (**Exhibit C/10-A**). The next stage in RCC work was again hindered as geometry was finalized by the PMC on 30/05/2017(**Exhibit C/10-B**). The hindrance cannot be taken only up to 30/05/2017 as the rains had commenced by that time. It resulted in subsequent delays in commencing the works such as in reinforcement fabrication, Formworks, Staging and concreting works. The period of hindrance considered in respect of delay in the receipt of Final Geometry is to be calculated from 10/11/2016 to 30/05/2017. The Respondent has not considered the fact that since the details of Administrative building were finalized on 30/05/2017, the first RCC concreting was actually executed on 24/06/2017. Hence, the delay was actually for 202 days after the commencement of work, i.e. 10/11/2016. Work being designed on hilly terrain, the level of footings of the RCC work was also different hence; the work at the lower level had to be completed before the footing at next level could be executed. There was no scope for works to be taken up simultaneously at all levels, and there were retaining walls to be constructed between footings. The design details for the portico were again finalized on 06/08/2017 and the footing level of portico was again at lower level, thus without its completion, work on adjacent structure could not be taken up. The delay on this account was considered for just 61 days while the actual delay from the date of commencement was for more than 6 months. The intent of the Agreement was never to issue drawings in phases or that there be no drawing for 90 days since commencement. The footings being at different levels, it was proposed to provide RCC walls between the footings. The original design did not include such work. Such change caused hindrance for almost 2 months. The excavation in footing was hindered from 13/07/2017 to September 2019 due to physical hindrances from Electric Poles and Live electrical cables. The Claimant had requested the Respondent to address the issue and remove such physical hindrances vide its letter dated 02/08/2017 (**Exhibit C/12A**). Overhead wires, old electric poles, etc. were removed from site after much delay, however, the said hindrance was denied by the Respondent. The Respondent is aware that the Office of the Divisional Forest Officer (Territorial), Namchi vide its



letter dated 21/01/2017 had allowed the Respondents to remove 1 No. of tree and 47 nos. of Poles. The Claimant vide its letter dated 13.09.2017 had requested the DFO to extend the validity of Marking Order for removal of stunted trees and poles from the site area (**Exhibit C/12B**). The delay in deciding the provision for Tie beam on the 3rd and 4th Row delayed works for 7 days. The Claimant was not informed the RL of the Portico. While the hindrance commenced from 14/07/2017, the Claimant ultimately had raised RFI 31 dated 03/08/2017 regarding RL of Portico which was cleared on 06/08/2017. It is submitted that the said hindrance was denied by the Respondent. The RFI-34 regarding retaining wall with Footing RF23 was also considered as overlapping 9 days with other hindrances. The Respondent is aware of the hindrance caused due to design deficiency at Administrative Building Grid 66'-57 in the 1st floor Roof Slab which was reminded by the Claimant vide its letter dated 27/07/2018(**Exhibits C/12C**). The hindrance kept the works suspended for the period 29/06/2018 and was cleared only on 31/07/2018.

(b) Respondent's Case

As per contract, all working drawings were to be released in a phased manner within 90 days after the award of work. GFC Drawings were issued on 13.01.2017 i.e., within 90 days after the award of work in a phased manner. Moreover, Extension of Time on this account had already granted 45 days. Further, geometry had to be changed due to road network excavation issue, however, only the front portion of the building was affected and the entire building footing was not affected. It is further submitted that as per the Monthly Progress Report of August, 2017, claimant's excavators worked during the time period claimed by the claimant as extension and the work was certainly not stopped. Since the issue was resolved on 30.05.2017, 61 days of Extension of Time without weightage has already been granted to the Claimant during the first Extension of Time and the cascading effect up to 24.06.2017 is not justified by the Claimant. Grid 66 to 57 is a minor portion of one zone. The same delaying the entire Project by 32 days is not justified in its absolute terms. Other alleged hindrances i.e. physical hindrances of electric poles and live electric cables, Portico Drawings, retaining wall with Footing RF23, delay in deciding the provision of Tie Beam, etc. raised by the Claimant are overlapping with the time period of hindrances caused by Gorkhaland Agitation.

c) My Findings:



I am of the view that it was fundamental obligation of the respondent to issue the requisite design and drawings, immediately after the stipulated date of start, if not immediately after the agreement was drawn. Moreover, the respondent has also considered this delay on this account and included this period while granting Extension of Time three times. To sum up, the respondent is held responsible for the delay caused due to delay in issue of GFC drawings and other issues on which work was held up. Quantum of justified delay has been worked in subsequent para.

19.1.5 **Library Building**

(a) Claimant's Case

The Structural details and drawings in soft copy (GFC drawings) and the IIT vetted drawings were received on 08 December 2016. The excavation on the basis of drawings made available was taken up by the claimant; however, the GFC drawings for structural works for the Library Building were issued on 13/01/2017. The building survey and fixing of NGL was completed on 31 Jan 2017. The excavation works were recommended on 06/02/2017. The base line program for commencement of excavation was projected as 05/01/2017 with PCC in footing commencing simultaneously from 25/01/2017. However, there was delay in actual commencement as the GFC drawings received, prescribed for verification of bearing capacity of soil at founding level. The matter was brought to the knowledge of the Respondent vide its letter dated 05/01/2017 (**Exhibit C/7**). There was a subsequent delay due to the technical design issue in the tie beam for which the Respondent put the works on hold for the period 13/06/2017 to 16/06/2017. The design drawings for Staging & Shuttering works for the 1st Floor Slab were submitted on 28/06/2017 and the clearance from PMC was received after almost 4 months on 12/10/2017. The initial delay is very much evident from Claimant's letter dated 02/05/2017 (**Exhibit C/13**).

(b) Respondent's Case

As per contract, all working drawings were to be released in a phased manner within 90 days after the award of work. GFC Drawings were issued on 08.12.2016 i.e., within 60 days after the award of work in a phased manner. Moreover, Extension of Time was granted for 45 days. Further the hindrance with respect to the Tie Beam Concrete work was dealt with and four (4) days extension was granted. Furthermore, claim of hindrance with respect to the shuttering and staging works First Floor Slab from 28.06.2017 to 12.10.2017 is misleading since staging work was ongoing since

13.07.2017. With respect to the issue for staging of 08m to 13m height, the PMC wanted to ensure that the necessary safeguards are in place for carrying out the work and therefore, the PMC requested for some additional clarifications. Therefore, any delay is attributable to the Claimant who failed to submit the clarifications to the PMC despite several communications. The said issue of design drawings for Staging & Shuttering works for the 1st Floor Slab were submitted on 09.08.2017 and not on 12.10.2017 as being stated by the Claimant, the fact is also evident from the Minutes of the 8th Visit of the Monitoring Committee dated 12.08.2017 and the Email dated 18.08.2017 which clearly states that the RCC work in columns up to the first floor level was found to be completed. Time period of the said hindrance and such other hindrances is overlapping with the time period of hindrances caused by Gorkhaland Agitation, which have already been dealt with in first and third Extensions of Time.

c) My Findings:

I am of the view that it was fundamental obligation of the respondent to issue the requisite design and drawings, immediately after the stipulated date of start, if not immediately after the agreement was drawn. Moreover, the respondent has also considered delay on this account and included this period while granting Extension of Time three times. To sum up, the respondent is held responsible for the delay caused due to delay in issue of GFC drawings and other issues on which work was held up. Quantum of justified delay has been worked in subsequent para.

19.1.6 Rejection of RE Wall Block Mould

(a) Claimant's Case

The RE wall RCC block concrete casting started on 26/06/2017, but the PMC stopped the work from 27/07/2017 stating that the casting was to be done using block casting machine. This was nowhere provided in the specifications stipulated in the contract Agreement. The procurement of block casting machine required additional mobilization time and casting could recommence on 25/12/2017. Hence, it caused a substantial hindrance of about 5 months, but the Respondent did not consider the same.

(b) Respondent's Case

The said hindrance was never raised during the course of the work. Further, the RE Block Mix Design report was not submitted by the claimant failing which, the blocks were not casted. Furthermore, the PMC to maintain the quality had requested the Claimant to use the casting machine as per C.87 of the Technical Specifications. As per

C.87.1 of the Technical Specifications, the rate was also to be inclusive of supply of block making machine. Therefore, the said hindrance as raised by the Claimant is not tenable.

c) My Findings:

Having regard to the relevant facts and the provisions of the agreement, I am in agreement with the contention of the respondent. Moreover, the claimant never raised this issue in any of its three applications for EoT (Exh C-27, C-29 & C-31). I therefore do not accept the contention of the claimant.

19.1.7 Inadequate water supply

(a) Claimant's Case

The Respondent failed to provide the contractor with an adequate water source due to which several works were hindered. The Claimant vide its letters dated 28/11/2016 and letter dated 11/02/2017 pointed out inadequate water supply (**Exhibits C-14A & C-14B**).

(b) Respondent's Case

Clause 31A of the GCC of CPWD clearly states that the Department do not guarantee to maintain uninterrupted supply of water and it will be incumbent on the contractor(s) to make alternative arrangements for water at his/their own cost in the event of any temporary break down in the Government water main supply so that the progress of his/their work is not held up for want of water. Therefore, no claim of damage or refund of water charges will be entertained on account of such breakdown. The said hindrance was also not recorded in the Hindrance Register within 14 days of its occurrence. Therefore, the contentions, as raised by the Claimant are not tenable.

c) My Findings:

Having regard to the relevant facts and the provisions of the agreement, I am in agreement with the contention of the respondent. Moreover, the claimant never raised this issue in any of its three applications for EoT (Exh C-27, C-29 & C-31). I therefore do not accept the contention of the claimant.

19.1.8 Design Mix

(a) Claimant's Case

The samples for design mix were collected only on 08/02/2017 by the PMC. The Claimant vide its letter no. 022 dated 09/02/2017 (**Exhibit C/15**) immediately proceeded to send the sealed samples to Jadavpur University for carrying out Design

mix. The Claimant, as mentioned earlier, had mobilized its staff from the day of letter of acceptance, and therefore the representatives of the Claimant were always present at site since, so this delay in design mix is attributable to the Respondent's PMC.

(b) Respondent's Case

As per the available records, the quality control in-charge of the Claimant is responsible for the sample collection and testing reported at-site on 03.01.2017. The Respondent had issued a Letter dated 23.12.2016 (**Annexure R-18**) to Jadavpur University for the mix design, however, the Claimant did not depute a quality in-charge in place to prepare the same. Despite the issue highlighted by the PMC to Claimant, the Claimant itself requested that in absence of the quality in-charge, the PMC may allow the assistant quality engineer to proceed further with the sample collection and testing on 03.01.2017 (**Annexure R-19**). It is further submitted that the Claimant tried PPC cement mix design, despite the PMC recommending OPC as the PPC cement does not provide the required strength with the aggregate materials available at the premises of the University. When the PPC mix design failed, then the Claimant went ahead with the OPC mix design. Therefore, it is quite evident from the fact that the delay of sample collection and testing is accountable to the Claimant as the Claimant should have started the mix design immediately upon start of the work with OPC. The Claimant is also aware of the said fact and therefore, had not claimed the said hindrance during course of the work.

(c) My Findings:

Following exhibits have been filed by both parties:

- (i) Email dated 23.12.2016 from respondent to claimant forwarding thereof, a letter addressed to Jadavpur University in which request made to conduct concrete mix design (**Annexure R-18, page 863-864 of RD-3**).
- (ii) Email dated 03.01.2017 from claimant to respondent regarding request to allow submission of sample and deputing of AE-QC for observing test of Concrete mix design in Jadavpur University (**Annexure R-19, page 866 of RD-3**).
- (iii) Email dated 03.01.2017 from respondent to claimant intimating refusal to request of claimant made vide email dated 03.01.2017 regarding presence of AE-QC at the time of testing but allowed **joint sampling (by TCE & NCC)** and subsequent submission to Jadavpur University (**Annexure R-19, page 865-866 of RD-3**).

- (iv) Email dated 11.01.2017 from respondent to claimant stating that sample for testing has reached at Jadhavpur University but Quality Manager has not been deputed to witness the complete tests (**Annexure R-19, page 865 of RD-3**).
- (v) Email dated 11.01.2017 from claimant to respondent stating that Jadhavpur University has allowed witness of cube test only and the same can be attended by QC person instead of Senior QC person (**Annexure R-19, page 866-867 of RD-3**).
- (vi) Letter dated 09.02.2017 from claimant to Jadhavpur University submitting **signed & sealed sample** of materials to carry out test for Design Mix (**Exhibit C-15, CD-2**).

From the submissions made by both parties it is not clear what happened to first sample submitted on 11.01.2017. As another sample was submitted on 09.02.2017, it appears that first sample could not pass designed strength. It has been shown that hindrance on this account has been removed on 08.02.2017 (**S.No.4 at page 1 of Annexure-I attached with Vol-I of RD-10 and Annexure R-12 of RD-3**). It means sample submitted on 09.02.2017 was final. From Exhibit C-15, it is clear that sample of PPC was sent & it can be presumed that sample was collected in presence of respondent. Moreover from page 48 & 58 of Vol-I of Contract Agreement (S.No.71 & 114 respectively), there was no bar on using PPC. Therefore contention of respondent that cement used should have been OPC does not get sustained from the record produced. Concrete Design Mix is a process of trial and error and it can be witnessed by Quality Manager instead of Senior Quality Manager, therefore, delay in testing qualifies for consideration though the respondent is not held responsible for the delay as it was beyond control of respondent. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.9 **Geo Technical reports**

(a) Claimant's Case

The clearance for excavation was received from the Design consultant vide their mail dated 16/02/2017 and the excavation in footing was only finalized thereafter. The structural drawings for the Library and Faculty Building had evidently been prepared theoretically based on SBC evaluated at 300 KN/m² as available from prescribed drawings. The re-testing of Soil was preferred by the Respondent and the test results were finally intimated to the Claimant vide e-mail dated 16/02/2017 (**Exhibit C/16**) The Respondent did not consider the procedural delay arising from verification of SBC

though design details pertaining to structure were to be finalized based on SBC evaluated at some prior date. The hindrance caused due to delay in providing SBC in respect of the Library and Faculty Building for the period from 10/11/2016 to 16/02/2017 was for 98 days, however only 16 days only were considered by the Respondent.

(b) Respondent's Case

PMC vide Email dated 23.12.2016 (Annexure R-14) requested the claimant to conduct the soil investigation of the required locations as stipulated in the Contract. However, the excavation work was never kept on hold for the same and the records are available to support the contention as per the MPR of August, 2017. PCC work was on hold to freeze the excavation level. However, respondent granted 45 days of extension of time on this account. Issue pertaining to GFC drawings was primarily for the Admin Building, 70% weightage was considered by the committee. *Secondly*, the batching plant required for RCC/PCC work was calibrated only on 28.01.2017 therefore, the Respondent granted 16 days plus 3 days of extension of Time during the period between 28.01.2017 to 16.02.2017. 61 days of Extension of Time without weightage was also granted on account of excavation of footing (reinforcement, shuttering, staging & concreting work) and RCC works.

(c) My Findings:

Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, the respondent is held responsible for the delay caused due to delay in Geotechnical Reports. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.10 Tower Crane Installation

(a) Claimant's Case

The work was also disrupted as PMC demanded for 3rd party testing for the Tower Crane installed at site. Accordingly, an authorized person from M/s. Micro Inspection Testing Engineering Services accordingly was brought to site but he arrived with a photo copy of his authorization letter. The PMC denied considering the letter because the same was a photocopy and not an original. The 2nd time testing was done dated 11/11/2017. It is submitted that the Testing Service for Tower crane was not locally available as being 'specialized works'. The time lost on this account was approximately 3 months.

(b) Respondent's Case

Safety inspection of tower-crane is a statutory requirement in every project and Yangang being a remote site, such testing and planning ought to have been properly done. The Claimant was also continuously requested for early mobilization of tower-crane since January, 2017 considering the erection and testing of the same would need substantial time, however, the Claimant delayed the procurement of the same. Thereafter, the tower-crane testing was completed by the Claimant on 09.07.2017 only after which, it was fully functional which is evident from the Email dated 07.07.2017 (**Annexure R-20**) issued by the PMC citing that the tower-crane was non-functional. The work had never stopped in absence of the tower crane and therefore, there is no ground of claiming the hindrance for the same. As per Sr. No.4 of Clause 4.3 of NIT (Annexure-II), two (02) tower crane of 45 mtr. ht. were required to be deployed for achieving the progress of the Project Work, however, only one (01) tower crane was installed by the Claimant and the same was re-located and re-assembled at different locations at the Project Site. This fact was also conveyed to the Claimant by the PMC vide its Letters dated 15.11.2017 (Annexure R-13) and 11.10.2017 (Annexure R-20). This shows that it is the Claimant who is responsible for the delay in completion of the Project as it had failed to mobilize machinery as per the contractual provisions.

(c) My Findings:

The claimant did not place any exhibit on record in support of its contention. I find submission of claimant not convincing as it did not counter the defence arguments of respondent in its rejoinder effectively. Therefore, I agree with the contention of respondent and do not consider any extension of time for this hindrance.

19.1.11 HT Strands Testing

(a) Claimant's Case

The HT Strands for RCC and Post Tensioning works were procured at site on 18/08/2017 but the samples were sent for testing on 18/09/2017 (**Exhibit C-17A, C-17B & C-17C**) due to absence of responsible personnel from engaged agency BBR and their presence insisted upon by the PMC. It is to be noted that the only work done before the BBR personnel finally arrived was cutting a part of the HT strand and sending it to IIT Madras for testing thereafter. The time lost on this account was admittedly 31 days but Respondent denied considering this delay.

(b) Respondent's Case

Specialized sub-vendor for the HT Strands conducted the testing work as and when the representative of the specialized sub-vendor reached the site after which, the sampling was done. Majority hindrance of HT Strands Testing delay is overlapping with the time period of hindrances caused by Gorkhaland Agitation.

(c) My Findings:

The respondent has considered delay on this account and included this period while granting Extension of Time three times however stated that it was within the overlapping period. To sum up, the respondent is held responsible for the delay caused due to delay in testing of HT Strands. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.12 Road work

(a) Claimant's Case

The Road works remained on hold for the prolonged period since 12/11/2017 due to encountering rock area over the length as proposed in the original drawings that were IIT vetted. The same led to revised scope of work. The absence of road resulted also caused hindrances in movements to the other end of the Project area. The roadwork being 11% was given similar weightage and 30 days of hindrance was considered, despite the actual delay was for 273 days.

(b) Respondent's Case

Work on 70-meter stretch of road was kept on hold after encountering a large rock and the same was later de-scoped from the scope of the Claimant which the Claimant had never objected during the course of execution of the Project Work. Claimant did not execute the road work and the said road stretch was independent and did not affect the other structures in any way whatsoever, the same is evident from the drawing annexed herewith showing Chainage 20 onwards for Road No.20 (Annexure R-21). Respondent decided to de-scope the work with intent to assist the Claimant in expediting the progress of work. All structures in the Project were at different locations of the road and that even after de-scoping the road work, the progress of completion continued to remain poor. Further, there were no structures planned where the de-scoped road was located and the road was merely for future project(s), if any, of the Respondent University.

(c) My Findings:



Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, the respondent is held responsible for the delay. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.13 AAC Blocks in Library & Faculty Building

(a) Claimant's Case

AAC Blocks of makes prescribed were not available and, therefore the Claimant vide its letter dated 15/05/2018 (**Exhibit C/18A**) had submitted the proposal for alternate make of AAC Blocks. The said proposal was approved by the Respondent after 44 days on 27/06/2018. However, the work was at a halt as PMC was yet to give a go-ahead. The Claimant had raised concerns regarding the same with the PMC on 31.08.2018 (**Exhibit C/18B**). The AAC Blocks of subsequently approved make once brought to site was required to be tested as per contractual provisions. However, the testing of AAC Blocks is a specialized work and required substantial time. A letter dated 12.09.2018 (**Exhibit C/18C**) regarding the issue in execution of AAC Blocks was written. Subsequently, AAC Blocks were sent for testing to CBIR, Roorkee vide letter dated 29/09/2018. The CBRI, Roorkee informed that they would require 3 months to test the AAC Blocks. The Claimant vide its letter dated 31.10.2018 (**Exhibit C/18D**) asked for the work with the AAC Blocks procured at site to proceed at their risk and cost to avoid such delay. The Blocks were then sent to National Test House, Kolkata (**Exhibit C/18E**).

(b) Respondent's Case

Claimant approached the PMC for request to change the vendor for AAC block only on 12.06.2018 (Annexure R-22) and further, the Claimant submitted the incomplete documents/credentials on 12.06.2018. Thereafter, the PMC inquired the Claimant to re-submit the complete documents and the Claimant re-submitted the documents on 23.06.2018 which were approved on 27.06.2018 (Annexure R-22). Three days plus two days of extension of time granted. Testing requirement of the AAC block was contractual as per C.3.4 of the Technical Specifications and claiming delay due to poor planning of the Claimant is not tenable.

(c) My Findings:

Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, the respondent is held responsible



for the delay. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.14 Gorkhaland Agitations

(a) Claimant's Case

Claimant's initial planned progress was severely affected due to the political turmoil in the neighboring regions in the state of West Bengal. It not only hindered the procurement of materials to site, but the workers also left the site in masses. Due to a certain policy of the WB Government in May, 2017 the entire Nepali-speaking regions of West Bengal (majorly Darjeeling District) started to agitate for a separate state. The agitation, popularly called the "*Gorkhaland movement*" resulted in complete shutdown of the area and impromptu blockages of roads that lasted for four to five months. This Gorkhaland agitation caused severe hindrance towards remobilization of manpower at worksite. The disturbances in fact returned to normalcy somewhere after December 2017 (Exhibits C-19).

(b) Respondent's Case

Gorkhaland Agitation was from 17.06.2017 to 27.09.2017 which affected the movement of vehicles through West Bengal area of NH-10. The Claimant is claiming the hindrance for 103 days in its entirety. The said hindrance cannot be considered in full due to reasons that the Claimant is expected to have enough and adequate material stacked at the site to continue the work for at least fifteen (15) days. It is further submitted that the work was in progress during the said period of Gorkhaland Agitation and the site did not come to a standstill, whatsoever.

(c) My Findings:

Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, this period is required to be included in justified delay though the respondent is not held responsible for the delay as it was beyond control of respondent. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.15 State Regulations banning inorganic vegetables

(a) Claimant's Case

The Government of Sikkim banned the entry of all inorganic vegetables into the State. The same resulted in acute shortage of food for the work force engaged at site causing severe hindrance effectively for the period 01/04/2018 to 31/05/2018. Consequently,

the work force had to be disbanded during the hindered period. Moreover, the said period was in the eve of Monsoon rains resulting in further loss of working period. Claimant had vide its letter dated 03.05.2017 (**Exhibit C/20**) intimated the same to the Respondent.

(b) Respondent's Case

The Claimant is claiming a total of forty five (45) days of hindrance when inorganic vegetables were banned in Sikkim. Respondent had immediately approached the SDM, Yangang for aid and assistance for curing the said hindrance. Claimant never approached the SDM, Yangang despite of the Respondent taking all measures to cure the said hindrance. Respondent vide its Letter dated 22.05.2018 (**Annexure R-24**) informed the Claimant that the Government of Sikkim have assured enough availability and supply of vegetables to the state. Moreover, the ban on entry of in-organic vegetables and other edible items was partially lifted immediately by the Government of Sikkim. Despite all that, Extension of Time for seven (7) days was granted.

(c) My Findings:

Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, this period is required to be included in justified delay though the respondent is not held responsible for the delay as it was beyond control of respondent. Quantum of justified delay on this account has been worked out in subsequent para.

19.1.16 West Bengal Panchayat Elections

(a) Claimant's Case

The workers engaged at site were mostly from the adjacent districts of West Bengal. The Panchayat elections were declared in West Bengal and the workers in order to exercise their right of voting had left the worksite en masse for the period from 01/05/2018 to 21/05/2018. The Claimant's vide its letter dated 04/07/2018 (**Exhibit C/21**) had intimated about it to the Respondent. However, the Respondent incorrectly granted only 6 days of hindrance in this respect.

(b) Respondent's Case

Respondent had correctly granted a period of six (6) days of hindrance in respect of the West Bengal Panchayat Elections considering two (2) days of travel twice and two (2) days for voting i.e. one (1) day each. The Respondent has appropriately calculated and granted the time period of six (6) days to cure the hindrance caused. The Claimant

herein is expecting the extension of time for its manpower and labour not returning on time which is not justified by the Claimant in any way whatsoever.

(c) My Findings:

Respondent has considered delay on this account and included this period while granting Extension of Time three times. Therefore, this period is required to be included in justified delay though the respondent is not held responsible for the delay as it was beyond control of respondent. However I agree with the contention of respondent and find period of 6 days of justified delay as reasonable.

19.1.17 **Rainy Season, Severe Climatic conditions & Earthquakes**

(a) Claimant's Case

The Claimant had claimed for 160 days of hold up from rains for the period 11/01/2017 to 25/08/2018. The Respondent approved only 53 days while granting the 1st EOT and another 23 days while granting the 2nd EOT. The remaining 54 days were denied on vague grounds. The Rainfall data of Sikkim for the year 2017 being relevant is at **Exhibit C-11**.

Rainy season approximately lasts for 4 months each year in Sikkim and extreme cold in the months of December, January and February with temperatures when the concreting works were restricted. Moreover several earthquakes recorded during the time period of work at site.

(b) Respondent's Case

Respondent granted 53 days of extension in the first Extension of Time and granted another extension of 23 days in the second Extension of Time, both extensions being granted on account of rainy season and unseasonal rainfall. Extension of time on account of unseasonal rainfall during justified period came out to be 23 days. There is no record available in the Hindrance Register which pertains to rainy season and unseasonal rainfall. There was never an exodus of labour at site due to earthquake (**Annexure R-25**).

(c) My Findings:

Both parties have mentioned that 53 days of time extension was granted in first extension of time and 23 days in second extension of time. However, as per **Annexure-I attached with Vol-I of RD-10**, respondent has considered delay of only 23 days on this account and included this period while granting Extension of Time three times. Therefore, time period is required to be included in justified delay though the



respondent is not held responsible for the delay as it was beyond control of respondent. Against claim of 160 days, there are some overlapping days and some days are during the monsoon season. Therefore, after factorizing all these things, I consider 30% of claimed days i.e., 30% of 160 days would be reasonable period as justified delay.

19.1.18 **Delay due to Covid-19**

(a) Claimant's Case

Breach of contract on the part of the Respondent led to the work being spilled over into the COVID period and the Claimant has suffered financially from working in the COVID period.

(b) Respondent's Case

Claimed period on account of COVID-19 is beyond the justified EOT period. As per the circular(s) referred by the Claimant, the benefit of Force Majeure due to the COVID-19 Pandemic was applicable only to those parties who have not committed default on or before issuance of the said circular.

(c) My Findings:

There is no gainsaying that Covid-19 was a natural calamity which hampered all works badly. It is to find whether the start of period on account of Covid-19 falls within the justified EoT period. Justified Delay on this account will be decided after finalization of quantum of justified delay on other accounts.

19.1.19 **Variation in Earthwork in Excavation**

(a) Claimant's Case

Claimant has excavated 25,333 cum of earthwork in excavation in lieu of BOQ stipulated quantity of 13683 cum of earthwork. Work was absolutely on hilly terrains and the excavation was also not in soft and loose soil, due to which the excavation works took substantial time. The deviation in quantity was almost 100% and thus the additional time required was liable to be approved while granting EOT. The Claimant had raised the issue of encountering rocks vide its letters dated 17/02/2017 & 07/03/2017 (**Exhibit C/22-A & 22-B**). The samples of rock encountered while excavation in the 3 buildings were sent for identification of their classification through the PMC vide the Claimant's letter dated 01/08/2017 (**Exhibit C/23-A**) and the nature of soil is evident from Claimant's letter dated 13/09/2017 (**Exhibit C/23-B**). Additional time required on this account was approximately 129 days but the work in variation over such difficult area was not considered by the Respondent while granting EOT.

(b) Respondent's Case

Earthwork in excavation and filling is a minor part of the entire work, thus, weightage regarding the same has to be considered for this hindrance. Further, the compensation by the fact that several other items in the scope of the Claimant had been de-scoped upon request also needs adjustment and consideration. Quantity executed was only 2080 cum more than the required as per the Contract which comes out to an additional excavation of merely 7.5%. It can be corroborated by the Final Deviation Statement (Annexure R-27) certified by the Claimant which showcases the work that was never executed by the Claimant. Respondent vide its email dated 09.01.2018 (Annexure R-26) in response to the Claimant's email dated 09.01.2018 observed that both the excavators at site had demobilized/shifted from the site without any replacement and the site activity like back-filling and road excavation work were behind schedule as the excavators were not working since 31.12.2017.

(c) My Findings:

There is no provision in the agreement for giving extra time on account of increase in quantity of a particular item. Extra time can be given in case of increase in amount of total work done with respect to tender amount. Hence contention of claimant is not found tenable.

19.1.20 Variation in Earthwork in backfilling

(a) Claimant's Case

The volume of earthwork in filling was almost 40,000 cum as against the BOQ stipulated quantity of 20,517 cum and thus deviation in this respect was 100%. Time required in backfilling is generally 1.5 times that required in excavation. The Respondent failed to consider the aspect that the additional time required on this account was approximately 159 days. The Claimant vide its letter dated 15/09/2018 (**Exhibit C/24**) had raised the issue regarding incorrect assessment of EOT application.

(b) Respondent's Case

Although there was increase in filling earthwork, several works were also de-scoped from the Project. Further, filling works were executed in the initial stage of the Project where overlapping hindrances and extension of time had already been dealt with and provided. It is not justifiable to claim 159 days of extension due to a single activity in a Project which comprises of multiple activities.

(c) My Findings:

There is no provision in the agreement for giving extra time on account of increase in quantity of a particular item. Extra time can be given in case of increase in amount of total work done with respect to tender amount. Hence contention of claimant is not found tenable.

19.2 Justified Period of Extension of Time:

19.2.1 Respondent has filed copy of Hindrance Register (**Annexure R- 6**) and on the basis of all entries of hindrances in this register (signed by both parties), claimant had submitted its all applications to respondent for grant of extension of time (**Exh C-27, C29**) and subsequently respondent granted three extensions of time to claimant (**Vol-I of RD-10**). Admittedly, in order to decide justified period of Extension of Time, I worked out justified period of extension of time on the basis of all these entries. As per **Exhibit C-52 of CD-7** (not countered by respondent) weightages of various buildings are as under:
Total Work Done: 7531 Lakh ----- (A)

S. No.	BUILDING	AMOUNT (in Lakh of Rs.)	WEIGHTAGE Col 3/A
0	1	2	3
1	Library	1162	15%
2	Faculty	1026	13.62 say 14%
3	Admin	5220	69.31 say 69%
4	Road & Entrance Gate	123	2%

19.2.2 Accordingly, justified period for Extension of Time is worked out as under:

S No	Nature of Hindrance	Period	Days	Overlap days	weightage	Net hindrance	Reason
1	Faculty Building GFC drawing soft copy (structural)	10.11.16 to 08.12.16(for F)	29	0	14%	4	Work cannot be done in absence of GFC drawings
2	Admin. Building GFC drawing soft copy structural	10.11.16 to 13.01.17(for A)	65	0	69%	45	Work cannot be done in absence of GFC drawings

3	Library Building GFC drawing soft copy (structural)	10.11.16 to 08.12.16(for L)	29	0	15%	4	Work cannot be done in absence of GFC drawings
4	Delay in Sample collection for Mix Design	04.12.16 to 08.02.17	67				
		04.12.16 to 08.12.16(for all)	5	5	100%	0	Period already covered under S. No. 1 to 3
		09.12.16 to 13.01.17 (for L & F)	36	0	15%+ 14%	10	No work unless mix design is approved. Period for Admin. Building already covered under S. No. 2
		14.01.17 to 08.02.17(for all)	26	0	100%	26	No work unless mix design is approved.
5	Soil Test report for Library and Faculty Building	21.01.17 to 16.02.17	27				
		21.01.17 to 08.02.17 (for L&F)	19	19	15%+ 14%	0	Period already covered under S. No. 4
		09.02.17 to 16.02.17 (for L&F)	8	0	15%+ 14%	2	No work in absence of Soil Report.
6	Faculty Building Reinforcement Work	14.03.17 to 30.03.17	17	0	14%	2	Work held up
7	Excavation of Admin. Building	25.03.17 to 18.04.17	25	0	69%	17	Work held up
8	RCC Work of Admin. Building	31.03.17 to 30.05.17(for A)	61		69%		
		31.03.17 to 18.04.17(for A)	19	19	69%	0	Period already covered under S. No. 7
		19.04.17 to 30.05.17(for A)	42	0	69%	29	Work held up
9	Library Building Tie Beam Concrete Work	13.06.17 to 16.06.17(for L)	4	0	15%	1	Work held up

10	Gorkhaland Agitation	16.06.17 to 27.09.17(for all)	104				
		16.06.17	1	1	100% -15%	1	Period for Library Building already covered under S. No. 9
		17.06.17 to 27.09.17	103	0	100%	103	Work held up
11	Library & Faculty RCC Work on Hold	17.06.17 to 22.06.17(for L&F)	6	6	15%+ 14%	0	Period already covered under S. No. 10
12	PT Beam Drawing for Faculty Building	19.06.17 to 18.07.17(for F)	30				
		19.06.17 to 22.06.17	4	4	14%	0	Period already covered under S. No. 10
		23.06.17 to 18.07.17	26	26	14%	0	Period already covered under S. No. 10
13	Delay in getting clearance from PMC for operation of tower crane after 100% completion of erection and installation	20.06.17 to 09.01.18(for all)	204				Not tenable as per finding in para 19.1.10 supra
14	Sectional Details of RCC Wall in between footings in Admin. Building	21.06.17 to 18.08.17(for A)	59	59	69%	0	Period already covered under S. No. 10
15	Admin. Building 3 rd & 4 th low level Tie Beam	21.06.17 to 28.06.17(for A)	8	8	69%	0	Period already covered under S. No. 10
16	Shuttering & Staging work in Library Building First Floor Slab	28.06.17 to 12.10.17(for L)	107				
		28.06.17 to 27.09.17	92	92	15%	0	Period already covered under S. No. 10
		28.09.17 to 12.10.17	15	15	50% Of 15%	1	Small portion of work affected

17	Construction Hindrances from Electrical Pole & Live Cables	13.07.17 to 14.08.17(for A)	33	33	69%	0	Period already covered under S. No. 10
18	Admin. Building Portico Drawing	14.07.17 to 06.08.17(for A)	24	24	69%	0	Period already covered under S. No. 10
19	Retaining Wall on Footing RF23 in Admin. Building	02.08.17 to 11.08.17(for A)	10	10	69%	0	Period already covered under S. No. 10
20	Faculty Building Stair Case	03.08.17 to 17.08.17(for F)	15	15	14%	0	Period already covered under S. No. 10
21	Library Building Plinth Beam	03.08.17 to 09.08.17(for L)	7	7	15%	0	Period already covered under S. No. 10
22	HT Strands Testing Delay in giving clearance from PMC to send the same for Third Party Test	18.08.17 to 18.09.17(for all)	32	32	100%	0	Period already covered under S. No. 10
23	In Review Meeting (MA, Z Tech along with PMC) Shoulder & Rock Area (Road No. 20 Ch 120-180) Hold by M&A	12.11.17 to 28.08.18 (for all)	232		5% of 100%	12	Considered that it affected 5% of total work
24	Library Building First Floor Beam Structural drawing(RF 61)	14.12.17 to 23.12.17(for L)	10	10	50% of 15% of 95%	0	Considered that it affected 50% of work of Library and 5% already considered in S. No. 12
25	PMC raised queries regarding FGL in front of Library & Faculty Building for RE Wall foundation level (1 meter from	21.03.18 to 23.03.18(for L & F)	3	0	20% of (15% +14%)	0	Considering work of Library & Faculty Buildings affected by 20%

	FGL)(Work hold from PMC)						
26	Demobilisation of Labour due to shortage of vegetables and other edible items	01.04.18 to 31.05.18(for all)	61	-	50% of (100 %- 5%)	29	5% already covered under S. No. 23. Considered 50% slow down of work
27	Labour demobilization due to West Bengal Panchayat Election hampering the work progress	01.05.18 to 21.05.18(for all)	21	-		6	Respondent justified 6 days of delay which is reasonable
28	Execution of AAC Block in Library Building	15.05.18 to 27.06.18(for L)	44				
		15.05.18 to 31.05.18	17		60% of 15% of (100 %- 5%- 95/2 %)	1	Period already partially covered under S. No. 23 and 26. Considering affect on 60% on balance work in Library building
		01.06.18 to 27.06.18	27		60% of 15% of (100 %- 5%)	2	Period already partially covered under S. No. 23. Considering affect on 60% on balance work in Library building
29	Execution of AAC Block in Faculty Building	15.05.18 to 27.06.18(for F)	44				
		15.05.18 to 31.05.18	17		60% of 14% of (100 %- 5%- 95/2 %)	1	Period already partially covered under S. No. 23 and 26. Considering affect on 60% on balance work in Faculty building
		01.06.18 to 27.06.18	27		60% of	2	Period already partially covered

					14% of (100% - 5%)		under S. No. 23. Considering affect on 60% on balance work in Faculty building
30	Hindrance in Admin. Building Grid 66-57 First Floor Roof Slab	29.06.18 to 31.07.18(for A)	33		5% of 69% of (100% - 5%)	1	Period already partially covered under S. No. 23. Considering affect on 5% on balance work in Admin. Building
31	Execution of AAC Block in Library Building	01.08.18 to 24.09.18(for L)	55		15%		
		01.08.18 to 28.08.18	28		60% of 15% of (100% - 5%)	2	Period already partially covered under S. No. 23. Considering affect on 60% on balance work in Library building
		29.08.18 to 24.09.18	27		60% of 15% of 100%	2	Considering affect on 60% on work in Library building
32	Execution of AAC Block in Faculty Building	01.08.18 to 24.09.18(for F)	55		14%		
		01.08.18 to 28.08.18	28		60% of 14% of (100% - 5%)	2	Period already partially covered under S. No. 23. Considering affect on 60% on balance work in Faculty building
		29.08.18 to 24.09.18	27		60% of 14% of 100%	2	Considering affect on 60% on work in Faculty building
33	Execution of Road Work	28.08.18 to 24.09.18(for O)	28		2% of 100%	1	
34	Hindrance in Transit of construction material (steel,	10.09.18 to 21.09.18(for all)	12		98% of 100%	12	2% already covered under S. No.33

	cement, other material) & hindrance in transit of labour from Siliguri to Yangyang Site						
35	Hindrance due to rainfall except rainy season	11.01.17 to 25.05.18(for all)			30% of 160 days	48	As per finding in para 19.1.17 supra
36	Extra Work					0	Amount of work not exceeded beyond tendered amount
Total						368	

Justified period for Extension of Time is 368 days.

19.3 As found in para 19.1.8, 19.1.14, 19.1.15, 19.1.16 and 19.1.17, respondent is not responsible for justified delay under S. No. 4 (for 36 days), 10 (for 104 days), 26 (for 29 days), 27 (for 6 days) and 35 (for 48 days) respectively. Therefore out of **368 days** of justified delay, respondent is not responsible for justified delay of **223 days** (i.e., 36+ 104 + 29+ 6 + 48) and accordingly, respondent is held responsible for prolongation of contract by **145 days** (368 – 223). Therefore, claimant is entitled to compensation for loss due to extra overheads for 145 days.

20.0 **Whether the levy of compensation under clause 2 of the contract by the respondent is wrong and illegal as contended by the claimant.**

20.1 The issue is to be decided in the light of the relevant clause of the agreement and the events leading up to the action by the respondent to levy compensation under clause 2 of the agreement.

20.2 For ready reference, relevant portion of Clause 2 (**page 38 of CD-1**) is extracted below:
“If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule ‘F’ (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion

has been specified. (i) Compensation for delay of work @1.5%per month of delay to be computed on per day basis.”

- 20.3 Claimant applied for extension of time up to 31.12.2018 first time on 11.11.2017 (**Exh C-27**). The respondent granted first extension of time up to 23.10.2018 on 04.05.2018 (**Exh C-28**). Claimant second time applied extension of time up to 15.12.2019 on 28.09.2018 (**Exh C-29**) and respondent granted second extension of time up to 23.11.2018 on 26.10.2018 (**Exh C-30**). Claimant, vide letter dated 15.12.2018 (**Exh C-31**), reminded respondent to grant extension of time up to 31.12.2019. The respondent on 08.01.2019 (**Exh C-32A**) granted provisional extension of time up to 31.03.2019 and on 21.01.2019 (**Exh C-32B**) reduced it to 28.02.2019 as regular extension of time. All the extensions of time granted by respondent were having a rider that claimant will give an undertaking accepting the terms and conditions of the extension of time and one of the condition was that the claimant shall not claim for price escalation/ adjustment or revision of rates citing extended time and revised date of completion as the reason. The claimant showed its disagreement on respondent's letter dated 21.09.2019, vide letter dated 26.02.2019 (**Exh C-32C**).
- 20.4 Respondent issued a show cause notice under “Clause 2 of the Agreement” vide its letter being no. 1763 dated 21/01/2019 (**Exhibit C-33**). Respondent held a meeting with claimant on 25.02.2019, chaired by the Vice Chancellor to discuss various issues related to progress of work and extension of time. Claimant replied respondent's letter dated 21.09.2018, which was a show cause notice, vide its letter dated 26.02.2019 (**Exhibit C-33A**). The Respondent vide its letter dated 28/02/2019 (**Exhibit C/35**) levied compensation under clause 2 of the agreements upon the Claimant. The Claimant submitted its reply to the letter levying penalty vide its letter dated 01/03/2019(**Exhibit C/36**) denying and disputing the contents including the levy of penalty.
- 20.5 *The contention of the claimant is as under:*
- (i) The Respondent, on 04 Jan 2019 sent an e-mail asking the Claimant to enter into an Agreement that was in the nature of an undertaking. However, the Claimant had denied signing the said Agreement as it had unfair conditions as produced below beyond the original scope of contract and in absolute deviation from the intent of the contract. Extract of email is as under:

- (a) That the contract shall be extended on terms and conditions as executed between the parties in the General Conditions of Contract as well as the Agreement till 31st March, 2019 or the decision of the PMC whichever is earlier.
- (b) That the second party shall not be allowed to any benefit of price adjustment/ cost escalation claims beyond the original date of completion of the project dated 09/05/2018.
- (c) That second party has executed this deed of agreement without any force, or undue representation and further has decided to complete the contract within the extended time period. The second party has also understood the contents as well as the entire agreement to its fullest satisfaction.
- (ii) Said proposed undertaking, which was never agreed by claimant, was thereafter never insisted upon but the basic intent of the Respondent was to deprive the Claimant the legitimate payment under Clause 10 CC. It could not be imposed by the Respondent unilaterally. Non-payment of contractual escalation amount could not be a pre-condition for determination of Extension of Time and could not be bargained against the contractual escalation payment. The alleged waiver of this payment was in discussion all through the past meetings since the application for extension of time was made by the Claimant on 28/09/2018.
- (iii) The Claimant at such material time had submitted its 9th RA Bill dated 20 December, 2018 for Rs. 3,07,43,032.45. Another Bill by way of secured advance for Rs. 3,25,18,001.72 was also pending. The Claimant was under tremendous financial pressure due to the unpaid and denied bills by the Respondent. Therefore, the Claimant preferred some time to reply to the show cause notice until the held up payments were released by the respondent and the same was informed to the respondent at material time. The claimant in the said reply had objected to the absence of a PMC in terms of contractual provisions.
- (iv) Letter dated 28/02/2019, imposing compensation was issued in the evening of 28 February 2019, subsequent to receipt of the reply of the earlier letter by the claimant served at the office of the Respondents on 27 February 2019 and without taking into cognizance the replies of the Claimant on grounds of not being “timely” as alleged. It was breach of natural justice.
- (v) The Respondent has incorrectly levied a penalty of “maximum” Rs. 10.00 crores on alleged grounds of delay of 10 months in advance. Whereas, the juridical basis for any



action of claiming compensation has to be the loss suffered and not any equivalent payment of contractual dues. The alleged imposition of penalty of Rs. 10 Crores, stating that the penalty amount is to be restricted to the sum payable to the Claimant under the price escalation clause available under Clause 10CC is not only untenable in law, but also contrary to the provision in clause 2 of the contract. Hence, this is not an action under clause 2 of the contract and cannot be sustained under the contract.

(vi) The Respondent had mentioned that "*the rate of recovery shall be proportionate to the escalation paid or payable by the University up to 28.02.2019*" with no reasoning whatsoever. The Respondent did not submit the loss suffered based on which the sum of Rs. 10.00 crores was claimed by it. Thus the Respondent intends to make undue gains and intends to take back the payments made under the provision of the price escalation clause in the contract.

20.6 *The contention of the respondent is as under:*

- (i) Vide Letter dated 21.01.2019 respondent conveyed to the Claimant that any further extension shall be subject to the applicable contractual clauses and provisions. The Respondent further issued a Show Cause vide letter dated 21.01.2019 apprising the Claimant that as per the revised work schedule submitted by the claimant, the work was expected to be completed by 15.12.2019 and asked the claimant to show cause as to why action should not be taken as contemplated under Clause 2 of the GCC of CPWD. Thereafter, upon not receiving a timely and satisfactory response, Respondent invoked Clause 2 (i.e. Compensation for Delay) as Respondent was left with no option but to impose the delay compensation as the Claimant had been seeking extensions time and again and it was clear that the Claimant's endeavour to complete the Project by 28.02.2019 (i.e. third and last extension of time) could not be achieved. This fact was evident from the submitted work schedule at the relevant time by the Claimant contemplating to complete the Project by 15.12.2019. Work could only be completed by the Claimant on 30.06.2021 i.e., after imposition of compensation under Clause 2 for the period beyond 28.02.2019.
- (ii) As per Clause 2, the Respondent was well within its right to impose and levy delay compensation (@ 1.5% per month of delay to be computed on per day basis provided always that the total amount of compensation for delay to be paid under Clause 2 shall not exceed 10% of the Tendered Value of work) to the tune of Rs.10 Crores. Further, the alleged contention of the Claimant that the Respondent has not suffered loss is also



not tenable. Respondent had clearly intimated to the Claimant that the proportionate recovery of penalty was as per the escalation paid by the Respondent up to 28.02.2019. Lastly, the Claimant cannot impute allegations on the Respondent by quoting the contents of the letters/emails which were either withdrawn or not put in force by the parties.

20.7 My Findings and Decision:

- 20.7.1 In first extension of time dated 04.05.2018 (C-28), second extension of time dated 06.10.2018 (C-30) and third extension of time (provisional) dated 08.01.2019 (C-32A), one thing is common i.e., a condition that the contractor shall not claim for price escalation citing extended time. This intent was made more clear by respondent vide its email dated 04.01.2019 (though withdrawn later) that for extension of time claimant has to give undertaking that *“the second party shall not be allowed to any benefit of price adjustment/ cost escalation claims beyond the original date of completion of the project dated 09/05/2018”*. Respondent was very clear from the start that it would give extension of time only if the claimant forgoes its right to escalation of cost for the justified period of delay.
- 20.7.2 As claimant denied giving any undertaking to forgo its right for escalation of cost as per contractual provision for justified period of delay, respondent issued a show cause notice under clause 2 on 21.09.2019 (C-33). It appears that this brought the claimant to negotiation table and in this process time elapsed. Perhaps on failure of negotiation claimant submitted reply to show cause notice on 26.02.2019 which was received by respondent on 27.02.2019 (C-33A).
- 20.7.3 Surprisingly enough, the respondent, without addressing the issues raised by the claimant in its reply and without even referring to the claimant’s reply dated 26.02.2019, levied compensation under clause 2 of contract agreement vide letter dated 28.02.2019 (C-35).
- 20.7.4 Relevant extract of letter dated 28.02.2019 (C-35) is produced as under:
*“ In exercise of the powers conferred to the University under Clause 2 of the agreement , the University has determined that you are liable to pay **maximum of Rs. 10.00 Cr** as and by way of compensation as stipulated in clause 2 of the agreement. However, the University **may increase or decrease the same based on the future performance of the contractor.***

The said amount of compensation is hereby levied on you for the period of 10 months (i.e., up to 31st December 2019) and the rate of recovery shall be proportionate to the escalation paid or payable by the University up to 28.02.2019”.

20.7.5 There are many anomalies in order dated 28.02.2019 (C-35) which are as follow:

- (i) As per agreement maximum compensation cannot be increased.
- (ii) A compensation once levied cannot be changed on the basis of future performance as compensation is levied on the basis of past performance.
- (iii) Compensation cannot be levied for futuristic 10 months as contractor may speed up its work and can complete before expiry of 10 months.
- (iv) Recovery of compensation has been made proportional to escalation paid or payable up to 28.02.2019. It means if no escalation is paid or claimed by contractor, no compensation will be levied. Compensation cannot be variable with respect to escalation of cost. There is no such provision in clause 2 or in anywhere in the contract agreement. Compensation cannot be part of barter system which the respondent was trying to enforce since first extension of time.

20.7.6 In view of all the above mentioned findings, I decide that action of respondent under clause of contract agreement was arbitrary, wrong and illegal.

21.0 Claimant and respondent proposed issues to be framed /points of determinations on 31.01.2024 and 22.12.2023 respectively. However, as proposed points of determination/ issues are claim specific, it was agreed by parties to take up these points of determination along with arguments during hearings of the case.

I, accordingly, proceed to adjudicate the individual claims:

CLAIMS:

22.0 Claim No.1: Claim for payment of escalation as billed marked as RA Bill No. 13 dated 04/05/2019 to RA Bill No. 22 dated 31/03/2021 (Rs. 8,33,28,553).

22.1 Claimant's Case:

22.1.1 As per the terms of the contract, the Claimant is entitled to payment of escalation under clause 10 CC. Once the time is set at large and the Respondent accepts performance of the contract and records completion in July 2021, the Respondent cannot deny extension of time. Time is deemed to be extended till the date of completion.

22.1.2 The contract rather provides that no escalation is entitled at all for the period for which there are liquidated damages imposed under the clause 2.



22.1.3 Respondent was required to decide extension of time independently and solely on the grounds specified under clause 5. Hence, the escalation payment under clause 10CC is payable till the date of completion is recorded. The payment due under Clause 10CC is Rs. 8,33,28,553/- (details as **Annexure 'A'**).

22.2 **Respondent's Case:**

22.2.1 RA Bill No.13 dated 04.05.2019 to RA Bill No.22 dated 31.03.2021 were raised by the Claimant on account of escalation as per Clause 10CA and 10CC of the GCC of CPWD. However, in exercise of the powers conferred to the Respondent under Clause 2 of the GCC of CPWD, the Respondent vide its Letter dated 28.02.2019 had already imposed a penalty by way of compensation of Rs.10 Crores for the period beyond 28.02.2019. It is clearly stipulated in Clause 10CA and 10CC of the GCC of CPWD that the escalation bills shall not be acceptable in the extended period of the Contract if the Contract has been extended by the Respondent after the imposition of Clause 2 of the GCC of CPWD.

22.3 **My Findings & Decision:**

22.3.1 The relevant portions of Clause 10CA and Clause 10CC in the agreement are produced as under:

Clause 10CA

If after submission of the tender, the price of materials specified in Schedule F increases/ decreases beyond the base price(s) as indicated in Schedule F for the work, then the amount of the contract shall accordingly be varied and provided further that any such variations shall be effected for stipulated period of Contract including the justified period extended under the provisions of Clause 5 of the Contract without any action under Clause 2.

However for work done/during the justified period extended as above, it will be limited to indices prevailing at the time of updated stipulated date of completion considering the effect of extra work (extra time to be calculated on pro-rata basis only as cost of extra work x stipulated period/tendered cost).

Note: (i) In respect of the justified period extended under the provisions of clause 5 of the contract without any action under clause 2, the index prevailing at the time of updated stipulated date of completion considering the effect of extra work (extra time to be calculated on prorata basis only as cost of extra work x stipulated period/ tendered cost) shall be considered.

CLAUSE 10 CC

If the prices of materials (not being materials supplied or services rendered at fixed prices by the department in accordance with clause 10 & 34 thereof) and/or wages of labour required for execution of the work increase, the contractor shall be compensated for such increase as per provisions detailed below and the amount of the contract shall accordingly be varied, subject to the condition that such compensation for escalation in prices and wages shall be available only for the work done during the stipulated period of the contract including the justified period extended under the provisions of clause 5 of the contract without any action under clause 2. No such compensation shall be payable for a work for which the stipulated period of completion is equal to or less than the time as specified in Schedule F.

Note: Updated stipulated date of completion (period of completion plus extra time for extra work for compensation under clause 10C, 10CA and 10CC The factor of 1.25 taken into account for calculating the extra time under clause 12.1 for extra time shall not be considered while calculating the updated stipulated date of completion for this purpose in clause 10C, clause 10CA, and clause 10CC.

22.3.2 The Clause-10CA & Clause 10CC clearly stipulate that escalation shall be payable for the justified period extended without any action under Clause-2 and not for the period for which action under Clause-2 is taken. Hence, claimant is entitled to payment under Clause-10CA and Clause 10CC for the quantity brought to site and work done at site in the justified extended period respectively. As per Clause-10CA and Clause 10CC, for the work done during the justified period, the payment shall be limited to indices prevailing at the time of updated stipulated date of completion or as prevailing for the period under consideration whichever is less.

22.3.3 As determined under para 19.2 supra, justified extended period is 368 days from 09.05.2018 i.e., stipulated date of completion. It means justified extended period is up to 11.05.2019 without any action under Clause 2 and claimant is entitled for escalation of price up to 11.05.2019.

22.3.4 Claimant as per **Annexure-A, CD-3**, initially claimed Rs. 8,33,28,555 against this claim which has been modified to Rs. 7,92,41,695 (**CD-9**). The respondent was directed to check / verify the same without prejudice to its contention that the claim for the extended period is not admissible and the same was verified by the respondent (**RD- 9**). Admissibility of claim already decide in para 22.3.3 supra.

22.3.5 Modified claim of Rs. 7,92,41,695 consists of claim under clause 10 CA up to July, 2020 and claim under 10CC up to April 2021 with price indices frozen on February 2019. Price escalation is payable up to May, 2019 as found in para 22.3.3 supra and the same has been worked out as under:

10 CC Escalation Amount up to May, 2019

- (i) 10CC From Feb-19 to Apr-19 = 44,94,240 (as worked out in CD-9)
- (ii) 10CC for May-19 = $[22744478(W) \times 0.4(Xm) \times (215.74(MI) - 202.32(Mo) / 202.32(Mo))] + [22744478(W) \times 0.25(Y) \times (373(LI) - 246(Lo)) / 246(Lo)]$
- = 35,38,979
- Total = 80,38,219

10 CA Escalation Amount up to May, 2019

Sep-18	19,45,957 (as worked out by claimant in CD-9)
Oct-18	59,95,497 (as worked out by claimant in CD-9)
Nov-18	2,62,569 (as worked out by claimant in CD-9)
Dec-18	35,56,231 (as worked out by claimant in CD-9)
Jan-19	0
Feb-19	4,931 (as worked out by claimant in CD-9)
Mar-19	4,68,365 (as worked out by claimant in CD-9)
Apr-19	12,47,284 (as worked out by claimant in CD-9)
May-19	39,49,872 (as worked out by claimant in CD-9)
Total	1,74,30,706

Total Escalation up to May 2019 = 80,38,219 + 1,74,30,706
= 2,54,68,925

Award: Based on my finding as above, I award Rs. 2,54,68,925 (Rupee Two Crore Fifty Four Lakh Sixty Eight Thousand Nine Hundred Twenty Five Only) in favour of claimant under Claim 1

23.0 **Claim No.2: Claim for release of amount on hold allegedly for non-submission of 'No Claim Certificate' (Rs. 27,26,225/-)**

23.1 **Claimant's Case:**

An amount of Rs. 27,26,225/- has been withheld by the Respondent from the certified payments to be released to the Claimant (**Exhibit C-49**). There is no contractual or legal basis for withholding such sum of money from the dues of the Claimant by the

Respondent. The Respondent could not coerce the Claimant to give a No Claim Undertaking. A No Claim Certificate, if any, has to be based on true and valid consent of the parties. Hence, the withholding of the amount of Rs. 27,26,225/- by the Respondent is wrongful and should be refunded to the Claimant, with interest (which is claimed separately).

23.2 Respondent's Case:

Respondent has with-held the aforesaid amount of Rs.27,26,225/- on account of non-submission of 'No Claim Certificate' by the Claimant. Respondent vide its Email dated 20.07.2021 (**Annexure R-38**) had intimated the Claimant regarding the submission of No Objection Certificate for no pending dues up to Final Bill.. M/s Ganesh Enterprises, Rangpo, East Sikkim, a supplier, vide its Letter dated 13.07.2021 (**Annexure R-37**) had intimated registration of Complaint against claimant vide General Diary No.1407 dated 10.07.2021 of Yangang Police Station, Sikkim, Gangtok (**Annexure R-36**). The Respondent as a prudent measure decided to with-hold the said amount in the apprehension that some other claims may also arise in the future by other suppliers/vendors/sub-contractors/labourers of the Claimant or other Forest/Environment/Labour Departments regarding payment of their legitimate dues. It is further submitted by the Respondent that furnishing the 'No Claim Certificate' is an integral part of the Contract Agreement. The mere act of declaration of the 'Integrity Pact' by both the Parties and signing the Integrity Agreement dated 23.11.2016 (**Annexure R-35**) by the Claimant in itself is to pledge to 'Unconditional and Absolute Acceptance of Terms and Conditions of the NIT'. The Respondent University, in exercise of its powers conferred in Clause 29 of the GCC of CPWD holds the entitlement to withhold and lien to retain any such amount in respect of any sum due from the Claimant Contractor as well as the RISK and COST expenses incurred.

23.3 My Findings & Decision:

23.3.1 From page 2 of RD- 9, it is clear that amount under this claim has been withheld/ recovered on account of following:

- (i) Non submission of NOC from Dept. of Power
- (ii) Non submission of NOC from Dept. of Forest
- (iii) Non submission of NOC from Dept. of Labour
- (iv) Non submission of No claim Certificate
- (v) Non submission of documents against General Diary of Sub Vendor

23.3.2 The respondent has verified that NOCs for S. No. (i) and (iii) above have been received (**page-2, RD-9**). Respondent has received royalty documents against S. No.2 but not considering it as NOC. On perusal of royalty document (**CD-9**) it is clear that payment of royalty up to 30.06.2021 has been verified by Forest department and since then till date, there is no complaint pending with respondent against claimant for less payment of royalty. Therefore withholding / recovering amount of account of S. No.(i), (ii) and (iii) is not tenable.

23.3.3 The respondent could not cite any provision of the Contract Agreement including Integrity Pact, on the basis of which amount has been withheld by respondent for non submission of No Claim Certificate. Withholding / recovering of amount on this ground is arbitrary, ad-hoc and beyond the scope of CA. Similarly there is no provision for recovery in CA against S. No. (v) above. Assuming contention of respondent that amount can be withheld under Clause 29 of CA as correct, it would have been withheld from Security Deposit. Even the claimant could not finalise or adjudicate the claim of sub vendor till date. The amount cannot be withheld for indeterminate time. Moreover copy of no FIR has been filed by respondent in favour of S. No. (v). Therefore I do not find withholding / recovery against S. No. (iv) & (v) above, tenable. I find the claimant entitled for Rs. 27,26,225 against this claim.

Award: I award Rs. 27,26,225 (Rupee Twenty Seven Lakh Twenty Six Thousand Two Hundred Twenty Five Only) in favour of claimant under Claim 2

24.0 **Claim No.3: Claim for release of amount incorrectly put on hold on alleged claim against defects stated to have been identified during taking over of worksite. (Rs. 17,92,332/-)**

24.1.1 **Claimant's Case:**

It is not at all in notice of the alleged defects stated to have been identified by the Sikkim University during taking over of work site. The claimant has thereafter also been deprived of the scope to correct the defects if at all they were present during the stated handover. The work has been recorded completion on 30th June 2021. The defect liability period under clause 17 is thereby over on 30th June 2022. For any recovery for any alleged defect, the said clause 17 lays down a specific procedure and requires the Respondent to serve a notice to the Claimant within the defect liability period for rectifying the defect. In case the Claimant fails to rectify such defects, then the Respondent could rectify the defects on its own and recover the cost from the security

deposit amount of the Claimant. The Respondent is in breach of contract by withholding money payable to the Claimant, unless and until the same become due under the procedure prescribed under the said clause 17. There is nothing due under the clause 17, that the Respondent could demand. As such, there is no such provision in the contract for withholding money of the Claimant Contractor. Withholding of Rs. 17,92,332/- is wrongful.

24.2 **Respondent's Case:**

There have been several correspondences wherein respondent has repeatedly informed claimant regarding the poor progress, showing quality failures, insufficient technical persons, proforma & shuttering arrangements, machineries, poor quality & serious violations etc. Respondent vide e-mail dated 18.03.2021 (Exh R-34) along-with the attached report dated 17.03.2021, requested the claimant to rectify the defects. This clearly shows that letter dated 17.03.2021 (Exh C-45A) by the claimant for issue of Final Completion Certificate is far from the actual circumstances. Respondent after joint inspection on 08.04.2021 to verify the repair and rectification work done by the claimant, informed the claimant vides its email dated 08.04.2021 (Exh R-34) that the said work done by the Claimant is not satisfactory in nature. The Hand Over/ Taking Over Report dated 12.07.2021, duly signed by the claimant showcases that the Claimant accepted the listed defects in the said report but the Claimant never performed its contractual obligations to rectify the listed defects in the Hand Over/Taking Over Report during the Defect Liability Period of 12 months.

24.3 **My Findings & Decision:**

- 24.3.1 Recovery has been made by respondent on account of defective work by applying certain ad-hoc %age on entire quantity of Formwork, M-25 Concrete, External Plaster, Roof Gutter and Roof Sheeting (**page 3 of RD-9**). The respondent failed to establish specific locations/points where work was defective. As per page 2 of RD-9 "*the committee after due physical verification & evaluation recommended that the minor defects do not affect the overall quality & usability of the buildings. Accordingly, the buildings may be taken over by charging penalty on the contractor*". From the report of committee it is clear that defects were in superficial in nature and recommended penalty. But there is no provision of ad-hoc penalty in contract agreement.
- 24.3.2 In this case, respondent had two options (i) it could have made payment at reduced rates after making actual measurements of defective items and proper analysis of market

rates of those items (ii) it could have got the defects rectified by some other agency and would have recovered the amount of rectification of defects from the claimant at the rates actually paid. The respondent did not adopt any of the two methods. Instead recovery has been made on total quantities of items at arbitrarily decided percentages which have no justification.

24.3.3 In view of the above, I find recovery of Rs. 17,92,332 by respondent not tenable.

Award: I award Rs. 17,92,332 (Rupee Seventeen Lakh Ninety Two Thousand Three Hundred Thirty Two Only) in favour of claimant under Claim 3

25.0 **Claim No.4: Claim for release of amount incorrectly put on hold alleged as 'Staff penalty' (Rs. 65,62,600/-)**

25.1.1 **Claimant's Case:**

Respondent has all along functioned without the promised assistance of PMC. The work has prolonged for reasons not attributable to the Claimant and the Claimant had the duty to mitigate its loss. There is no action by the Respondent under the relevant Clause 36 of the GCC to affect recovery for non-deployment of staff. Such a recovery, in essence, is a provision of penalty and cannot be sustained unless there is evidence of legal injury or loss to the Respondent for any alleged non-deployment of staff. There is no evidence that the quality of the work has suffered or staff were not available to take instruction from the Respondent; whereas the Respondent itself had disengaged the PMC to save cost and breached the contract. Hence, no such money can be kept on hold by the Respondent which is arbitrary and the sum is liable to be released in favor of the Claimant.

25.2 **Respondent's Case:**

Respondent/ PMC vide its letter dated 02.08.2017 intimated claimant regarding non-availability of technical persons. Further, respondent vide its letter dated 26.09.2017 (Exh R-40) informed the claimant regarding the absence of quality in-charge from the site. Furthermore, the respondent vide its letter dated 14.10.2017 informed the claimant regarding the presence of no key technical representatives. Claimant vide letter dated 28.06.2018, have accepted that deployment of key personnel as per Clause 36.1 of GCC of CPWD was 'nearly' satisfied and not 'completely satisfied'. It is also to be noted herein that in R.A. Bill Nos.1, 3, 6 and 17, the deduction of shortfall of staff and recovery thereof was proposed by the claimant itself (Exh R-41).

25.3 **My findings and decision:**



Providing technical persons at site as per clause 36 of the Contract Agreement (CA) was contractual obligation of claimant. As per submission of respondent, the claimant failed in fulfilling this contractual obligation, hence recovery for the same at the rate prescribed in the CA has been proposed by respondent. Claimant's statement that respondent disengaged services of PMC during the work cannot be considered a reason for deployment of less number of technical persons by claimant. The claimant could not justify its claim in its pleadings. Therefore, I find this claim not tenable.

Award: I award NIL amount against claim no.4 in favour of claimant.

26.0 **Claim No. 5: Claim for additional expenses due to prolongation of contract on Overheads and site Establishment, deployment of manpower, etc. beyond the stipulated date of completion. (Rs. 2,84,22,107/-(as referred) and Rs. 6,19,57,726/-(as per SoC))**

Claim No.6: Claim for additional expenses due to prolongation of contract on deployment of plant, machinery, tools, etc. beyond the stipulated date of completion (Rs. 6,01,56,163/-)

Claim No.7: Claim for locked up deposit Bank Guarantees and expenses on renewal of Bank Guarantees in the extended period. Rs.13,94,521/-(as referred) and Rs. 59,00,733/-(as per SoC))

26.1 Admittedly, the agreement is based on CPWD Form of Contract and the respondent follows CPWD guidelines which are all in public domain. CPWD O.M. No. DGW/MAN /169 dated 31.12.2008 lists out various factors which are included in the "overheads". Keeping in view of this O.M., claim no. 5, 6 & 7 can be clubbed together and considered as one claim, that is, claim on account of compensation for loss due to extra expenditure on overheads because of prolongation of contract. I proceed accordingly.

26.2 **Limitation on Claims:** I have carefully studied these claims and the pleadings & submissions made by claimant. These claims are founded on the breach by respondent in terms of delay in work caused by respondent and the claimant seeks compensation due to this breach. I refer to Art. 55 of Limitation Act as under:-

" 55. For compensation for the breach of any contract, express or implied not herein specially provided for	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it
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ceases)

Claimant in its application for extension of time raised many hindrances on which alleging breach by respondent. Therefore unless respondent decides on extension of time case, the claimant may not know as which one was last justified hindrance to consider as breach and from where limitation period to start. Even then I am relying on extension of time case. As per Hindrance Register (**Annexure R- 6**), last hindrance ceased on 24.09.2018 (S. No. 31, 32 & 33). Thus as per Art.55 of Limitation Act, the clock of limitation had started ticking not later than 25.09.2018 in respect of these claims and the limitation of three years expired not later than 24.09.2021. However as per order dated 10th January 2022 of Supreme Court of India in case MA No. 21 of 2022 in MA No. 665 of 2021 in Suo Motu WP(C) No. 3 of 2020, period from 15.03.2020 to 28.02.2022 shall stand excluded for the purpose of limitation. Further balance period of limitation remaining on 15.03.2020 i.e., 1 year & 194 days (from 15.03.2020 to 24.09.2021) shall become available with effect from 01.03.2022 i.e., up to 10.09.2023. Claimant revoked arbitration as per clause 25 on 19.12.2022. Accordingly, as per S-21 of A & C Act, the date of referral of dispute shall be reckoned as 19.12.2022 which is within the date of 10.09.2023. Thus, these claims are well within the limitation of 3 years.

26.3 Amounts of claim no 5 & 7, referred to Arbitral Tribunal by competent authority under clause 25 of the agreement, are Rs. 2,84,22,107 and Rs. 13,94,521 respectively whereas as per statement of claims, these amounts are Rs. 6,19,57,726 and Rs. 59,00,733 respectively. As upward revision in claim amount is required to be referred by competent authority under clause 2 of the agreement, which has not been done in this case I will restrict claim amounts of claim no 5 & 7 to the amounts referred under clause 25.

Specific submission by the parties on claim nos. 5, 6 and 7 are as per paras that follow

26.4 **Claimant's Case on claim no.5:**

26.4.1 Stipulated period of completion had to be extended for reasons that are all beyond the Claimant's control. The various delay events are already explained in paras 6 to 10 of SoC. Hence in addition therewith, the original rates quoted, the Claimant is also entitled to compensation towards fixed cost affected for performing the work during prolonged period which is not compensated. The expenditure on the deployment of manpower, etc. in the prolonged period is amounting Rs.6,19,57,726/-. The month-wise necessary

details are furnished and the certification by the Chartered Accountant is annexed marked in the form of **Annexure - 'B'** herewith. The Claimant also submits that the subject claim is in harmony with the provisions under Section 73 of the Indian Contract Act, praying that once there is breach of contract, damages are payable. The expenditure on the cost of deployment of manpower, machinery, insurance and bank charges for project etc. in the prolonged period setting aside the period lost on COVID issues, i.e., 6 months is amounting to said Rs. 2,84,22,107/-.


26.5 Respondent's Case on claim no.5:

26.5.1 Delays were attributable to the Claimant due to quality failures, insufficient technical persons, proforma & shuttering arrangements, machineries, poor quality & serious violations, etc. during the execution of the project. The delays have further been explained in detail vide respondent's letter dated 05.07.2022. Further, the hindrances which were beyond the control of claimant and respondent were duly considered and reasonable extension of 294 days was granted to the claimant for the timely completion of the project. Therefore, the claimant cannot hold the respondent liable for the delay pertaining to the justified period of extension which was provided up-till 28.02.2019. Further, the respondent is also not liable for the extended period beyond the justified period of extension i.e. 28.02.2019 till the completion of the project on 30.06.2021 as the reason for delay was primarily attributable to the claimant and due to which, the Respondent was left with no option but to impose compensation as per clause 2 of the GCC of CPWD vide its letter dated 28.02.2019. Lastly, it is submitted that no damages as per the provisions of Indian Contract Act, 1872, can be claimed against the respondent when the respondent is not at fault for the prolongation of the contract.

26.6 Claimant's Case on claim no. 6:

Claimant contractor did bear additional expenses on maintaining and operating its Plants, Machinery, tools, form works, etc. beyond the stipulated period of completion. The schedule of completion as originally submitted and duly accepted at Respondent end was meticulously planned. However, the same continued up to extended period. The Claimant has explained the delay events in paras 6 to 10 of SoC. The expenditure on hire charges/maintenance of plant & machinery, formwork, other tools & material etc. for the prolonged period is amounting to **Rs. 6,01,56,163/-**. The month-wise necessary details is furnished in the form of **Annexure - 'C'**.

26.7 Respondent's Case on claim no. 6:



Delays were attributable to the Claimant due to quality failures, insufficient technical persons, proforma & shuttering arrangements, machineries, poor quality & serious violations, etc. during the execution of the project. The delays have further been explained in detail vide respondent's letter dated 05.07.2022. Further, the hindrances which were beyond the control of claimant and respondent were duly considered and reasonable extension of 294 days was granted to the claimant for the timely completion of the project. Therefore, the claimant cannot hold the respondent liable for the delay pertaining to the justified period of extension which was provided up-till 28.02.2019. Further, the respondent is also not liable for the extended period beyond the justified period of extension i.e. 28.02.2019 till the completion of the project on 30.06.2021 as the reason for delay was primarily attributable to the claimant and due to which, the Respondent was left with no option but to impose compensation as per clause 2 of the GCC of CPWD vide its letter dated 28.02.2019. Lastly, it is submitted that no damages as per the provisions of Indian Contract Act, 1872, can be claimed against the respondent when the respondent is not at fault for the prolongation of the contract. It further observed and held that the claim is barred by limitation and no expressive calculations were given before the respondent earlier. It further held that the claim is a repetition of previous claim under the head of site establishment.

26.8 Claimant's Case on claim no. 7:

Due to prolongation of contract period the Claimant had to renew the bank guarantees multiple times. The unreasonable prolongation of work was never contemplated during the submission of subject tender. There was no scope to cater for the huge expenses made towards renewal of Bank Guarantees and this expense is liable to be reimbursed from the Respondent end to NCC Limited as consequential payment of damages. The additional expenses made on this account is Rs. 59,00,733/- and the Respondent liable to reimburse the same. The details of cost spent on recurring renewals are furnished in the form of **Annexure - 'D'**.

26.9 Respondent's Case on claim no. 7:

The work in execution of the project was prolonged due to reasons primarily attributable to the claimant which have been mentioned in the Statement of Defence against the foregoing claims. It is a settled position that the Bank Guarantee was to be renewed by the claimant up to the Defects Liability Period mentioned in the Contract Agreement. It is further submitted that no extra cost is required to be paid by the

Respondent to the Claimant to extend the Bank Guarantee as per clause 1 of the GCC of CPWD. Thus, no extra cost is allowed to be compensated from the Respondent under the provisions of the contract agreement.

26.10 My Findings and Decision on claim no.5, 6 and 7:

26.10.1A numbers of claims of the claimant are on account of losses allegedly suffered due to prolongation of the contract which the claimant has raised under section 55 and 73 of the Contract Act, viz. compensation for losses due to extra overheads and overstay of plant and machinery etc. Hence it is considered essential to first decide whether the claimant is entitled for such compensation.

26.10.2The agreement as per clause 5 provides for extension of time whereas clause 2 thereof provides for levy of compensation if the work does not progress in terms of clause 5 or is not completed on or before the contract or extended date of completion. Hence, it is implied that time as stipulated in the agreement was not intended to be essence of the contract in the real and effective sense of the term.

26.10.3As already discussed in para 19.3 supra, the respondent failed to perform its fundamental reciprocal promises and thus committed breach for delay of 145 days which goes to very root of the contract. The non-performance of the reciprocal promises by the respondent on which depended the reciprocal promise by the claimant, that is, to complete the work in the stipulated period attracts section 54 of the Indian Contract Act, 1982. According to which the respondent is liable to make compensation to the claimant for any loss which the claimant may have sustained by the non performance of the reciprocal promise by the respondent.

26.10.4As held in para 26.10.2 supra, the time was not the essence of the contract. Hence as per second para of section 55 too, the claimant is entitled to compensation from the respondent for any loss occasioned to it by failure of the respondent to perform its reciprocal promise in time. It is also noted from section 55 that in such cases no notice is required to claim compensation if the parties continue to perform beyond the specified date of completion. Such a notice is required only if the time is essence of the contract as stated in para 3 of section 55.

26.10.5Further to above, I have held in para 19.3 that there was breach by respondent which was of fundamental nature and which goes to root of the contract. Hence, under section 73 of Indian Contract Act, 1872 too, the claimant is entitled to compensation for loss

caused due to breach by the respondent which naturally arose in usual course of things from such breach provided the loss is not remote and indirect.

26.10.6 It is natural that in a competitive bidding, as in the instant case, a contractor would quote his contract price in genuine anticipation that the work would be completed in the stipulated period of completion. Hence, if there is prolongation of the contract period, the contractor is bound to suffer losses due to unanticipated and unavoidable liability on account of extra expenses on overheads during the extended period. It therefore follows that if the prolongation is due to reasons attributable to the employer as is the present case, the employer is liable to compensate the contractor for such losses. I also hold that such losses naturally arose in the usual course of things from breach and that these losses cannot be treated as remote and indirect loss in terms of section-73 of Indian Contract Act, 1872.

26.10.7 Based on my findings above, it is held that the claimant is entitled to compensation for loss due to extra overheads because of prolongation of the contract period for 145 days.

26.10.8 Section 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the compensation has to be assessed. However, I am of the view that the method to be employed should be such that stands to reason.

26.10.9 As submitted by claimant, its expenditure on these three claims from 01.03.2018 to 31.03.2021 (37 months) is as under:

S.No.	Claim No.	Expenditure incurred (in Rs.)	Reference
1	5	61957726	Page no. 456 to 499 of CD-3
2	6	58665922	Page no. 503 of CD-3 (amount not tally with amount given in abstract at page 500)
3	7	2938175	Page no. 505 of CD-3 (expenses on interest of mobilization advance not considered as it was on principle amount which was with claimant)
Total		123561823	

Average expenditure per month on claim no. 5, 6 & 7 = $12,35,61,823/37$

= 33,39,509

It is not known whether this expenditure was optimum and it could not have been reduced further and it does not include wasteful expenditure. Therefore, assuming 70% of this expenditure i.e., 23,37,656 (33,39,509 x 0.70) would be optimum expenditure per month as overheads during extended period.

26.10.10 It will be prudent to cross check this with other method. As schedule 'F' is an agreed term of contract, I am of the view that percentage of overheads as per this schedule can be the basis for working out the reasonable compensation for comparison.

26.10.11 As some of the overheads are of fixed nature like office set up, cement godown etc. for which recurring expenditure is minimal, I am of the view that as against 7.5% overheads stipulated in schedule F, it would be appropriate to consider 5% as overheads factor. Accordingly, the average overheads liability per day works out as under:

(a) Contract Price including all overheads and profits = Rs. 1,06,45,26,587

(b) Prime cost (i.e., excluding overheads and profit @15%) = Rs. 92,56,75,293

(c) Cost of all overheads for stipulated period @ 5% of prime cost = Rs. 4,62,83,765

(d) Stipulated time of completion = 18 Months

(e) Average overheads per month = Rs. 25,71,320

26.10.12 On comparison of two, I find that expenditure of Rs. 23,37,656 per month is reasonable and on the basis of this average overheads per month, overhead charges for 145 days = $(145 / 365) \times 12 \times 23,37,656 = 1,11,43,894$

26.10.13 The party who incurs losses due to breach on the part of the other party is required to take measures to mitigate its losses. Taking into consideration the nature of work and other related facts, I consider it reasonable to apply a reduction factor of 20% on the amount on this account. The reasonable amount of compensation would accordingly be 80% of 1,11,43,894 = Rs. 89,15,115

Award: I award Rs. 89,15,115 (Eighty Nine Lakh Fifteen Thousand One Hundred Fifteen Only) against claim no.5, 6 and 7.

27.0 **Claim no. 8: Claim for Interest @ 15% per annum on claim amounts against claim no 1 to 7 above with effect from the date the amount was actually due for payment till date of award.**

27.1. **Claimant's Case:**

The Claimant suffers due to blockage of its money by the Respondents. The Cost of Capital in construction industry is very high and the Claimant had to arrange money at

commercial rates. The Claimant claims interest as per as per Section 31(7) (a) of the Arbitration and Conciliation Act, 1996 on Claim No. 1 to Claim No. 7 enumerated above @ 15% per annum for the pre award period. The Claimant also claims post award interest on awarded sum including interest as per Section 31(7) (b) of the Arbitration and Conciliation Act, 1996.

27.2 Respondent's Case:

Claims No.1 to 7 are untenable and no claim is legally subsisted, therefore, no interest is liable to be paid in the said regard.

27.3 My Findings and Decision:

27.3.1 Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, as amended, confers upon the Arbitral Tribunal the power to award interest in cases where the arbitration award is for payment of money.

27.3.2 Admittedly the parties have not agreed otherwise, i.e., there is no agreement between the parties that no interest shall be paid on the sum to be awarded by the tribunal or court. Hence the claimant is entitled to interest on award as provided in Section 31(7)(a) of the Act.

27.3.3 Claimant has been deprived of its dues and its capital was blocked from further investment and earnings and claimant is eligible to be compensated for losses by way of interest. This is direct loss as a natural consequence and no proof is required to establish the same.

27.3.4 Claimant is entitled to interest on amounts awarded under claim no.1 & 2 from date of final bill i.e., 05.10.2021 and on amounts awarded under claim no.3, 5, 6 and 7 from date of invocation of arbitration i.e., 19.05.2022.

27.3.5 I consider it reasonable to award interest @ 9% per annum (simple) on the awarded amounts on claims for the respective due periods as stated above. Accordingly, the amount of interest works out as under:

Claim/Sub Claim No	Amount awarded (Rs.)	Period of interest to be considered	Amount of interest (Rs.)
1	2,54,68,925	From 05.10.2021 to 30.09.2024 (2.98907 yrs)	$25468925 * 0.09 * 2.98907 = 68,51,556$

2	27,26,225	From 05.10.2021 to 30.09.2024 (2.98907 yrs)	$27,26,225 * 0.09 * 2.98907 = 7,33,399$
3	17,92,332	From 19.12.2022 to 30.09.2024 (1.78415 yrs)	$17,92,332 * 0.09 * 1.78415 = 2,87,801$
5,6 & 7	. 89,15,115	From 19.12.2022 to 30.09.2024 (1.78415 yrs)	$89,15,115 * 0.09 * 1.78415 = 14,31,531$
Total			93,04,287

Post award interest is decided later on in the award.

AWARD: I award an amount of Rs. 93,04,287 (Rupee Ninety Three Lakh Four Thousand Two Hundred Eighty Seven Only) in favour of the Claimant as interest up to the date of award.

28.0 **Claim no.9: Claim for reimbursement of GST payable on the award amount.**

28.1 **Claimant's Case:**

The Claimant humbly submits that the work was commenced in the pre-GST period partly executed then and completed on 31/03/2021. The CGST Act, 2017 was implemented from 01st July 2017. In the present context of the matter as per statutory guidelines under the CGST Act, 2017, the Claimant would be liable for payment of GST @ 18% over entire awarded amount. The Claimant prays for declaratory Award of said claim to reimbursed as to be accrued.

28.2 **Respondent's Case:**

Claims No. 1 to 8 of the Statement of Claims are untenable and no claim is legally subsisted, therefore, the claim for reimbursement of GST payable on the award amount is not valid.

28.3 **My Findings and Decision:**

Govt. of India issued order on 01/07/2017 for imposing GST on all purchases and all payment to be received. The Claimant had to pay GST on all payments received after 01/07/2017 as per GST ACT. Accordingly, I award that GST payable in future by the claimant contractor on the award amount would be reimbursed by the respondent within

15 days of receiving such claim and after satisfying about the said payment made to the GST authority.

29.0 Claim no.10: Claim for cost of arbitration

This Claim has been dealt later in this award together with the Counter Claimant/respondent's Counter Claim No.10.

30.0 Counter Claim No.1: Reimbursement of loss attributable to the Respondent due to delay in execution of de-scoped works and for awarding said works to a new contractor i.e., ITDC India Ltd. at higher rates under "Construction of Various Buildings for Sikkim University – Package 2"..... Rs.2,53,00,000/-

30.1 Counter Claimant's/ respondent's Case:

Counter-Claimant has suffered losses on account of delay in the execution of de-scoped works from the scope of the work required to be fulfilled by the respondent/Contractor. The final cost of the work executed by the Respondent/Contractor came out to be Rs.93.99 Crores against the initial awarded amount of Rs.106.45 Crores to the Respondent/Contractor. Therefore, work of Rs.12.46 Crores was de-scoped from his scope of work to meet the timelines of the present time-bound project as the Respondent/Contractor failed to complete the work within the stipulated period of time (including the justified period of extension granted to the Respondent/Contractor till 28.02.2019). Counter-Claimant shown leniency while granting justified extensions and in descopeing the work upon the request of the Respondent/Contractor. Completion of project took place only by 30.06.2021. Counter-Claimant awarded de-scoped works to the new contractor in its future tender which was "*Construction of Various Buildings for Sikkim University – Package 2*" for Rs.303.55 Crores. The new contractor quoted 20.34% above the tendered value i.e. Rs.365.29 Crores (Exh CC-2). On this account, loss as suffered by the Counter/ Claimant is Rs. 2.53 Crores. Hence, the Respondent/Contractor is liable to reimburse the said amount to the Counter-Claimant.

30.2 Claimant's case:

The Claimant denies this counterclaim, as it has no contractual or legal basis. Respondent never took any action under clause 14, for the descoped work, to entitle it to any claim for risk and cost. Hence, when there is a specific provision in the contract for claiming risk and cost amount and the same is not acted upon by the Respondent, it could not claim any such damages from the Claimant, on this ground alone. The Respondent has alleged that on the request of the Claimant items of works to the tune

of Rs. 12.46 crore were de-scoped, which was allegedly subsequently executed through another contractor at 20.34% higher rates. The allegation of the Respondent that items of work were de-scoped on the request of the contractor is factually incorrect. Facts remain that items of doors, windows, flooring, fall ceiling and PVC Raceways were not in the scope of the contract allotted to the Claimant. Certain BOQ items for PVC conduits viz. item no 3.0027, 3.0028 and 3.0029 could not be executed in absence of connected items of flooring, fall ceiling, doors, windows, flooring and PVC Raceways, which were not in the scope of the Claimant, and hence the Claimant vide letter dated 08.05.2019 requested the Respondent to delete these items. Similarly, the internal plastered item no. 1.0160 and 1.0162 provided in the BOQ could not be executed to the full quantity as provided in the contract. The Respondent, accordingly deleted these items and decided to reduce the quantities of item no. 1.0160 and 1.0162 vide letter dated 10.05.2019 allegedly under special conditions of the contract Clause 3.1. (B) 7. In this regard it is submitted that there is no such Clause 3.1. (B) 7 in the contract. Further for de-scoping, the same has to be under Clause 13 and in that case, there is no risk and cost involved. The Respondent while de-scoping such items vide letter dated 10.05.2019 did not notify the Claimant that these items are being de-scoped, to be executed through another contractor at the risk and cost of the Claimant. The Respondent never claimed this amount even in the final bill, which it ought to have done, if it had a legitimate claim.

30.3 My Finding and decision:

30.3.1 Respondent/Counter Claimant has assumed that work always finishes at tendered amount which is not true. Actual amount of execution of work may vary from tendered amount as tendered amount is based on estimation of quantities of various items. Therefore, calculation of amount of descoped work, given by respondent is not agreed to. Work can be descoped for that amount only for which both parties agree. As per C-53 and R-28, both parties agreed to descope the work amounting Rs. 6,68,57,005. Respondent issued order in this regard on 20.02.2019 (Exh. R-28 and C-53). In this order, it is nowhere mentioned that later on descoped work will be got done at risk & cost of claimant. In case of risk and cost situation, difference of cost is adjusted from the final bill which is not so done in this case. This counter claim is an afterthought only without any legal support. Therefore, I do not find this counter claim tenable.

Award: In view of above, counter claim no.1 is rejected

31.0 **Counter Claim No.2: Reimbursement of loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.1... Rs.15,00,000/-**

31.1 **Counter Claimant's/ Respondent's Case:**

The Counter Claim is on account of loss suffered by the Counter Claimant due to change in the rate of GST from 12% to 18% (Annexure CC-3) on amount claimed under Counter-Claim No.1. The Counter-Claimant would not have incurred the differential rate/amount of 6% increase in the GST rates had the Project Work would have been executed by the Respondent/Contractor within the justified period of time i.e. 28.02.2019. Therefore, the additional excess amount to the tune of Rs.15,00,000/- is attributable to the Respondent/Contractor.

31.2 **Claimant's case:**

The Claimant has made out its case in the above Counter-Claim No.1 that it is not tenable. Respondent has no legitimate Counter-Claim No. 1 and as such it is not entitled to an award of additional GST of 6% on the above-mentioned Counter-Claim no. 1.

31.3 **My Finding and decision:**

As I decided that Counter Claim No.1 is not tenable, I reject this Counter Claim for difference of GST on Counter Claim No.1.

Award: I award NIL amount against Counter Claim no.2 in favour of counter-claimant.

32.0 **Counter Claim No.3: Reimbursement of loss towards extra expenditure incurred due to rent and miscellaneous overheads, etc. for the period beyond 01.03.2019 up to 30.06.2021- Rs. 18,96,00,000/-**

32.1 **Counter Claimant's/ Respondent's Case:**

On account of the failure of the contractor to complete the project by 28.02.2019 and the fact that the Handing Over/Taking Over Note was finally executed between the parties only on 12.07.2021 which clearly recorded the completion of project on 30.06.2021 that too with defects, the Counter Claimant was not in a position to operate and maintain the University due to which, the Counter-Claimant had incurred extra expenditure of Rs. 18,96,00,000/-. Hence, the Respondent/Contractor is liable to reimburse the said amount to the Counter-Claimant. Copy of the Certificate of the Finance Officer of the Counter-Claimant duly certifying the cost incurred in respect of house rent & GST, against hiring of Security Manpower & GST and against repair &

maintenance of hired buildings from 01.03.2019 to 30.06.2021 respectively along-with the relevant extract of the Books of Accounts is annexed as Annexure CC-4.

32.2 Claimant's Case:

This counter-claim by the Respondent is denied, being without any contractual or legal basis. Firstly, without admitting any delay on the part of the Claimant, the Respondent had a remedy of liquidated damages under the Clause 2 for any delay by the Respondent and it is trite law that once there is a liquidated damages provision, no general damages claim can be made and also the amount of liquidated damages or penalty acts as the limitation for claiming any damages and nothing can be claimed beyond such amount. Further, the Respondent itself was in breach of the contract and a party in breach cannot claim damages from the other party. Without prejudice the above, the work allotted to the Claimant was completed in March 2021, the Respondent invited the tenders for Package 2 work of the university at an estimated cost of Rs. 303.55 Crore in month of November 2021 and work was awarded on 23.12.2021 wherein finishing work of Admin, Library and Faculty building was also included. The Finishing work of Admin, Library and Faculty building had not been completed till June 2023, the Photographs taken by the Claimant on 23.06.2023 attached as **Exhibit C- 47 in the Statement of Claim.**

32.3 My Finding and decision:

32.3.1 I agree with the contention of claimant that *Respondent had a remedy of liquidated damages under the Clause 2 for any delay by the Respondent and it is trite law that once there is a liquidated damages provision, no general damages claim can be made and also the amount of liquidated damages or penalty acts as the limitation for claiming any damages and nothing can be claimed beyond such amount.*

32.3.2 The certificate regarding expenditure, obtained from Finance Officer is dated 01.11.2023 and respondent did not file any document in support that claimant was informed or given any notice in this regard. It came to notice of claimant through Statement of Counter Claims only. The respondent has also not denied that buildings were not in position to use till June 2023.

32.3.3 In view of above, I do not find this counter claim tenable.

Award: In view of above, counter claim no.1 is rejected.

33.0 **Counter Claim No.4: Reimbursement of loss incurred due to delay in award of future tender of the Sikkim University namely "Construction of Various Buildings**

for Sikkim University – Package 2” to ITDC India Ltd. on account of delay in completion of work of the initial Project by Respondent Contractor. – Rs.5,25,00,000

33.1 Counter Claimant’s/ Respondent’s Case:

Counter-Claimant had prepared the DPR (Exh Annexure CC-5) for the next project titled “*Construction of Various Buildings for Sikkim University – Package 2*” based on the estimated fact that the Project Work that was being executed by the Respondent/Contractor in the present Project would be completed within the justified period of time i.e. by 28.02.2019. However, the work got prolonged and delayed from the very beginning due to reasons attributable to the Respondent/Contractor and the Project was finally completed on 30.06.2021 with defects. The new contractor quoted 20.34% more than the tendered value due to the delay of the completion of the previous Project which was required to be completed in 2019 and which was actually completed in 2021. In the present scenario, the Counter-Claimant is eligible to claim the reasonable additional amount of 20.34% of the tendered value. The Counter-Claimant submits that the tendered amount for finishing of the structural works executed by the Respondent/Contractor was to the tune of Rs.25.82 Crores. Accordingly, the excess amount 20.34% above tendered value comes to Rs.5.25 Crores.

33.2 Claimant’s Case:

This counter-claim is being without any contractual or legal basis. Respondent had a remedy of liquidated damages under the clause 2 for any delay by the Respondent and the Respondent cannot claim such general damages while there is provision of liquidated damages. The Respondent was at the fault which made it hard for the Claimant to work within the sanctioned time. Contention that new work has been awarded at 20.34% above the estimated cost due to the delay of the completion of the previous project is not tenable and is denied. Without prejudice to the above, the work allotted to the Claimant was completed in March 2021 but the Respondent invited the tenders for Package 2 work in the month of November 2021 and the same was not been completed till June 2023, so the delay is attributable to the Respondent only. The main components of the works under package-2 awarded by the Respondent at later date are for construction of various buildings i.e., hostels, teaching block, kitchen & dining and residential accommodation which have no connection with the works under the scope of the claimant’s contract. Thus, for any alleged loss on account of getting the items of

the works, not in the scope of the Claimant at higher rates later on, the Claimant cannot be held liable.

33.3 My Finding and decision:

33.3.1 I agree with the contention of claimant that *Respondent had a remedy of liquidated damages under the Clause 2 for any delay by the Respondent and it is trite law that once there is a liquidated damages provision, no general damages claim can be made and also the amount of liquidated damages or penalty acts as the limitation for claiming any damages and nothing can be claimed beyond such amount.*

33.3.2 Respondent did not file any document in support that claimant was informed or given any notice in this regard at the time of award or during currency of execution of work. Even copy of "Letter of Intent" issued to new contractor on 23.12.2021 (**Annexure CC-2**) was not given to claimant. Had this counter claim be the intention of respondent at that time, it would have been sent to claimant. From the record produced before tribunal, it appears that it came to notice of claimant through Statement of Counter Claims only. The respondent has also not denied that buildings were not in position to use till June 2023.

33.3.3 In view of above, I do not find this counter claim tenable.

Award: In view of above, counter claim no.4 is rejected.

34.0 Counter Claim No.5: Reimbursement of Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.4..... Rs.32,00,000/-

34.1 Counter Claimant's/ Respondent's Case:

The present Claim is the loss suffered by the Counter Claimant due to change in the rate of GST from 12% to 18% on amount claimed under Counter-Claim No.4. Counter-Claimant would not have incurred the differential rate/amount of 6% increase in the GST rates had the Project Work would have been executed by the Respondent/Contractor within the justified period of time i.e. 28.02.2019. Therefore, the additional excess amount to the tune of Rs.32,00,000/- is attributable to the Respondent/Contractor. Hence, the Respondent/Contractor is liable to reimburse the said amount to the Counter-Claimant. The notification of the GST rates as applicable is already annexed as Annexure CC-3.

34.2 Claimant's Case:

The Claimant has made out its case in the above Counter-Claim No.4 that it is not tenable and the Claimant is not liable for the same. Respondent has no legitimate Counter-Claim No. 4, hence is not entitled for increased GST component of 6% on the amount of Counter-Claim no.4.

34.3 My Finding and decision:

As I decided that Counter Claim No.4 is not tenable, I reject this Counter Claim for difference of GST on Counter Claim No.4.

Award: I award NIL amount against Counter Claim no.5 in favour of counter-claimant.

35.0 Counter-Claim No.6 – Loss incurred due to delay in execution of damaged works. – Rs.4,00,000/-

35.1 Counter Claimant's/ Respondent's Case:

Respondent/Contractor had informed the completion of the Project Work to the Counter-Claimant on 17.03.2021, however, during the inspection, it was observed and noted by the Counter-Claimant vide its email dated 08.04.2021 that certain work was incomplete which were yet to be rectified by the Respondent/Contractor. The Respondent/Contractor had failed to complete the incomplete work and failed to rectify the defects as intimated to claimant on 08.04.2021 before or during the Defect Liability Period of 12 months. It is also evident from the Handing Over/Taking Over Note dated 12.07.2021. Amount of Rs.18,00,000/- was deducted from the payment of the Respondent/Contractor against the non-rectification of the defects and in order to rectify the defects, the Counter-Claimant had to award the incomplete work for rectification to the new contractor at rate of 20.34% more than the tendered value for the next project. Therefore, the excess amount of Rs.4,00,000/- as the difference of excess amount, has been claimed under this head which is in addition to Rs.18,00,000/- withheld by the Counter Claimant. Respondent/Contractor is liable to reimburse the said amount to the Counter-Claimant.

35.2 Claimant's Case:

The Claimant relies on its submissions in Paras above and Statement of Claims for claim no. 3 to deny the present Counter-Claim of the Respondent and the Respondent is not entitled to this counterclaim either in law or as per the terms of the contract.

35.3 My Finding and decision:

This counter claim is hypothetical only. The respondent did not produce any detail

supporting that defects have been rectified by new contractor for an amount of Rs. 18,00,000 + 20.34% enhancement. 20.34% mark up is on estimated cost put to new tender. Respondent did not file any document supporting that items to the tune of Rs. 18 lakh were included in the estimated cost of new work. Therefore, in view of all these findings, I do not find this counter claim tenable.

Award: In view of above, counter claim no.6 is rejected.

36.0 **Counter-Claim No.7 – Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.6. – Rs.20,000**

36.1 **Counter Claimant's/ Respondent's Case:**

The present Claim is the loss suffered by the Counter Claimant due to change in the rate of GST from 12% to 18% on amount of Rs. 4,00,000 claimed under Counter-Claim No.10. Counter-Claimant would not have incurred the differential rate/amount of 6% increase in the GST rates had the Project Work would have been executed by the Respondent/Contractor within the justified period of time i.e. 28.02.2019. Therefore, the additional excess amount to the tune of Rs.20,000/- is attributable to the Respondent/Contractor. The notification of the GST rates as applicable is already annexed as Annexure CC-3.

36.2 **Claimant's Case:**

The Claimant has made out its case in Counter-Claim No.6 that it is not tenable and the Claimant is not liable for the same. It is submitted that the Respondent has no legitimate Counter-Claim No. 6, hence is not entitled for increased GST component of 6 % on the amount of counter claim no.6.

36.3 **My Finding and decision:**

As I decided that Counter Claim No.6 is not tenable, I reject this Counter Claim for difference of GST on Counter Claim No.6.

Award: I award NIL amount against Counter Claim no.7 in favour of counter-claimant.

37.0 **Counter-Claim No.8 –Payment of penalty imposed on Respondent/Contractor i.e. M/s NCC Limited by the Counter-Claimant due to unjustified extensions by the Respondent/Contractor.– Rs.8,33,28,533**

37.1 **Counter Claimant's/ Respondent's Case:**

The Counter-Claimant had extended and granted Extension of Time to the Respondent/Contractor up to 28.02.2019. It is pertinent to mention here that vide Letter

dated 21.01.2019 (Ref: SU/REG/ENGG/F-2/03/2018/Vol-II/1761), the Counter-Claimant had categorically conveyed to the Respondent/Contractor that any further extension shall be subject to the applicable contractual clauses and provisions. The Counter-Claimant further issued a Show Cause Notice vide Letter dated 21.01.2019 (Ref: SU/REG/ENGG/F-2/03/2018/Vol-II/1763) wherein, the Counter-Claimant apprised the Respondent/Contractor as per the revised work schedule submitted by the Respondent/Contractor, the work was expected to be completed by 15.12.2019 due to which, the Counter-Claimant vide the said Letter asked the Respondent/Contractor to show cause as to why action against the Respondent/Contractor should not be taken as contemplated under Clause 2. Thereafter, upon not receiving a timely and satisfactory response from the Respondent/Contractor, the Counter-Claimant invoked Clause 2 (i.e. Compensation for Delay) by letter dated 28.02.2019 and imposed compensation. work could only be completed by the Respondent/Contractor on 30.06.2021 after imposition of compensation under Clause 2 for the period beyond 28.02.2019. As per Clause 2, the Counter-Claimant was well within its right to impose and levy delay compensation (@ 1.5% per month of delay to be computed on per day basis provided always that the total amount of compensation for delay to be paid under Clause 2 shall not exceed 10% of the Tendered Value of work) to the tune of Rs.10 Crores. The Counter-Claimant has in fact incurred a loss of Rs.8,33,28,553/-towards penalty / liquidated damages due to the prolongation and delay in completion of the Project Work by the Respondent/Contractor beyond the justified period of extension. Counter Claimant had already imposed penalty by way of liquidated damages for the delay in completion of the project as per Clause 2 of the Contract on the Respondent, with rate of recovery for penalty by way of liquidated damages as proportionate to the escalation payable for the extended period till 28.02.2019 which was the stipulated date of completion after considering the justified period of extension. Accordingly, this amount of Rs.8,33,28,553/- as claimed is at par with the alleged loss claimed by the Claimant for the period 01.03.2019 till 30.06.2021 towards escalation cost in the Claim No.1 raised by the Respondent/Contractor in its Statement of Claims. Therefore, the Respondent/Contractor is liable to pay the Counter-Claimant the penalty amount as per Clause 2 of the contract to the tune of Rs.8.33.28.553/-due to delay in completion of the Project Work beyond the stipulated period of time i.e. by 28.02.2019.

37.2 Claimant's Case:



The Respondent firstly granted a provisional extension of time as already submitted which itself was *de hors* the provision in the contract. Once the time is set at large and the Respondent accepts the performance of the contract, the Respondent cannot deny the extension of time. Also, when the time was set at large, the Respondent could no longer impose penalty or the alleged liquidated damages on the Claimant. The Respondent issued a Show-cause notice on 21.01.2019 and the Claimant made a reply to it, vide its letter dated 26.02.2019, which was received by the Respondent on 27.02.2019. However, the Respondent vide letter dated 28.02.2019 in a completely vague and ambiguous manner imposed the penalty, arbitrarily upon the Claimant and the Respondent has denied taking into cognizance the replies of the Claimant on the ground of non-timely. Since the said reply had been received by the Respondent before taking action under Clause 2 of the GCC, non-consideration of the said submission of the Claimant by the Respondent, was in the breach of natural justice. As already stated in its Statement of Claim, Respondent has incorrectly levied, on alleged grounds of delay of 10 months in advance. Whereas, the juridical basis for any action of claiming compensation has to be the loss suffered, but the Respondent put a penalty for the period after 28.02.2019 to December 2019 in advance. This shows that the Respondent has accepted the fact that work got delayed not because of the Claimant during the period before 28.02.2019 as the Respondent did not put penalty for the period before 28.02.2019. The sole reason for the delay was the Respondent can be inferred. Assuming, that the Respondent was right in putting the penalty on the Claimant, then Respondent at that time should have claimed or recovered this amount from the Claimant. The Respondent obviously has not acted so, and to cover this has now made a counter-claim equal to the escalation payment to the Claimant when the Claimant invoked arbitration. The Respondent has no valid claim of any liquidated damages. Further, there are no liquidated damages for the period beyond December 2019, though the work was continued, setting the time at large. If the Respondent had to put any compensation or liquidated damages under Clause 2 it was required to do so strictly as per the terms of the said clause and not *de hors* the same.

37.3 My Finding and decision:

37.3.1 Respondent has not furnished any details as how the loss of Rs. 8,33,28,553 is arrived at except that that this amount of Rs.8,33,28,553/- as claimed is at par with the alleged loss claimed by the Claimant for the period 01.03.2019 till 30.06.2021 towards

escalation cost in the Claim No.1 raised by the Respondent/Contractor in its Statement of Claims. Escalation cost for justified delay period for which respondent is responsible is a part of contract agreement and cannot be treated as loss. I have already decided that action taken by respondent under clause 2 was wrong and not as per contract agreement. Therefore, I find this counter claim not tenable.

Award: In view of above, counter claim no.8 is rejected.

38.0 Counter-Claim No.9 –Interest on loss incurred on amounts as mentioned under Counter-Claim Nos. 1 to 8. – Rs.12,45,39,994.

38.1 Counter Claimant's/ Respondent's Case:

As mentioned in the Counter-Claim Nos. 1 to 7 of the present Counter-Claims, the Counter-Claimant had incurred losses to the tune of Rs.35,58,28,533/-for the additional period of delay from 01.03.2019 till 30.06.2021 i.e. 2 years 4 months due to the Respondent/Contractor. Therefore, the Counter-Claimant also suffered an additional loss of interest amount on the expenses incurred by it as per the Counter-Claim Nos. 1 to 8 of the present Counter-Claims, as the requisite amount as per the expenses suffered under Counter Claim Nos. 1 to 8 were not available with the Counter-Claimant. In light of the same, the Counter Claimant is claiming a reasonable interest @ 15% from 01.03.2019 till 30.06.2021.

38.2 Claimant's Case:

It is submitted by the Claimant that Claim Nos. 1 to 8 of the Statement of Counter-Claim are untenable and no claim is legally subsisted, therefore, no interest is liable to be paid in the said regard. The claim is for loss, i.e., interest is claimed as damages. So, the Respondent if it is claiming it as damage then it should have given a notice under Section 3 of the Interest Act, 1978 beforehand. However, the Respondent did not act as per it. Also, when there is a claim for interest as damages then loss has to be proved by the way of any evidence, but in the present case, there is no evidence for the same. Also, damages are not admissible on damages as all previous Counter-Claims are also for damages. Respondent cannot quantify its interest claim based on what the Claimant has claimed the Respondent have to give quantification for its claim. The Respondent, for the first time, has brought this Counter-Claim, vide this Statement of Counter-Claim. before this, there has been no claim regarding this by the Respondent. There were payments done by the Respondent to the Claimant after 2019 also, but there was no claim as laid above for loss at that time by the Respondent.



38.3 My Finding and decision:

As no Counter Claim from Counter Claim no.1 to 8 has been found tenable by the arbitral tribunal, I decide to reject this counter claim.

Award: I award NIL amount against Counter Claim no.9 in favour of counter-claimant.

39.0 Counter-Claim No.10 – Reimbursement of expenditure incurred on account of cost of arbitration

This counter-claim is dealt later along with claimant's claim No.10.

40.0 Counter-Claim No.11 – Pendente Lite and Future Interest

40.1 Counter Claimant's / Respondent's Case:

Claimant is limiting its Claim for claiming pendente lite interest @ 15% per annum, the said rate of interest is also reasonable as it is at par with interest rates claimed by the Respondent/Contractor under Claim No.8 of its Statement of Claims. Therefore, the Claimant is claiming pendente lite interest @ 15% p.a. on the aforementioned claim amounts under Counter-Claim No. 1 to 9 from the date of filing of the Counter-Claims till the date of pronouncement of the Award. The Counter-Claimant further, is claiming future interest @ 17% p.a. in view of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 on the pending counter-claim amounts under Counter-Claim No. 1 to 10 as aforementioned from the date of the award till the said amounts are paid, which amount will also be liable to be paid by the Respondent/Contractor at the said rate and which is the discretion of the Ld. Sole Arbitrator. Hence, the Respondent/Contractor is liable to reimburse the said amount(s) to the Counter-Claimant.

40.2 Claimant's Case:

Claims No. 1 to 8 of the Statement of Counter-Claim are untenable and no claim is legally subsisted, therefore, no interest is liable to be paid in the said regard.

40.3 My Finding and decision:

As no Counter Claim from Counter Claim no.1 to 8 has been found tenable by the arbitral tribunal, I decide to reject this counter claim.

Award: NIL award is given against Counter Claim no.11 in favour of counter-claimant.

41.0 Cost of Arbitration:



Claimant as per its claim No.10 has claimed cost on account of arbitration and legal expenses and the Counter Claimant/ Respondent too, as per its counter-claim No.10 has claimed cost of arbitration and legal expenses. Cost of Arbitration which is borne by claimant has been intimated as Rs. 17,59,649 (**Exh CD-11**) and cost of Arbitration which is borne by respondent has been intimated as Rs. 7,36,384 (**Exh RD-13**). I have considered the respective submissions of the parties and keeping in view the facts and circumstances of the case, I decide that both parties shall bear their own cost.

42.0 **Summary of claims and award thereon:**

Clai m No	Description of Claim	Amount claimed as per SoC (in Rs)	Amount awarded in Rs.
1	Claim for payment of escalation as billed marked as RA Bill No. 13 dated 04/05/2019 to RA Bill No. 22 dated 31/03/2021.	8,33,28,553/-	2,54,68,925
2	Claim for release of amount on hold allegedly for non-submission of 'No Claim Certificate'	27,26,225/-	27,26,225
3	Claim for release of amount incorrectly put on hold on alleged claim against defects stated to have been identified during taking over of worksite.	17,92,332/-	17,92,332
4	Claim for release of amount incorrectly put on hold alleged as 'Staff penalty'	65,62,600/-	Nil
5	Claim for additional expenses due to prolongation of contract on Overheads and site Establishment, deployment of manpower, etc beyond the stipulated date of completion.	2,84,22,107/-	

6	Claim for additional expenses due to prolongation of contract on deployment of plant, machinery, tools, etc. beyond the stipulated date of completion	6,01,56,163/-	89,15,115
7	Claim for locked up deposit Bank Guarantees and expenses on renewal of Bank Guarantees in the extended period.	13,94,521/-	
8	Claim for Interest @ 15% per annum on claim amounts against claim no 1 to 7 above with effect from the date the amount was actually due for payment till date of award.	As to be accrued.	93,04,287
9	Claim for reimbursement of GST payable on the award amount.	As to be accrued.	Declaratory
10	Claim for cost of arbitration	As to be accrued	Nil
Total			4,82,06,884

43.0 Summary of counter claims and award thereon:

Counter Claim No	Description of Counter Claim	Amount claimed as per SoCC (in Rs)	Amount awarded (in Rs.)
1	Reimbursement of loss attributable to the Respondent due to delay in execution of de-scoped works and for awarding said works to a new contractor i.e., ITDC India Ltd. at higher rates under "Construction of Various Buildings for Sikkim University – Package 2"	2,53,00,000	Nil

2	Reimbursement of loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.1	15,00,000	Nil
3	Reimbursement of loss towards extra expenditure incurred due to rent and miscellaneous overheads, etc. for the period beyond 01.03.2019 upto 30.06.2021	18,96,00,000/-	Nil
4	Reimbursement of loss incurred due to delay in award of future tender of the Sikkim University namely " <i>Construction of Various Buildings for Sikkim University – Package 2</i> " to ITDC India Ltd. on account of delay in completion of work of the initial Project by Respondent Contractor	5,25,00,000/-	Nil
5	Reimbursement of Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.4	32,00,000	Nil
6	Loss incurred due to delay in execution of damaged works	4,00,000	Nil
7	Loss due to increase in the Rate of GST from 12% to 18% on amount claimed under Counter-Claim No.6	20,000	Nil
8	Payment of penalty imposed on Respondent/Contractor i.e. M/s NCC Limited by the Counter-Claimant due to unjustified extensions by the Respondent/Contractor	8,33,28,533	Nil

9	Interest on loss incurred on amounts as mentioned under Counter-Claim Nos. 1 to 8	12,45,39,994	Nil
10	Reimbursement of expenditure incurred on account of cost of arbitration		Nil
11	Pendente Lite and Future Interest		Nil

44.0 POST AWARD INTEREST:

Post Award interest shall be paid @ 10 % per annum (simple) on Rs. 4,82,06,884 from 01.10.2024 to the date of payment. However, no post award interest shall be payable if the award amount is paid within three months of the date of award. For avoidance of any doubt, it is made clear that if the award amount is not paid within three months of the date of award, post award interest shall be payable from 01.10.2024 till date of payment.

45.0 FINAL AWARD:

Respondent shall pay to the claimant a sum of Rs. 4,82,06,884 (Rupees Four Crore Eighty Two Lakh Six Thousand Eight Hundred Eighty Four Only) plus post award interest as awarded in para 44.0 above subject to statutory deductions.

46.0 The award has been made and signed on 30th September, 2024 at Delhi and engrossed on a non judicial stamp paper of Rs. 500 supplied by the claimant. Balance requisite stamp duty shall be made good by the claimant.


[B B MAKKAR]

