

Before the Dispute Adjudication Board of

Shri Achal Khare
Member

Shri Kanwar Singh
Member/Chairman

Shri Dinesh Kumar
Member

In the matter of Dispute between

Sojitz-L&T-Gayatri (SLTG) Consortium

Claimant

And

Dedicated Freight Corridor Corporation of India Limited
(DFCC)

Respondent

Dated: 26.06.2024

1. Dedicated Freight Corridor Corporation of India Limited (hereinafter referred to as "DFCC" or "Respondent" or "Employer") invited open tenders on EPC basis for Design and Construction of Civil, Building and Track works for Double line Railway including Testing and Commissioning on Design-Build Lump Sum Price Basis for Iqbalgarh - Vadodara Section for Western Dedicated Freight Corridor (Phase-1) – Contract Package – 3 (R) wherein amongst others M/s. Sojitz-L&T-Gayatri Consortium (hereinafter referred to as "Claimant" or "Contractor" or "Consortium") submitted their Bid. Contract Package – 3 (R) [CTP-3R] was awarded to the Claimant vide Letter of Award ("**LOA**") dated 25th February 2016 and the Contract Agreement between the Parties was signed on 17th May 2016. Claimant has preferred Extension of Time for Completion (EOT) for the delays accrued up to 30th September 2022 and cost claims in respect of additional costs said to had been incurred by the Claimant during the extended period of the Contract on account of delays not attributable to the Claimant. The Claimant has filed their Statement of Claim (SOC) on 30th December 2023 for the Dispute No. 05 pertaining to "**Dispute pursuant to the Contractor's Entitlement of Extension of Time and Applicable Costs for Excusable and Compensable delays till cut-off date 30.09.2022 (EOT-7) and Contractor's entitlement for incentives as per Cl. 8. 7 for early completion of Iqbalgarh to Sanand North stretch**" pursuant to GC/PC Clauses 3.5 and 20. The Claimant has referred the Claims (Dispute-05) to the DAB for the matter including extension of Time for Completion (EOT), prolongation cost during the delay period, disruption claim, idling claim of track laying resources, cost on account of additional works of demarcation of Right of Way (ROW), incentive for early completion of the stretches being commercially operated by the Respondent.


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2. **Salient features of the Contract**

Subject	Details
Name of the Works	Design and Construction of Civil, Building and Track Works for Iqbalgarh - Vadodara Section of Western Dedicated Freight Corridor (Phase-1) Package CTP-3(R).
Claimant	Sojitz-L&T-Gayatri Consortium
Employer/ Respondent	Dedicated Freight Corridor Corporation of India Ltd. (DFCC)
Engineer	N.K. Consortium
Contract Agreement No.	(HQ/EN/PWC/PHASE-I PKG-3(R)/D&B/8/ Sojitz-L&T-Gayatri Consortium) Dated 17 May 2016
LOA date	25.02.2015.
Contract signing date	17.05.2015.
Accepted Contract Amount	INR 47,439,999,405/- (INR 41.031 Bn + JPY 10.827 Bn + USD 11.367 Mn)
Total length of track	Main line =288 km; Connecting line=54.37km Total 342.83 km =343km
Nature of Contract	EPC based on FIDIC CONDITIONS OF CONTRCAT FOR PLANT DEISGN- BUILT EDITION 1999.
Price Adjustment Provision	Prices are subject to adjustment as per Price Adjustment Formula included in the Contract.
Commencement Date of Works	06 .06.2016.
Scheduled Completion Date	31.05.2020 (208 Weeks from Commencement Date).
Defects Notification Period (DNP) Period	31.05.2022 (104 weeks).
Schedule for Access to Site/Handing of land for the Works	80%: 28 days from Commencement Date (04.07.2016). 90%: 91 days from Commencement Date (05.09.2016). 100% except 3 stretches of 10.8km: 182 days from Commencement Date (05.12.2016)

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	3 stretches of 10.8km: Land in stretch from Wamaj – Pansar (0 – 13.95) in Gandhi Nagar: 80 weeks from Commencement Date (18.12.2017).												
	<table border="1"> <thead> <tr> <th>Location</th> <th>Chainage from</th> <th>Chainage to</th> </tr> </thead> <tbody> <tr> <td>Mahesana</td> <td>46700</td> <td>50000</td> </tr> <tr> <td>Unjha</td> <td>67400</td> <td>72700</td> </tr> <tr> <td>Chappi</td> <td>95800</td> <td>9800</td> </tr> </tbody> </table>	Location	Chainage from	Chainage to	Mahesana	46700	50000	Unjha	67400	72700	Chappi	95800	9800
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Mahesana	46700	50000											
Unjha	67400	72700											
Chappi	95800	9800											
Contract Milestones for the purpose of Delay Damages	<p>MS-1: Completion of Track Skeleton for entire Package: 180 weeks (17.11.2019), for temporary use by the Employer or by other Employer's contractors for construction and/or for running of material trains, tower wagons, rail cum road vehicle etc.</p> <p>MS-2: Completion of all Civil and Track Works for commencement of Integrated Testing and Commissioning: 196 Weeks (08.03.2020).</p> <p>MS-3: Completion of all Works by Contractor and Taking Over by DFCC: 208 weeks (31.05.2020).</p>												
Delay Damages	<p>For MS-1: 0.25% of the Contract Price per week of delay or part thereof;</p> <p>For MS-2: 0.5% of the Contract Price per week of delay or part thereof;</p> <p>For MS-3: 0.5% of the Contract Price per week of delay or part thereof;</p> <p>Maximum limit of Delay Damages: 05% of Accepted Contract Amount.</p>												
Total structures	<p>As per Contract = 847</p> <p>Actual including variations= 935</p> <p>Total length of structures as per ER=10,334m</p> <p>Total length of Structures with Variations = 14,278m [38% increase]</p> <p>140 (new structures) + 386 (changes/variations in existing structures) (-) 52 dropped structures.</p>												
Additional works through 390 Variations Orders	Rs. 1494.54 crores												
EOT accorded by DFCC considering 7 th application of the Claimant covering	<p>MS1:21.01.2023</p> <p>MS2: 29.04.2023</p> <p>MS3: 06.05.2023</p>												

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hinderances upto 30.9.2022.	
EOT claim referred to DAB	Covering hinderances upto 30.09.2022.
Status of Works as on	Still in progress.
Governing Law	Laws of India.

3. **Scope of Works:** First Phase Western Dedicated Freight Corridor (WDFC) covers a distance of 922 kilometre of double line electric track from Vadodara to Rewari. Construction of the 1st phase of the WDFC was planned in 9 Contract Packages which interalia includes Contract Package CT P-3(R) comprising Civil/Building/Track Works Iqbalgarh - Vadodara Section 134km (Iqbalgarh and Pansar) +154km (Pansar and Vadodara -Makarpura) (excluding bridges across river Mahi and Sabarmati). Scope of Works under the Contract Package CTP-3(R) comprise of design and construction of civil, building and track works for Double Line Railway involving formation in embankments/cuttings, bridges, structures (excluding civil works for bridges and formation in embankment/cutting and structures in approaches for 150m length from abutments on both sides of the bridges across rivers Mahi and Sabarmati), buildings, ballast on formation, track work, testing and commissioning on Design-Build Lump Sum Price Basis for Iqbalgarh -Vadodara Section of WDFC. Total structures executed/to be executed including 386 modified structures and 140 new structures are 935 against Employer's Requirements (ER) of 847 structures. Total structure cumulative lengths in running metres as per ER was 10,334m and modified length is 14,278m i.e. increase by 38%. Embankment quantity increased from ER quantity of 339.3 lakh cum to 453.6 lakh cum i.e. increase by 34% mainly in Section D (53%) Section E (71%) and Section F (92%). Similarly concrete quantity increased from 8.47 lakh cum to 11.67 lakh cum i.e. increase by 38% mainly in Section D (37%), Section E (85%), Section F (70%). Thus on an average the quantities of Works resulting from Respondent's ordered variations is about 38% which is something unprecedented in a EPC Contract philosophy. As per para 404 of the SoC, 390 number Variation Orders costing Rs. 1494.54 crores were issued by the Respondent. 20 Variation Orders were issued after 06.05.2023 (EOT date for MS-3) out of which last Variation order was issued on 05.03.2024.
4. **Pleadings/submissions of the Parties:** In the preliminary hearing of the Parties taken by the DAB on 23.01.2024, schedule for submission of pleadings by the Parties was agreed to between the Parties and the Parties accordingly made their submissions and argued their case as per following schedule:



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Sr	Activities	Date of submission
1	Claimant filed their Statement of Claim (SoC), with supporting documents containing 9299 pages in 12 volumes.	Through email on 30.12.2023 and hard copy on 05.01.2024.
2	Submission of summary of SoC in 87 pages including 10 pages of 3 Annexures by the Claimant.	Through email on 22.1.2024.
3	Respondent filed their Statement of Defence (SoD) along with supporting documents containing 5044 pages in 10 volumes.	Email on 27.03.2024 and Hard copy on 28.03.2024.
4	Submission of summary of SoD in 37 pages by the Respondent.	Email on 27.03.2024 and Hard copy on 28.03.2024.
5	Respondent submitted additional documents along with supporting documents (RD-77 to RD-97) containing page number 5045 to 5342 in volume-XI.	Hard copy on 16.04.2024.
6	Date of hearing -Arguments by the Claimant in support of his Claim	01.04.2024: 10am to 1.30pm in Nitibagh Club, New Delhi. 02.04.2024: 9.30am to 11.30am in Nitibagh Club, New Delhi. 16.04.2024: 10 am to 11.30am in SNS ADR Centre, New Delhi.
6	Date of hearing -Arguments by the Respondent in support of his defence	02.04.24: 11.30am to 1.30pm in Nitibagh Club, New Delhi. 03.04.2024: 9.30am to 1.30pm in Nitibagh Club, New Delhi. 16.04.2024: 11.30 am to 2.00pm in SNS ADR Centre, New Delhi.
7	Submission of Written Submission of oral arguments by the Claimant in 101 pages alongwith 436 pages attachments.	30.04.2024


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8	Submission of Written Submission of oral arguments by the Respondent in 103 pages.	01.05.2024
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5. In addition to Party's personnels including the Engineer (representing the Respondent), the Parties were also represented through their counsels and Delay analysis experts as under:

Name Mr.	Designation	Party
Adarsh Ramakrishnan	Counsel M/s. MRP	Claimant
Pallavi Agrawalla	Counsel M/s. MRP	Claimant
Mayank S Thakur	Delay Analysis Expert Sr. Partner, Masin	Claimant
Pallavi Chavan	Delay Analysis Expert Director, Masin	Claimant
Sadiqua Fatma	Counsel	Respondent
Tanvi Kakar	Counsel	Respondent
Aparna Banerjee	Counsel	Respondent
Tenzen Tashi Negi	Counsel	Respondent
Adarsh Kumar	Delay Analysis Expert Consultant	Respondent

6. **Respondent's application dated 31.03.2024 regarding certain preliminary jurisdictional issues:** Respondent's application dated 31.03.2024 regarding certain preliminary jurisdictional issues was disposed off by the DAB vide its Order No. 7 dated 01.04.2024 (Annexure-X). The Respondent, vide his application dated 31.03.2024, submitted through email on 31.03.2024, raised certain preliminary jurisdictional issues and had requested that (i) the Respondent be heard by the DAB before commencement of arguments by the Claimant on 01.04.2024 and (ii) arguments of the Respondent scheduled on 02.04.2024 & 03.04.2024 be postponed by 2 weeks i.e. from 17.4.2024 to 20.04.2024. The DAB clarified that the Respondent has been given more than fair opportunity to submit their SoD. The DAB clarified that as per GC/PC clause 20 of the Contract, the DAB is required to give its decision within 84 days of making reference by the Claimant whereas the Respondent could submit their SoD to Claimant's SoC dated 30.12.2023, only on 27.3.2024 i.e. after about 3 months much beyond 84 days outer time line for resolution of disputes by the DAB. It was clarified by the DAB that the arguments by the Parties are for facilitating understanding of the issues by the DAB and accordingly if need is felt by the DAB for any further clarifications in the matter then the DAB, with 3-4 days advance notice, shall organise for a

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meeting (physical or virtual) with the Parties after completion of formal hearings of the parties i.e. after 03.04.2024. It was clarified by the DAB that the parties shall be at liberty to include any additional information, which could not be covered in their arguments by the Parties, in their Written Submission scheduled for submission by 10.04.2024. During hearing of the Parties on 02.04.2024, the DAB agreed for having one day more hearing on 16.04.2024.

7. **Extension of Time for Completion (EOT) Claim:** The Claimant has sought EOT for Interim Contract Milestones MS-1, MS-2 and MS-3 covering hinderances upto 30.9.2022, as under:

Contract Milestones	Contractual timelines	Timelines agreed between the Parties	Claimant's claim to the DAB	Claimant's entitlement beyond dates agreed between the Parties (in days)
MS-1	17.11.2019	21.01.2023	26.09.2024	614
MS-2	08.03.2020	29.04.2023	31.01.2025	643
Ms-3	31.05.2020	06.05.2023	23.04.2025	718

8. **Cost Claims:** In addition to claim towards extension of Time for Completion (EOT), the Claimant has preferred cost claims amounting to Rs.1779,34,30,917 under the following 5 heads:

Sr No.	Description of cost Claim	Claim Amount in Rupees
1	Prolongation Cost (Time related cost)	7,11,90,88,007
2	Disruption Cost (earthworks, blanket, and concrete works)	7,56,00,09,668
3	Track laying resources idling cost	14,68,15,114
4	ROW demarcation cost	61,22,465
5	Early Completion Incentive	2,96,13,95,664
	Total claim amount	1779,34,30,917

9. **General**

- 9.1 The Respondent's argument that the Claimant failed to serve Notice of claim within 28 days of the occurrence of the claimed event and/or not submitting quantification of cost claim within 42 days of end of effect of event giving rise to

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claim making the claim inadmissible, is violative of Section 28 of the Indian Contract Act and well as Law of Limitation, as such, can not negate the Claimant's submission of claim beyond 28 days of its proposal seeking Engineer/Respondent's approval. The Claimant's submission in its SoC in CD-5/27 from page 6785 to 6809 shows adequate number of Claimant's letters to the Respondent that the Claimant reasonably complied with requirement of notification of incidents giving rise to claim under GC Cause 20.1. The DAB is of the opinion that non issue to 28 days notice and/or 42dys for making available details of claim quantifications can not negate otherwise admissible claims of the Contractor.

9.2 **Contemporary records:** The Respondent, in para 162 of its SoD, has argued that the "Contemporary records" to substantiate claim in terms of GC/PC Clause 20.1 were not submitted by the Claimant, does not appear to be correct because the Respondent himself in his submissions dated 16.4.2024 at RD-79 (Claimant's letter dated 4.8.2018 page 5089-90) has made reference to joint records of hinderances and submission of records of underutilisation of Claimant's resources during the period October, 2017 to May 2018 and sought Respondent's directions for submission of contemporary records as per Respondent's approved format. The Claimant's submission in its SoC from page 4855 to 4944 shows adequate number of Claimant's letters to the Respondent that the Claimant reasonably complied with requirement of submission of contemporary records under GC Cause 20.1. The Claimant's aforesaid letter dated 04.08.2018 establishes that the Claimant complied with the requirement of submission of Contemporary records.

9.3 **Design Build Lump Sum contract:** The Respondent in para 13 and 14 of its Written Submission has submitted that the referred work is a Design Build Lump sum (DBLS) basis governed by General conditions, (FIDIC-Yellow Book-First Edition 1999) supplemented by particular conditions and Employer's Requirements. DBLS contract philosophy effectively works only if reciprocal promises of the parties are bare minimum to enable the Contractor to work with full freedom without much of Employer's involvement. Cardinal principle of DBLS contract philosophy is that the Employer's role is limited only to check the compliance of Employer's Requirements and the Contractor should not allow the Employer to pirate into the contractor's freedom of activities. Here in this Contract the Respondent has issued more than 450 No. Variation orders, with host of modification in Employer's Requirements, spread over more than original Time for Completion. For a DBLS contract 450 No. Variation Orders amounting to Rs. 1581.55 crores is very much unusual by any standard of industry practice. The Claimant can be made responsible only for performance of Contract within specified Time for Completion only if the Employer's Requirements are not altered


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by the Employer, which is not the case here as such, the Respondent's trying to get support of DBLS contract is not proper and does not support his case.

- 9.4 Delay analysis expert (ProUltimus) in his PPT No. 69 has concluded Solely Contractor delays as 1108 days (MS-1), 1112 days (MS-2) and 1084 days for (MS-3); Solely Employer's 's delays as 50 days for each of the MS; Concurrent delays as 716 days for (MS-1), 739 days for (MS-2) and 735 days for (MS-3). Total Employer's and concurrent delays assessed by ProUltimus works out to 766 days for MS-1, 789 days for MS-2 and 785 days for MS-3 whereas the Respondent had already granted EOT of 1161 days for (MS-1), 1147 days for (MS-2) and 1070 days for (MS-3) much more than that assessed by ProUltimus i.e. 49% more for MS-1, 45% for MS-2 and 36% for MS-3 (average about 43% more than Expert's assessment, meaning as if the delay analysis of ProUltimus appears to be in complete violation of express terms of the Contract because as per GC/PC Clause 8.4 subsequent determination of EOT can not be reduced but can only be increased. EOT of 123 days granted by the Respondent was the period when no concurrence can be applied and accordingly the delay analysis of ProUltimus appears to be misplaced.

The Claimant made 1st three applications for interim determination of EOT (EOT-1, 2 and 3) based on Impacted As Planned (IAP) methodology and remaining 4 applications (EOT-4, 5,6 and 7) using Time Impact Assessment (TIA) methodology. The Respondent (through Engineer) made interim determination of 7 EOTs following IAP methodology. The Claimant argued for application of IAP methodology whereas the Respondent argued for application of TIA methodology for determination of EOT including 7 interim EOT determinations done in the past. The Contract does not specify any particular methodology for interim determination of EOT.

- 9.5 The Baseline programme was submitted by the Claimant as 04.07.2016 and approval of the same was accorded by the Respondent as 13.2.2017 i.e. Respondent took more than 8 months to approve the Claimant's Baseline programme (Contract Construction Programme i.e. CCP). EOT Submission of subsequent programmes by the Claimant under GCC Clause 8.3 and approval thereof by the Respondent was not followed and all the 7 interim determination of EOTs were done following IAP methodology. However, it was brought to the notice of the DAB by the Respondent that the approved baseline program comprises of 2233 activities, out of which 201 activities are not having successor and 5 activities are without predecessor. Due to these open linked activities (missing linkage), the Float in various activities will not be reflected correctly and hence the correct critical path could not be determined. It is thus, quite clear that


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the baseline program, even though approved, cannot be used to determine the critical path and the concurrency of delay (if any). The Claimant did not dispute the incorrectness of the approved baseline program as highlighted by the Respondent, however, it argued that it has not provided logical linkage to these open activities and emphasized that there is no impact on the critical path due to open links and Claimant's delay analysis is correct. On the other hand, the Respondent stated that it has corrected the baseline program with the correct and logical links without changing the original links and original duration of activities to arrive at its delay analysis. From the above, following conclusions are drawn:

- (i) The approved baseline program is incorrect and cannot be used without providing the missing links inasmuch as 201 open activities.
- (ii) Unless there is an agreement between both the parties on the logic of providing these missing linkages, the delay analysis submitted by either party cannot be relied upon as various permutations and combinations are possible which would change the critical path and the party may select a combination which suits its arguments. Infact, it appears to be the case, as the results of delay analysis submitted by both the parties are quite opposite.

9.6 Since both the parties have referred to the provisions of Society of Construction Law Delay and Disruption Protocol ("**SOCL protocol**"), it would be appropriate to refer Clause 11.8 of this protocol, which is relevant in this regard and also reproduced below for ready reference:

"11.8 In order to avoid or atleast minimize disputes over methodology, it is recommended that the parties try to agree an appropriate method of delay analysis before each embarks upon significant work on and after the event delay analysis. Failure to consult the other party on delay analysis methodology is a matter that the protocol considers might be taken into account by the Adjudicator, Judge or Arbitrator in awarding and allocating recoverable costs of the dispute."

The DAB noted that firstly, the baseline program is incorrect and secondly, there is no consensus between the Parties on the application of missing linkages. As per SOCL Protocol Clause 11.6(d), under such circumstances, when there is concerned over the validity or reasonableness of the baseline program and /or where there are too few contemporaneously updated programmes (in present case, there is none after the approved baseline program), the "**as planned versus as built**" window analysis is more appropriate as it is less reliant on programming software.


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The DAB is therefore, of the view that the Parties may do the delay analysis based on jointly agreed methodology by both the parties.

10. As per the Claimant, major categories of delay events said to had impacted the Works are as follows:
- DE 01 - Missing ROW pillars / demarcation of the ROW.
 - DE 02 - Delay in Site handover, land issues & obstructions.
 - DE 03 - Delay in approval of Inception Report.
 - DE 04 - Delayed approval of alignment designs.
 - DE 05 - Delays in design approval of bridges.
 - DE 06 - Changes in Law due to COVID-19 Pandemic.
 - DE 07 - Additional time required for implementation of Variations.

Each of the above Dealy Events were determined by the Respondent fully or partially and are deliberated separately hereinafter.

***DE 01: Missing ROW pillars / demarcation of the ROW
Claimant's arguments in support of his Claim***

11. That there was an additional requirement for the Claimant, outside the provisions of the Contract, to erect ROW pillars for the entire Detour section (218 kms) and 61% of parallel section (76 kms), due to the default of the Respondent. This delay event had a cascading effect on the Claimant's submission of the Alignment Design.
12. That as per the Contract, the Respondent had provided alignment drawings showing available ROW physically demarcated. The Claimant planned to erect additional boundary pillars required for its survey validation works.
13. That the Claimant was required to carry out surveys to validate the data provided by the Respondent before commencing the Alignment Design works. This includes centreline, topographical surveys and geotechnical investigations as well as verifying the adequacy of the contractual Alignment Design drawings and rectifying mistakes arising therefrom. All these survey validations relied upon knowing the ROW demarcation.
14. That the Respondent's boundary pillars in the entire detour section (Packages C, D, E and F) were missing. In the parallel section (Packages A and B), the Respondent's boundary pillars were incomplete. Of 2,377 expected boundary pillars, only 39% were found in place and 1,443 boundary pillars were either missing or tampered with in Packages A and B.


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15. That due to discrepancies between alignment drawing and the ROW width found in the Contract, the Claimant was instructed to use land acquisition plans (Joint Measurement Sheets) to demarcate the ROW in this section. The detour section accounted for around 150km of the main line and 40km of sidings. This affected around 60% of the overall track.
16. That additional works required to demarcate the ROW delayed the survey validation works and caused the Claimant to carry out additional surveying verifications delaying the Claimant's submission of the Alignment Designs. The Alignment Designs could only be submitted once the Claimant could confirm that the Alignment Design adequately falls within the ROW.
17. That the Claimant is entitled for an Extension of Time for Completion (EOT) on account of delays pertaining to missing ROW pillars affecting survey validation works and also caused in additional surveying verifications.
18. As per Clause 5.2(b) of ER-General, Clause 4.1 of ER – Functional, Clause 16.2 & 16.6.1(1) of ER – Design, it has been confirmed that the Respondent has to physically stake the entire ROW of the Project and the Claimant's responsibility is only to validate this staked ROW and fix the missing stakes, if any.
19. The missing ROW pillars / Demarcation of the ROW affected survey validation works and also caused in additional surveying verifications. The said delay had cascading effect on the Claimant's submission of the alignment designs and also led to several Variations to the bridges.

Respondent's arguments in support of its defence

20. That ROW pillars were stacked at site all along the alignment. As per Clause 3.2, Scope of Work of the Contractor, inter alia, comprise of carrying out validation of the data provided by the Employer including but not limited to carrying out additional surveys, verifying the available ROW and re-fixing the missing stakes.
21. The parallel portion constitutes 40% of the length of Project. Attachment-1A of ER provides the ROW offsets for DFCC with reference to existing IR Main Line or has provided the Width of Land acquired by the DFCC w.r.t nearest IR track implying as if there were no issues with respect to the Parallel portion. The Contractor delayed the validation of ROW in the parallel portion and the same was completed in Sept-Oct 2017 instead of Sept-2016 planned in CCP.


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22. That the methodology to be adopted for validation of the ROW from the data provided by the Employer, is the responsibility of the Contractor
23. That it was responsibility of the Contractor to verify/validate the ROW.
24. That the Project is with a total length of 342km. In such a vast area of land, it is not possible for the Employer to ensure that not even a single pillar is missing. In view of such practical difficulties, the Parties had structured the Contract in such a manner, so as to adequately deal with such eventualities.

Contract Provisions:

Employer's Requirements (ER) - General

25. ER Clause 2.1 – General defines ROW *“as the width / area of the land as required and/or acquired for the operations of the railway. Right of Way for DFC shall be as indicated in Attachment 1A to the Scope of Works included in the Employer's Requirement – Functional.”*
26. Clause 2.1 of ER – General 'Alignment Drawings' as *“one of the Reference Drawings showing the indicative horizontal and vertical alignment for the whole main line, connecting lines including loop lines, sidings (yard layout) for each Station as developed by the Employer and collectively referred to as Alignment Drawings. This forms the basis of final design of the alignment and construction by the Contractor within the available Right of Way as listed in Attachment 1A to the Scope of Work included in the Employer's Requirement-Functional.”*

Employer's Requirements – Functional Clause 4 Alignment of Track ways:

27. **“4.1** *The proposed indicative Alignment and yard layout for each Station as developed by the Employer is enclosed in the Alignment Drawings as part in the Reference Drawings and is further detailed in Appendix 1 [Alignment of Track ways and Work Areas] to the Employer's requirements. The Employer has acquired the adequate Right of Way (ROW) for the same and is staked at Site. ROW offsets have been provided in Attachment 1A and have also been indicated in the Alignment drawings for reference.”*

Employer's Requirements – Functional (Including Scope of Work)

28. Clause 3.2 of ER-Functional (Scope of Item-Wise Works) provides *“.....the Scope of Work of the Contractor is inclusive of Validation of Data provided by the Employer*


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including additional surveys if considered necessary by the Contractor for design of the Permanent Works and verifying the available Right of Way at Site and re-fixing the missing stakes, if any."

29. Clause 5.2(1) (b) of ER- General, ".....the Reference Drawings are *indicative and the Contractor shall be responsible for verifying their correctness and modifying them in compliance with the Design Criteria stipulated in Employer's Requirement*".

Clause 5 Reference Drawings:

30. "5.2 General features of those drawings are described below:

(1) *Alignment Drawings*

(b) *Definite Right of Way (ROW) available all along the Alignment including the junction / Crossing Stations in line with the list of ROW attached as Attachment 1A to the Scope of Work included in Employer's Requirements – Functional ROW has also been physically staked all along the Alignment."*

31. Clause 15 of ER-General

"Prior to the Alignment verification and reviews of the various Reference Drawings by the Contractor, the Contractor shall carry out validation of the data as provided by the Employer and any additional surveys, if considered necessary by the Contractor, including geotechnical investigations to commence the design.....The Contractor shall plan and programme those validation and additional surveys if considered necessary and investigations required to commence the design of Works and develop them to the Survey Plan and Programme as detailed in Appendix 2 [Validation of Data, Additional Survey and Setting Out], Appendix 14 [Requirements for Design] and Appendix 5 [Project Programme Requirements] to the Employer's Requirements.....The Contractor shall summarise the results of Validation of Data and Additional Survey including all site surveys and investigations in to different reports as specified in Appendix 2 which shall form part of the Survey Report, and shall be submitted to the Engineer for his consent. The Contractor shall continue to be solely responsible for the accuracy and entirety of all the site surveys and investigations including Traverse Survey, Topographic Survey, Centre Line Survey and Geotechnical Investigations etc. throughout the Contract..."


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Employer's Requirements – 16 Design Criteria

32. **"16.2 Design Principles**

Indicative horizontal and vertical Alignment as developed by the Employer is given in the Alignment Drawings included in the Reference Drawings. Accordingly, the required Right of Way (ROW) has been identified and acquired by the Employer. The acquired ROW is marked on the Alignment Drawings and also staked on the ground all along the proposed alignment.

With a view to optimize, the Contractor shall review the horizontal and vertical alignment and modify the same in respect of his design within the available ROW only. In case of the parallel section, the Contractor shall ensure the minimum distance to be maintained from existing IR tracks (as specified herein below) and other obligatory / control points viz. existing bridges, level crossings etc.

The Contractor shall carry out the Alignment review and Detailed Design as per the Design Criteria specified herein below as part of his Technical Design during Design Phase."

Employer's Requirements Clause 16.6.1 General

33. **"(1) The Iqbalgarh – Pansar section of the proposed Alignment runs parallel to the existing alignment of Indian Railways (IR), whereas Pansar – Vadodara section takes detour. Indicative horizontal and vertical Alignment and schematic yard layout at each station, as developed by the Employer, is given in the Alignment Drawings included in the Reference Drawings. Accordingly the required Right of Way (ROW) has been identified and acquired by the Employer. The acquired ROW is marked on the Alignment Drawings and has also been physically staked on the ground along the entire proposed DFC alignment."**

34. **Employer's Requirements of ER Design Sub-Clause 16.9.4:**

- (i) While designing the bridges, it shall be obligatory that the total bridge length and high flood level for an individual bridge for DFC tracks shall not be less than that of corresponding IR Bridge, i.e. bridge length, HFL not to be less than IR.
- (ii) Span configuration for the proposed bridges shall be such that it does not obstruct the span configuration of corresponding IR Bridge i.e. No obstruction to waterway of existing bridge.

35. **Clause 1.2(5) Appendix 1 to the Employer's Requirements "The ROW has also been physically staked at Site all along the Alignment."**


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Deliberations of the DAB

36. As per Clause 5.2(b) of ER (General), Clause 4.1 of ER (Functional), Clause 16.2 & 16.6.1(1) of ER (Design), it is expressly stated that the Respondent had physically staked the ROWs along the entire proposed DFC alignment. Express provision under the ER that *acquired ROW is marked on the Alignment Drawings and has also been physically staked on the ground along the entire proposed DFC alignment*, makes it clear that it was the Respondent's obligation to fix the ROW pillars all along the DFC alignment and the Claimant's mandate was only to validate the already staked ROWs and to fix missing ROWs. Accordingly the DAB is of the opinion that it can be clearly considered that the Claimant, in order to keep his bid competitive, can not be considered to have factored ROW pillar fixation related time and cost in his bid.
37. The DAB noted that the Claimant in Annexure-2 to its Written Submission has mentioned that discrepancy between ROW as per Attachment 1A to the ER and JMS sheets ranges from (-) 48m to + 55m (negative indicates that width as per JMS is less than width as per Attachment 1A). This large deviation demonstrates importance of finalisation of ROWs before finalization of Alignment Design. Without finalization of Alignment Design GADs for the bridges can not be submitted for approval of the Respondent and accordingly delay in ROW pillar fixation would have cascading effect for completion of Permanent Works as a whole.
38. Para 269 of the SoC at page 146, the statement of Claimant that "*..the revised alignments from IR and shifting of centre line to make allowance for IR Future line...*" indicates as if alignment of the DFCC line can not be fixed without ROW staking in Detour section and fixing of ROW pillars was not in Scope of the Claimant. Time taken for fixing of pillars in the Detour section needs to be compensated to the Claimant as excusable delays. The Claimant's obligation under Clause 3.2 Appendix 2 Employer's Requirement is to confirm ROW staking already done by the Employer at Site and to provide the missing stakes that is limited to the ROWs staked at Site.
39. As regards parallel line the delay in works mainly relate to removal/relocation of utilities by IR as well as removal of structures by the Respondent as per his Scope of obligations deliberated in DE-2 separately.
40. From the documents made available by the rival parties to the DAB it is observed that in the parallel stretch of DFC track constituting about 40% of total stretch (120.2 km) only 39% ROW pillars were in position whereas for the


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complete Detour section of remaining 60% stretch (228.2km) no ROW pillars were staked. In essence only 16% ROW pillars were found in position and the remaining pillars had to be fixed by the Claimant. Installation of majority (about 84%) of the ROW pillars can not be considered to fall under category of missing stakes and accordingly does not fall within scope of Contractor's obligations under the Contract. The commencement of Works including the pre-construction activities cannot take place unless the physical and encumbered ROWs are identified or demarcated. The Respondent was obliged to provide Alignment drawings forming part of Reference drawings containing definite ROW all along the alignment with ROWs and the Claimant is required to verify the correctness of the ROWs and Alignment drawings.

41. Para 67 of the SoD at page 34, based on the MPRs of the Claimant, the Respondent has mentioned that pillar fixation (@ 5km, 1km and 200m) for the ROW was completed by the Claimant from July, 2016 to December 2016. Time period of 6 months (July 2016 to December 2016) for Fixation of ROW pillars along the Detour section of the stretch where no pillars were staked, amounts to extra works beyond Scope of the Claimant and accordingly the same needs to be counted for under the excusable delays qualifying under EOT.
42. The Respondent's submission in para 14, 15 and 16 of its Written Submission are generic in nature and can not override express terms of Contract related to staking of ROW pillars along alignment of the DFC line under ER at more than one location [Clause 5.2(b) of ER (General), Clause 4.1 of ER (Functional), Clause 16.2 & 16.6.1(1) of ER (Design)]. The Respondent has not disputed the Claimant's submission that no ROW pillars were found in position in Detour section and accordingly majority of the ROW pillars were fixed by the Claimant and, as such, it amounts to clear admission of the Respondent about fact of the dispute that ROW pillars in entire Detour stretch and 61% in the parallel stretch were fixed by the Claimant.
43. The DAB is of the opinion that the Respondent has failed in its express obligation of making available ROW pillars fixed in position all along the alignment of the Track and the Claimant was obligated only for revalidation of already fixed in position ROW pillars and to install only missing pillars, if any, in position whereas in this case only 16% pillars were staked in position contrary to Employer's Requirements [Clause 5.2(b) of ER (General), Clause 4.1 of ER (Functional), Clause 16.2 & 16.6.1(1) of ER (Design)]. The DAB is of the opinion that time required for fixation of ROW pillars is extra contractual requirement and would have cascading effect for the subsequent activities viz. topographical survey, finalization of Alignment Design, Design of structures (bridges) and thereafter commencement


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construction activities on the ground which will ultimately result delay in achievement of Contractual milestone MS 1, MS-2 and ultimately MS-3. The Respondent's argument that it was responsibility of the Claimant to verify/ validate the ROW does not carry any legal force in view of the fact that more than 84% ROW pillars were not in position and were installed by the Claimant after Commencement of Works.

44. It is seen that Package A and Package B are in parallel to Indian Railways existing track whereas the Packages C, D, E and F are in detour. The Claimant's principal argument is that it had to do ROW demarcation afresh in the Packages C, D, E and F (Detour portion) as the Respondent had not stacked any ROW pillars in these Packages which resulted into time delay. The Claimant in its SoC (Page 154) has stated a maximum time delay of 396 days in Package C, 306 days in Package D, 201 days in Package E and 173 days in Package F. In Package A and Package B, which are primarily parallel sections, the ROW pillar stacking was not available for the connecting lines i.e. Palanpur connecting line of about 14 km length in Package A and Mehsana connecting Line of about 6.685 km length in Package B. The Claimant in its SoC, has not stated the date of first RFI to establish the actual start date of the survey validation work. The Claimant has only provided the date of actual final RFI approval of ROW demarcation. It is further noted that the Claimant was to validate the DFC control points and benchmarks as per Para 2.1 (6) of the Contract Agreement Vol. 2 (Page 489). The Claimant has not provided the start and finish date of this activity also. As per the CCP (Ref. Page 8777 to 8787 of the SoC), the work of survey validation in most of the packages was to start on 05.07.2016. The Claimant has not placed on record any documentary evidence to show that actual date of start of this activity in the field. The only evidence referred by the Claimant in its SoC (Para 162) in this regard is CD-5/35 (Page 8880 of SoC). However, on perusal of this Exhibit, it is seen that it is a letter dated 21/06/2016 written by the Engineer to the Claimant regarding "Review of Right of Way (ROW) indicated in the alignment drawing". This letter does not refer anything about physical demarcation of the ROW and pillar fixing at site and hence cannot be considered as relevant. In the absence of the details and evidences as mentioned above, the delay period as stated by the Claimant in its SoC cannot be conclusively established. However, the fact that the ROW stacking was not done by the Respondent in detour portion and also in the connecting line portion of Package A and Package B cannot be denied, as the Respondent has not challenged this position in its SoD. It is a common understanding that the ROW demarcation afresh in comparison to ROW validation (based on stacking already done) would require more time and effort and to that extent, the Claimant is entitled for additional time and costs.



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45. It is further noted from the pleadings that the Claimant has not placed any document on record for the contemporary period (05.07.2016 to 15.09.2017) to show that the work of ROW demarcation / pillar fixing was affected/stopped due to any external reasons (such as PAPs stopping the work). It would, therefore, be logical to apply one single duration for this activity for all the packages to determine the extra time taken in this activity, as all the packages are linear and could be dealt simultaneously and independently. Keeping this in view and to be fair to both the Parties, it would be appropriate to consider the first completion date of this activity in any of Detour package for the purpose of realistically assessing the additional time required for this activity. As per the details submitted by the Claimant in its Written Submissions (Annexure 4, Page 143 of 436) in form of strip chart, the work of ROW pillar fixing in Package E was completed on 24.12.2016. It works out to a total time of 170 days (from 05.07.2016 to 24.12.2016). As per the CCP, the total time allocated for fixing of pillars and ROW validation for Package E is 64 days (Ref. Page 8803 of SoC). Accordingly, the net delay on account of non-stacking of boundary pillars in detour packages can be reasonably assessed as 106 days (170 days – 64 days). Further, the portions of the connecting lines in Package A and Package B can be considered similar to the Packages falling in Detour portion and accordingly, the period of 106 days can be considered for Package A and Package B also. As regards to the main line portion of Package A and Package B, the ROW demarcation in this stretch was to be done based on the offsets from the existing RI track as per the details provided in the Contract. Though there were utilities/obstructions existing in these packages in the form of LT Poles, LC Huts, Staff Quarters, Temples, Signal Posts etc. but the sizes of these obstructions were in the range of 30-100 meters. Thus, it should have been possible for the Claimant to demarcate the ROW by measuring the offsets from existing ROW track even with the presence of these utilities /obstructions.


46. In view of above, a time delay of 106 days is considered as excusable delay for all the packages in detour portion i.e. Package C, D, E and F and the connecting line portions of Package A and Package B for which the Claimant is entitled to time and costs.

DE-2: Delay in Site handover, land issues & obstructions

Claimant's arguments in support of his Claim

47. Pursuant to GC/PC Clause 2.1 of Contract, the Respondent was obligated to provide specified percentage of land to the Claimant in a phased manner.


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48. During the course of execution of the Project, the Claimant's works were frequently held up due to the encumbrances and obstructions in ROW. Such obstructions should have been removed within reasonable time as stated in GC/PC Clause 2.1 by the Respondent or before handing over the Site to the Claimant to enable the Claimant to execute the construction activities in planned manner. However, the issues persisted leading to intermittent stoppages of work and idling of the Claimant's resources.
49. As per GC/PC Clause 1.13 (a), the Respondent was required to indemnify and hold the Claimant harmless against any failure of the Respondent to obtain any planning/zoning or similar permissions for the Permanent Works, which were to be obtained by the Respondent as per the Contract.
50. There were also significant continuous discoveries of uncharted utilities that impacted the progress of the embankment and bridge construction works. The Claimant had to relocate/protect these utilities before the affected embankment works and bridge construction works can be completed.
51. Without access to the Site in PCL, Technical Design and Construction Design cannot be taken up by the Claimant. As such, the Claimant is also entitled to additional time for preparation of Technical Design and Construction Design of each Structure in PCL.
52. Computation of prorate delays of Formation and Utilities Works is inappropriate.
53. Working on piecemeal basis in the available isolated stretches is not the intent under the CCP. The Programmed works were for continuous uninterrupted Site within the time duration specified in GC/PC Clause 2.1. Further, working on piecemeal basis has adversely impacted productivity of works for which the Claimant is entitled to EOT.

Respondent's arguments in support of his defence

54. The Engineer has assessed nil EOT on account of encumbered Site access due to late handover, land issues and obstructions, except for minor sections of Pkg. A2, Pkg.A3 (2.4Km), Pkg.B1(0.7Km), Pkg.C3 (0.54Km) & Pkg.E1 (MJB-488 PSC Girder).
55. The Claimant did not follow the procedure laid down under ER Clause 1.2.2 Appendix-14 towards timely notification & handling of the obstructions/ uncharted utilities and land issues. The Claimant failed to timely identify & handling of uncharted utilities and there have been enormous delays by the Claimant in


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completion of formation works despite many fronts available to the Claimant to proceed with the Works. As per the Contract, the Contractor is not entitled to any EOT for identification and/or removal of uncharted public utilities and this falls exclusively within the scope of work of the Contractor under Clause 3.4 of the ER-Appendix 15.

56. In a Project of around 342 km length, it is impossible for the Employer to chart all encumbrances and thereafter undertake to remove such Encumbrances and to hand over an encumbrance free site. The Parties never intended such an unreasonable term nor has the same been recorded in any of the Clauses of the Contract.
57. As per comparisons of progress of various work activities as per CCP for the land available vs actual progress of works to demonstrate that sufficient work fronts were available with the Claimant and there have been substantial delays on the part of the Claimant which has affected the work progress.
58. Delay by the Contractor to commence the work at the locations despite availability of land and clearance to cut the trees. Presence of trees, even after having approval to cut these trees indicate that the Contractor was short of resources to start the work at these locations which led to inordinate non-excusable delays.
59. Although the land handing over was delayed but the Plan and Profile (P&P) and technical & construction design of the structures in the obstructed stretches were already approved by the Engineer/Respondent. Accordingly, the Engineer has not considered any delay in respect of design. The Engineer has considered the delay impact on the construction with regard to completion of various activities as planned in CCP.
60. Temples, Wells, Mast etc. are Charted/uncharted utilities which are under the scope of the Contractor. Any delay on account of delay in removal of same is responsibility of the Contractor. Moreover, these isolated obstructions like trees, poles, railway quarters etc. These are isolated features with a very miniature footprint and generally are not expected to obstruct the Works in any considerable manner.
61. The Engineer has granted EOT for the last stretch of 10.8 km in parallel section which was handed over on 27.08.2019 (SoD Pg. 5047). All the factors, within obligation of the Respondent, were considered by the Engineer while assessing the EOT for excusable reasons of delay for the Claimant.


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Contract Provisions

62. **GCC Sub-Clause 1.5 (Priority of Documents):** The documents forming the Contract are to be taken as mutually explanatory of one another. For the purpose of interpretation, the priority of the documents shall be in accordance with the following sequence:

- the Contract Agreement (if any),
- the Letter of Acceptance,
- the Letter of Tender,
- the Particular Conditions,
- these General Conditions,
- the Employer's Requirements,
- the Schedules, and
- the Contractor's Proposal and any other documents forming part of the Contract.

If any ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction.

63. **GCC/PCC Sub-Clause 2.1 (Right of Access to the Site):**

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

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

Sr. No.	Period after Commencement Date in days	Cumulative percentage of land to be handed over for the work with respect total length
1	28	80%
2	91	90%


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3	182	<p>100%</p> <p>Complete land will be handed over except the land within ROW at following Chainage:</p> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th colspan="2">DFC Chainage</th> <th rowspan="2">Length (m)</th> <th rowspan="2">Location</th> </tr> <tr> <th>From</th> <th>To</th> </tr> </thead> <tbody> <tr> <td>46700</td> <td>50000</td> <td>5300</td> <td>Mehsana</td> </tr> <tr> <td>67400</td> <td>72700</td> <td>3300</td> <td>Unjha</td> </tr> <tr> <td>95800</td> <td>98000</td> <td>2200</td> <td>Chhapi</td> </tr> </tbody> </table> <p>Land in above stretches would be handed over up to 80 weeks from the commencement date of the package.</p>		DFC Chainage		Length (m)	Location	From	To	46700	50000	5300	Mehsana	67400	72700	3300	Unjha	95800	98000	2200	Chhapi
DFC Chainage		Length (m)	Location																		
From	To																				
46700	50000	5300	Mehsana																		
67400	72700	3300	Unjha																		
95800	98000	2200	Chhapi																		

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

- a) *an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and*
- b) *payment of any such cost-plus reasonable profit subject to a maximum of Rs.2000.00 (two thousand) per day for every km. For length than a kilometre pro-rata amount shall be calculated provided. Provided further that if such delay in handing over does not affect the execution of the foundation work and formation works in approaches, provision under para2.1(b) of this sub-clause shall not apply."*

64. **Appendix to Tender to clause 2.1 stipulates** *"Initially possession of site for work will be handed-over to the Contractor in continuous stretches of at least 10 kms. Thereafter Employer shall make efforts to handover access in chunks of at least 5 kms length in Isolated locations or minimum 1.0 km in stretches in continuation to the previously possessed stretch".*

65. ER Clause 3.2 Appendix 15 *'.....For unchartered public utilities at the Site, the Contractor shall ascertain their actual location / conditions by trial trenches, cable detection by cable locators etc. as specified in Employer's Requirement – Construction. The Contractor shall be responsible for all the trial trenches, cable detection and associated works'.*

66. Under ER Clause 2.2.3(1) of ER, the actual land as required for execution of Permanent Works within the ROW shall be handed over to the Contractor with


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charted utilities mentioned in Attachment 4, 6, 7, 8, 9, 13 and indicative list of trees in Data Book Volume IV of Bid Documents. Under ER Clause 2.2.3(2), the Employer is required to 'Demolish all buildings, constructed facilities, abandoned structures existing within the ROW' except those mentioned in Attachment 4, 8 and list of trees in Data Book. Clause 2.2.3(2) of ER-Appendix 1 that *"In case any building, constructed facility or abandoned structure existing within the land required for execution of Permanent Works in the ROW is leftover for removal by the Employer, the required work shall be carried out by the Contractor duly consented by the Engineer and approved by the Employer and Costs thereof shall be paid under variation order w.r.t. PCC Cl. 13.3 (Volume 1 of Bid Document)."*

67. Under Clause 2.2.3 of ER-Appendix 1, the land was to be handed over with certain identified utilities listed in Attachments- 4 (*List of Existing Duty Huts and Gate Lodges to be Shifted*), Attachment 6 (*List of Public Powerline 33Kv and Below to be Diverted*), Attachment 7 (*List of Existing Roads to be diverted/new roads to be constructed*), Attachment 8 (*List of abandoned structures to be demolished and removed*), Attachment 9 (*List of other chartered public utilities existing within Right of Way and Requiring Extension/Temporary Diversion and/or to be Supported/Handled/Protected During Construction*), Attachment 13 (*List of Irrigation Canal Requiring Permanent Diversion*) and Indicative list of Trees in Data Book.

Deliberations of the DAB

68. The land was to be handed over in stages as per the Contract provision stated in Para 63 above. It is the contention of the Claimant that as per the provisions of the Contract, the Site was to be handed over by the Respondent encumbrances free except those listed in Contract in the Contractor's scope. It is thus, assumed that all the encumbrances in the form of land obstructions would have been resolved by the Respondent by the time of handover. However, the Site was regularly affected with the land accessibility issues causing delays to construction work progress. These access issues faced by the Contractor include the following:

- (i) Land compensation issues with the local land owners.
- (ii) Obstructions on the land (presence of IR cables, IR material store, OHE Masts, Signal Posts, Level Crossings and Stations, Structures, EHT Lines, Temple Structures etc.).

69. On the other hand, the contention of the Respondent that the Contract does not envisage any particular manner or mode of handing of possession of the land or giving right to access to site. Therefore handover in form of JMS sheets was a valid handover of land. Further the Respondent's position is that the land was to be


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handed over with encumbrances and the Claimant was supposed to plan its activities in such a manner that the presence of such encumbrances and the process of removal /diversion thereof would not come in the way of timely achievement of milestone events.

70. On the above basis, as per the Respondent, the access of land given to the Contractor as on scheduled dates compared to the Contract provisions are as follows:

Summary-Land handed over to the Contractor

	As per Clause 2.1 PCC			% of Handed over Land	
	Scope km	%age	km	km	%age
28 Days	332	80%	265.6	208.22	63%
91 Days	332	90%	298.8	316.13	95%
182 Days	332	100%	332	316.13	95%
80 Weeks	10.8		10.8	0	0%

71. As per the stand taken by the Claimant and the Respondent as stated above, the following points of dispute need to be examined:


- (i) Whether handover of land by the Respondent in the form of JMS is a valid and logical mode of transfer of land?
- (ii) What would constitute the handover of land free from all encumbrances?

To examine the above issues, it would be appropriate to refer to the relevant clause of Contract i.e. ER Clause 2.2.3 as reproduced below for the ease of reference:

“2.2.3 Conditions of Possession of the Site from the Employer shall be described as follows:

- (1) The actual land as required for the execution of Permanent Works within the ROW shall be handed over to the Contractor free from all encumbrances except for the land area occupied by the duty huts & gate lodges, public power lines of 33 kV and below, existing roads, abandoned structures, other chartered public utilities which are to be handed /supported/protected /temporary diverted, irrigation canal and all the trees including the trees having girth 300mm and more, as identified and listed in **Attachment 4, Attachment 6, Attachment 7, Attachment 8, Attachment 9, Attachment 13 and Indicative list of trees in Data Book-Volume IV of Bid Documents** respectively, to the Scope of Work (included in Employer’s Requirements – Functional) as part of the Scope of Work. Such land area shall also be handed over to the Contractor and making it free from all the encumbrances and/or handling the utilities to facilitate the execution of Permanent Works shall be the responsibility of the Contractor.*


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(2) Before handing over the possession of the Site, which may be composed of multiple Work Segment: (as defined in Appendix 14 to the Employer's Requirements) in ROW, the Employer shall

a) Demolish all the buildings, constructed facilities abandoned structures existing within the land required for execution of Permanent Works in the ROW (and remove the demolished materials from the Site) except for those buildings, structures & trees (including the trees having girth 300mm and more) which are identified and listed in **Attachment 4, Attachment 8 and indicative list of trees in Data Book-Volume IV of Bid Documents** respectively, to the Scope of Work included in Employer's Requirement – Functional, demolition/cutting and removal of which shall be the responsibility of the Contractor.

In case, any building, constructed facility or abandoned structure existing within the land required for execution of Permanent Works in the ROW is leftover for removal by the Employer, the required work shall be carried out by the Contractor duly (illegible) by the Engineer and approved by the Employer and costs thereof (illegible) variation order w.r.t. Particular Conditions Clause 15.3 (Volume 1 of the Bid Documents).

The Contractor shall take into account the likely time to be taken for removal of such structures, in the overall construction programme. The Contractor shall inform the Engineer about his programme of works relating to these structures and shall take adequate measures to ensure that removal of these structures do not affect the Contractual Construction Programme as consented by the Engineer and as described in Clause 8 of Employer's Requirements – General and Clause 5 of Appendix 5 [Project Programme Requirements] to the Employer's Requirements.

b) Divert all the charted public utilities existing in the ROW other than those 33kV and below electric lines, other charted public utilities and existing irrigation canal which are included in the Scope of Works for the Contract and as listed in the **Attachment 6, Attachment 9 and Attachment 13** respectively to the Scope of Works included in the Employer's Requirements – Functional Diversion / handling / supporting / protection of the public utilities as listed in the **Attachment 6, Attachment 9 and Attachment 13** to the Scope of Works shall be the responsibility of the Contractor.


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(3) *The Contractor shall ensure that the land for which the Right of Access has been given by the Employer, is not encroached by unauthorized persons and is not used for any purposes not connected with the Works.*

(4) *Diversion of all the uncharted public shall be handled as specified in Appendix 15 [Requirements for Construction].*

(5) *Although the Site within the ROW shall become a possession of the Contractor during his construction as described below the Contractor shall be solely responsible for maintaining the same and reinstating the same within the occupancy of Temporary Works to the entire satisfaction of the Engineer/ Employer at his own expenses."*

72. From the perusal of the above clauses, it is observed that the key sentence /words as presented in this clause are: *"Contractor's possession of the site (Clause 2.2)", "employer has acquired about 90% of the land within ROW... (Clause 2.2.1)", "Employer shall give right to access to the Site to the Contractor.... (Clause 2.2.2)", "Conditions of Possession of Site from the Employer...(Clause 2.2.3)".*

As per the common understanding, the words *"Possession", "Acquired" and "Right to Access"* can only be used with respect to physical availability of land and not by way of handover in form of JMS. Therefore, the argument of the Respondent that the land was handed over in form of JMS does not sustain.

73. The second issue which is to be examined and decided is regarding obstructions /hindrances caused by the PAPs (on account of land compensation, etc.) and the encumbrances which existed on the land at the time of handover /Contractor's access to the Site. As regards to the obstructions /hindrances caused by the PAPs, the Respondent referred GC/PC Clause 4.22 (a) which obligates the Contractor for keeping unauthorized persons of the site. It further referred to Clause 1.5 of Appendix 15 of the ER which mandates that the Contractor shall make necessary arrangements to ensure that no unauthorized persons enter the work area by way of posting security guards. The DAB Noted that the Respondent in its submission made on 16.4.2024 at page 5062 has mentioned that *".....In regard to claim for land issues, most of cases are pertaining to Payment issues by the land owners with the revenue authorities to whom the payment has been made by the Employer much in advance. The issue was taken up by the Employer with the Authorities for early settlement, however, the responsibility of the claimant to pursue with the authorities should not be under estimated."* The above statement of the Respondent amounts to clear admission that the land owners obstructed smooth


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execution of the Works. Contrary to the Respondent's argument in para 219 and 220 of the SoD, the DAB is of the view that the land related issues cannot be termed as unauthorised persons to be dealt through security guards referred to in GC/PC 4.22 as well as Clause 1.5 of Appendix 15 of ER. Dealing with the land owners was very much obligation of the Respondent and the Respondent has addressed the same by way of Variation Orders etc. Accordingly the Claimant needs to be duly compensated in terms of time as well as cost due to delay in accessing the site on account of obstructions/hindrances caused by the PAPs.

74. With regard to the encumbrances (utilities) existing on the Site, it is seen that keeping in view various provisions of the Contract, the encumbrances can be classified into three categories namely; (i) encumbrances (utilities) which are within the scope of the Employer; (ii) encumbrances (utilities) which are within the scope of the Contractor; (iii) uncharted /unidentified encumbrances (utilities) which were to be identified and appropriately dealt with by the Contractor during the course of the execution of the work. These are further dealt with as under:

74.1 (i) **Encumbrances (utilities) which are within the scope of the Employer** – The Contract under the provisions of Clause 4.2 of Vol. IV Part 5 (Data Book) and attachment 15 of ER, specify certain encumbrances /charted utilities and structures which the Respondent was obligated to remove. This clause has 20 sheets from the Contract (Page No. 6627 to 6646) which list these charted utilities falling in the scope of the Respondent. As referred from Para 48 of the Written Submissions by the Claimant, the package wise summary of such utilities is tabulated below:


CLAUSE REF.	TYPE OF UTILITIES	NOS.	PACKAGE WISE LENGTH OF CHARTED UTILITIES						LENGTH (KM)
			A	B	C	D	E	F	
4.2.1 to 4.2.7	House, Water structures and Temples	386					3.05	0.81	3.86
4.2.8 to 4.2.10	IR Utilities (Staff quarters, station buildings, S&T cables, FOB and Platforms)	-	10.8	21.6	1.06	-	-	-	33.46
4.2.11 to 4.2.14	Building, Pipeline and Structures	501	2.05	1.87	0.59	0.5	-	-	5.01
4.2.15	Duty Huts and Lodges	36	0.08	0.13	0.15	-	-	-	0.36
4.2.16 to 4.2.20	Existing Roads, Powerline 33kv and below, Oil pipelines and Structures	65	2.02	6.51	0.5	0.55	-	-	9.58
Attachment 15	Electric utilities above 33 KV	83	0.52	0.88	0.56	0.18	0.78	0.44	3.32
Total length			15.47	30.99	2.86	1.21	3.81	1.25	55.59*

* without actual quantification for IR stretch S&T cables

** 16.2% of Project total length in scope

74.2 **Encumbrances (utilities) which are within the scope of the Contractor** are summarized and tabulated in Table 7 of Para 46 of Written Submission by the Claimant on Page 23. For ready reference, Table 7 is being extracted hereinbelow:


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CHARTED UTILITIES/STRUCTURES AS PER CL. 2.2.3 OF ER (APPENDIX 1)									
ATTACHMENT NO.	TYPE OF UTILITIES	NOS.	PACKAGE WISE LENGTH OF CHARTED UTILITIES						LENGTH (KM)
			A	B	C	D	E	F	
4	Duty Huts & Gate Lodges	-							-
6	33 KV Powerline	585	1.48	1.80	1.36	1.18	4.22	1.66	12
7	Existing Roads	69	2.81	2.35		0.96	9.70	4.27	20
8	Twin ROB	1	0.05						0.05
9	Water pipeline and OFC Cables	60	0.12	0.11		0.04	0.04		0.30
13	Irrigation Canal	1						0.74	0.74
Data Book	Trees	38481							Not Defined
Total length			4.46	4.26	1.36	2.18	13.96	6.67	32.88*

It is thus, quite clear that the handover of the land by the Respondent to the Claimant would include these encumbrances as stated above as per ER Clause 2.2.3 (Appendix 1)

74.3 **Uncharted /unidentified encumbrances (utilities):** These utilities are in the scope of the Contractor and required to be dealt with appropriately as per the Contract. The Contract ER Clause 3.2 – Appendix 15 which deals with uncharted utilities is extracted below for the ease of reference:

“3.2 For unchartered public utilities at the site, the Contractor shall ascertain their actual location /conditions by trial tranches, cable detection by cable locators etc. as specified in Employer Requirement – Construction. The Contractor shall be responsible for all the trial tranches, cable detection and associated works.”

Further, with respect to the construction programme vis-à-vis uncharted utilities, ER Clause 3.6 – Appendix 15 is relevant and extracted below:


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“3.6 The Contractor shall take into account the likely time to be taken for diversion of such uncharted utilities in the overall construction programme. The Contractor shall inform the Engineer about his programme of works relating to utility diversion and shall take adequate measures to ensure that these utilities diversion work do not affect the contractual construction programme as consented by the Engineer and as described in Clause 8 of Employer’s Requirement – General and Clause 5 of Appendix 5 (Project Programme Requirements) to the Employer’s Requirements.”

The DAB referred the Contractual Construction Programme (CCP) submitted by the Contractor along with its SoC (Refer Exhibit CD-5/33, Pages 8819, 8825, 8826, 8830, 8832 and 8835) pertaining to various packages. It is noted that the Contractor had provided 180 days to 210 days for uncharted utility identification and shifting. The details of start and finish of this activity for various packages as per the CCP is as follows:

- (i) **Package A:** 08.10.2016 to 10.04.2017 (Page 8819)
- (ii) **Package B:** 09.11.2016 to 10.06.2017 (Page 8825)
- (iii) **Package C:** 09.12.2016 to 11.07.2017 (Page 8826)
- (iv) **Package D:** 06.12.2016 to 11.05.2017 (Page 8830)
- (v) **Package E:** 08.10.2016 to 11.05.2017 (Page 8832)
- (vi) **Package F:** 09.11.2016 to 10.06.2017 (Page 8835)

The DAB also noted that the details of shifting of uncharted utilities by the Contractor, have been furnished by the Respondent in its Statement of Defence (Refer RD-17, from Pages 844 to 849). It is seen that there has been considerable delay in the identification of uncharted utilities by the Contractor and it ranges from 451 days to 1853 days. The DAB also noted that the cost of shifting of the uncharted utilities has been paid through various variation orders at different point of time (Refer RD-17, total 47 variation orders). Thus, the issue is with respect to time required to identify and relocate these utilities. It is a fact that uncharted utilities are not known to the Contractor at the time of bidding and one may argue that how would a contractor allocate the time for an activity whose scope is not known. However, it is seen that the Contractor had provided for 180 to 210 days for identification and shifting of uncharted utilities. With clear emphasis on identification of uncharted utilities as per ER Clause 3.2 (as extracted above), it was prudent for the Contractor to identify and then specifically make its case for additional time, if required for relocation of the specific uncharted utilities, depending upon the nature of work involved in relocation of such specific utilities. It appears that the same has not been done by the Contractor. Accordingly, the


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DAB is of the considered opinion that no additional time for the relocation of uncharted utility can be considered to be termed as excusable delays.

74.4 Under Clause 2.2.3 of ER- Appendix 1, the Employer was required to **demolish** all the buildings, construction facilities, abandoned structures existing within land required for execution of Permanent Works in the ROW. The responsibility for removal Charted Utilities covered in clause 2.2.3 of the Employer's Requirements for 32.88km stretch rests with the Claimant whereas clearance of all other encumbrances for (343km – 32.88km) 310.2 km listed in Clause 4.2.1 of Part-5 of the ER rests with the Respondent. The Respondent has argued that this obligation of removing charted utilities as listed in the Scope of Employer (refer para 74.1 supra) casted on the Employer is not absolute as the same very Clause 2.2.3 (2) of ER – Appendix 1 provides that *"in case any building, constructed facility or abandoned structure existing within the land required for execution of permanent works in the ROW is leftover for the removal by the Employer, the required work shall be carried out by the Contractor duly consented by an Engineer and approved by the Employer and costs thereof shall be paid under variation order with respect to TCC Clause 13.3 (Vol. 1 of Bid Documents.)"*

75. It is an admitted position that the handover of the land to the Claimant was done along with these encumbrances, the removal of which was in the scope of the Employer as per the Contract. Once a clear provision existed in the Contract, it is quite logical that a prudent contractor would not account for time and cost for such activities which are otherwise in the scope of Employer. Further, it is noted that most of these utilities pertain to Indian Railways or other government entities. Keeping in view the ownership and the nature of these utilities, it appears quite logical that these utilities were kept in the scope of Employer. Therefore, during the execution of the Contract, if the intent of the Employer changed, it was prudent on the part of the Employer to inform the Contractor to revise its planning with respect to time and cost accordingly. A mere provision in the Contract as cited by the Respondent (Refer Para 74 supra) would not shift the responsibility to the Contractor and absolve the Respondent from its contractual obligation. The Respondent has not placed any documentary evidence on record to establish that this change in the scope of work was ever advised to the Contractor. The DAB is therefore, of the view that the handover of the land with existence of the charted utilities (in Employer's Scope) cannot be considered as encumbrances free handover.

76. From the discussions in the foregoing paras (73 and 75), it is seen that such obstructions /hindrances by the PAPs and encumbrances in form of charted utilities (Employer's Scope) would delay the progress of work. The DAB is


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therefore, of the view that Contractor is entitled for additional time and cost on this account. It is seen that the removal of these hindrances /encumbrances has happened in phases. The Claimant has placed numerous correspondences along with jointly signed RFIs pertaining to various Packages (Package A to F) dated 31.01.2017, 04.02.2017, 07.07.2017, 14.07.2017, 19.09.2017, 22.11.2017, 09.01.2018, 19.06.2018, 06.10.2018, 08.10.2018, and 04.03.2019 (Refer Annexure 3, Page 28 to 132 of Written Submissions by the Claimant) regarding land obstructions and utilities /structures under Employer's Scope, to establish the presence of these hinderances/encumbrances during the execution of Works.

77. The DAB would now attempt to quantify the time delay as discussed in para 75 and 76 above based on the documents submitted by the Claimant and the Respondent. The DAB during the course of discussions with the Parties, had requested for the submissions of Package-wise strip chart pertaining to land issues and obstructions. In addition, reference is also made by the DAB on the monthly progress report submitted by the Respondent as part of its SoD (refer RD-11) to quantify the time delay. As per the provision of the Contract, 80% of the land was to be provided on 28th day, 90% on the 91st day and 100% on the 182nd day (except 10.8 kms which was to be handed over on 560th day). As per the Commencement Date, the 182nd day falls on 05.12.2016. Since DAB has already considered time delay upto 24.12.2016 on account of ROW demarcation, the DAB consider it appropriate to consider the status of land handover along with the status of existing encumbrances (Employer's Scope) as on 05.12.2016 for the purpose of analysing time delay on account of obstruction/hindrance and encumbrances (Employer's Scope). The strip charts submitted by the Claimant along with its Written Submissions (refer Annexure 4, Page 133 to 147) are referred and the position of availability of land along with the status of land affected by hindrances/charted utilities is summarized in the table below:

Sr. No.	Package	Total Scope (Km.)	Length affected by land issues/charted Utilities (Employer's Scope) (km)	Available work front (km)
1.	A	77.84	52.87	24.97
2.	B	76.688	64.17	12.518
3.	C	63.58	59.67	3.91
4.	D	37.92	37.92	0
5.	E	44.15	35.326	8.814
6.	F	42.858	15.63	27.23


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78. To ascertain the status of handover of encumbrances free land subsequent to the cut-off date of 05.12.2016, the Contractor's Monthly Progress Report (MPR) extract for period July 2017 to September 2022 as submitted by the Respondent in its SoD (RD-11 of SoD, page 480-539) are referred. The status of the net obstructed land at different time period is summarized below:

Net obstructed land (Kms.)

Sr. No.	Month	Package A	Package B	Package C	Package D	Package E	Package F	Total
1.	July 2017	58	24	4	14	12	15	127
2.	June 2018	15.3	10.3	8.8	3.8	7	6	51.2
3	June 2019	6.66	5.7	3.9	0.3	2.3	0.84	19.7
4.	March 2020	1.95	3.43	3.22	0.12	1.8	0.24	10.76
5.	March 2021	0.62	2.125	1.21	2.135	1.45	1.48	9.02
6.	December 2021	0.47	1.21	2.24	0	1.45	0	5.37
7.	September 2022	0.04	1.91	0.02	0	0.11	0	2.08

79. The DAB examined the status of the handover of land vis-à-vis progress of earth work as on 30.09.2022 (the cutoff date of present EOT) based on the MPR of September 2022 as submitted by the Contractor to the Engineer (refer RD-11, Page 518 to 524 of SoD). The DAB also went through the Engineer's assessment for this EOT (refer RD-36 of SoD, Page 1665). On the basis of net obstructed land as on 30.09.2022 (refer para 78 supra) and the earth work progress as given in the MPR. Following conclusions are drawn with respect to time delay on account of various land issues / hindrances (Employer's Scope) for each package:

(a) **Package A:**

- (i) Net Obstructed Length – 0.04 km.
- (ii) Earth work progress – 100% (page 519).
- (iii) Blanketing progress - 100% (page 519).

Hence, the DAB considers entitlement for EOT beyond 30.09.2022 – Nil

(b) **Package B:**

- (i) Net Obstructed Length – 1.91 km (as on 30.09.2022 and 3.308 km (as on 31.12.2022)).

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- (ii) Earth work progress – 98% (Page 520).
- (iii) Blanketing Progress - 96% (Page 520).

As per MPR (December 2022, Page 537), there are obstructions at 12 locations (varying length 30 m to 802 m) in form of IR cables /platform. The Engineer in its assessment, has opined that *“the isolated obstructions claimed by the Contractor in Package B2 are not significant as the delays by the Contractor (non-excusable delays) are more and as it has not affected the construction of permanent works as such. Accordingly, the delay on this account is not found tenable and the same has not been considered eligible for EOT towards completion of MS1.”* (refer page 1701of SoD).

The fact that the removal of such obstructions falls within the obligation of the Respondent and also the fact that the delay analysis prepared by both the Parties is in question by opposite Party, the DAB does not find any merit in the submissions of the Engineer. Accordingly, the DAB decides the entitlement of EOT as under:

Extension upto 30.09.2022 + period of delay till actual date of removal of obstructions + time required for mobilization (30 days if the work in the surrounding area is already complete) + time required for execution of the work (pro-rata basis for each location).

(c) Package C:


- (i) Net Obstructed Length – 0.02 km (September 2022).
- (ii) Earth work progress – 70% (Fill), 58% (Cut) (Page 521).
- (iii) Blanketing Progress - 53% (Page 521).

As per MPR of September 2022, there is obstruction at one location in the form of Adani Gas Pipeline and EHT line (20 m) (refer Page 527 of SoD). The Engineer has already considered an obstruction of 540 m in Chainage 72060 to 72600 (page 1704 of SoD). It is further noted that the earth work in surrounding Chainages was in progress and therefore, no extra time is considered due for remobilization. Hence, the DAB considers entitlement for EOT as per the Engineer’s assessment is correct.

(d) Package D:

- (i) Net Obstructed Length – 0 km.
- (ii) Earth work progress – 68% (Page 522).
- (iii) Blanketing Progress - 37% (Page 522).


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The DAB observed that the net obstructed land status in December 2021 MPR is also zero. It is further noted that the cutoff date of EOT- 6 is 31.12.2021 (refer Page 79 of SoC).

Hence, the DAB is of the view that the entitlement for EOT as assessed in EOT- 6 is correct and holds good as the same has been accepted by the Parties.

(e) Package E:

- (i) Net obstructed length – 0.11 km (as on 30.09.2022 and 0.45 km (as on 31.12.2022).
- (ii) Earth work progress – 35% (page 523).
- (iii) Blanketing progress - 4% (page 523).

As per MPR (September 2022, page 527), obstructions were at 2 locations comprising 1 land issue and other EHT line. Further, as per MPR (December 2022, Page 538), there are obstructions at 10 locations (varying length of 20m to 80 m). Since the obstructions are physically hindering the work, in view of the DAB following EOT is considered:

Extension upto 30.09.2022 + period of delay till actual date of removal of obstructions + time required for mobilization (30 days if the work in the surrounding area is already complete) + time required for execution of the work (pro-rata basis for each location).


(f) Package F:

- (i) Net obstructed length – 0 km (as on 30.09.2022 and 0.1 km (as on 31.12.2022).
- (ii) Earth work progress – 72% (page 524).
- (iii) Blanketing progress - 40% (page 524).

As per MPR (December 2022, page 538), obstruction was at one location at ROB 99 due to existing houses, forest department trees and shops. It is seen that 10 houses were to be removed by the Employer between Chainage 158548-160948. The present obstruction is at Chainage 160338 and thus, it is within the location of Employer's Scope. Since the obstructions are physically hindering the work, following EOT is considered by the DAB:

Extension upto 30.09.2022 + period of delay till actual date of removal of obstructions + time required for mobilization (30 days if the work in the


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surrounding area is already complete) + time required for execution of the work (pro-rata basis for each location).

DE-3 Delay in approval of Inception Report

Claimant's arguments in support of his Claim

80. The Claimant submitted the Inception Report for approval on 18 July 2016, within 42 days of Commencement Date. The Engineer is required to approve the Inception Report within 21 days of submission by the Claimant. The Respondent's approval was received on 27 February 2017 with delay of 203 days. The Claimant mitigated the impact of this event by preparing the Alignment Designs, where possible, based on the Engineer's approvals. However, no alignment and structural designs could be approved before the approval of the Inception Report by the Respondent.
81. The Claimant notified the delays in Monthly Progress Reports and in various progress review meetings, delay if any, in giving notice by the Contractor cannot absolve the Engineer/Employer from their obligation as per provisions of applicable laws.
82. Neither Contract nor CCP anticipates submission of all reports forming the Inception Report in a single submission. The Claimant's submission was well in accordance with the contractual requirements, whereby the Claimant was required to 'sufficiently develop' the Inception Report, including the main documentation needed to prepare and develop the Technical Design, to demonstrate compliance with design requirements.
83. The Claimant is entitled to an extension of time 179 days in MS-1, MS-2 and MS-3 due to the delay in approval of the Inception Report.

Respondent's arguments in support of his defence

84. Clause 1.2.2 of ER- Appendix 14 provides that even before the submission of Inception Report, within 28 days of the Commencement Date, the Contractor shall submit the 'design plan submission' containing details under 09 broad heads such as the Construction Programme; Survey Plan for validation of Data Provided by the Employer; Geotechnical Investigation Plan, amongst other things.
85. GC/PC Clause 5.2, read with the provisions of ER-Design, the Contractor was required to submit the entire Inception Report containing documents stipulated in


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the ER within 42 days after Commencement Date i.e. before 18.07.2016. It was only upon the submission of complete Inception Report the Engineer have approved the same in accordance with the terms of the Contract.

86. The Contractor has submitted the Inception Report in a piece-meal basis which was brought to its attention vide Engineer's letter dated 09-08-2016, wherein Engineer has pointed out the deficiencies and missing documents of the Inception report. The Contractor vide letter dated 26.08.2016 withdrew various letters submitted earlier.
87. On 28.10.2016, the Contractor submitted balance missing documents of the Inception Report. Therefore, the Contractor's claim that all the 43 documents were submitted within 42 days of Commencement Date (i.e. up till 18.07.2016) in incorrect. The Contractor has delayed the complete submissions of Inception report by a period of 102 days.
88. The Contractor, on 15.12.2016, made complete submission of Inception Report along with compliance of Employer's/Engineer's comments. Accordingly, the same was forwarded to Employer whereupon certain observations were given by the Employer.
89. The Contractor submitted the compliance of Engineer/Employer's observations vide its letter dated 14.02.2017 received on 15.2.2017.
90. NONO/NONOC to the Inception Report was issued on 25.02.2017 within a period of 10 days of Contractor's submission. Had the Contractor followed all Contractual provisions and submitted the complete Inception Report complying the Employer's Requirements (ER) and relevant Codes and Standards, the approval of ICR would have come much earlier.
91. The Claimant submitted the documents forming part of the Inception Report in a piecemeal basis, the works for which approvals were granted by the Engineer upon correction of errors by the Claimant were carried out by the Claimant which is evident from the Monthly Progress Reports and MOMs on record from Aug-2016 to Feb-2017 wherein it can be noted that the physical progress of work was not affected due to delay in finalization of Inception Report.
92. As per Contract, Inception Report is a single document containing the indicative 43 particulars which requires approval from Employer. The Engineer approved the part submissions of Inception reports as when the documents were submitted/complied by the Contractor with ER.


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93. There was inordinate delay in submission of complete Inception Report, the piecemeal submission and approval of the same did not prevent the Contractor from carrying out surveying works (ROW, topo survey etc.) and various site works and preparation of design works prior to issuance of NONO to Inception Report by the Employer. As per MPR of Jan-2017, the Contractor completed preliminary Embankment Design of 317km and Final Alignment Design of 20Km and NONO/NONOC was issued for Construction of 4 RUBs. Also several Technical design submissions were made by the Contractor before the approval of Inception Report.

Relevant Contract Provisions

94. ER Clause 1.3, 1.4 and 1.5 mandates the Contractor to maintain a qualified independent design team having experience and qualifications commensurate and appropriate for a project of this magnitude.
95. ER Clause 1.6 provides that there shall be following four Design Submissions covering both the design phase and construction phase i.e. (i) 'Inception Report', (ii) 'Technical Design', (iii) 'Construction Design' and (iv) As built documents. Requirements of each design stage is detailed in ER - Appendix 14 [Requirement for Designs]. ER Clause 3.2(1) (Design) stipulates that the Inception Report be submitted by the Contractor within 42 days after the commencement date.
96. GC/PC Clause 4.1 (Contractor's General Obligations) *"The Contractor shall design, execute and complete Works in accordance with the Contract...."*. It further provides that *"Works shall include any work which is necessary to satisfy the Employer's Requirements, Contractor's Proposal and Schedules, or is implied by the Contract, and all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works"*
97. GC/PC Clause 5.1 *"The Contractor shall carry out, and be responsible for, the design of the Works"*. The said clause further obligates the Contractor to ensure that the designs are *"prepared by qualified designers who are engineers or other professionals who comply with the criteria (if any) stated in the Employer's Requirement with reference to purpose, scope, design and/or other technical criteria for the works and Installation, Testing and CommissioningThe Contractor warrants that he, his designers and design Subcontractors have experience and capability necessary for the design"*.


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98. GC/PC Clause 5.2 (Contractor's Documents), *"The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements....they shall be submitted accordingly, together with a notice as described belowshall state that the Contractor's Document is considered ready, both for review (and for approval, if so specified) in accordance with this Sub-Clause and for use. The Notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply."*
99. GC/PC Clause 5.4 of GC/PC, (Technical Standards and Regulations) *"The design, the Contractor's Documents, the execution and the completed Works shall comply with the Country's technical standards, building, construction and environmental Laws, Laws applicable to the product being produced from the Works, and other standards specified in the Employer's Requirements, applicable to the Works, or defined by the applicable Laws.....All Laws shall, in respect of Works and each Section, be those prevailing when the Works or Section are taken over by Employer under Clause 10 [Employer's Taking Over]"*.
100. ER Clause 3.2(2) (Design), *"The Inception Report shall be based on the Contractor's Bid Design and shall be sufficiently developed including the main documentation needed to prepare and to develop the Technical Design and to demonstrate compliance with design requirements, including but not limited to, survey and investigation plans, design submission plan and programme, reviews of Employer's Document. The Inception Report shall sufficiently define the main structures, track alignment & track components, non-traction power supplies and building services etc."* Clause 3.2(3) of ER-Design further mandates that in addition to what is stated in Clause 3.2(2) above as well as Employer's Requirement - Appendix 14 and 12, the *"general construction, manufacture, installation, testing and commissioning methodologies and documentation required to develop the Technical Design shall be submitted"*.
101. ER-Appendix 12, table 12.1 [Programme Submissions], the Contractor has been made aware and notified about the various requirements forming an integral part of its Inception Report and it has been clearly provided that such compliance has to be ensured within 42 days from the commencement date.
102. ER Clause 1.2.1 -Appendix 14 (Inception Report) provides *"Based on the Contractor's Bid Design and Technical proposals during the bidding process, the Inception Report submission shall provide reports, drawings and documents for the purpose of review of the Employer's Requirements and preparation of Technical Design to be developed in the Design Phase."* This clause categorically states that *"The Inception Report shall be sufficiently detailed to show the main elements of*


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the design and to include the items necessary to develop the design". It further provides a list of 43 items which shall necessarily form a part of the inception report (however, not limited to these 43 items).

103. ER Clause 2.2 - Appendix 13 (Submission and Response Procedure) provides *"Each submission shall be accompanied by a brief introduction to explain which subsystem – part of the Works to which the submission refers, listing the documents enclosed with the submission, and describing in outline how all relevant requirements of the Employer's Requirements are achieved by the proposals."*
104. ER Clause 2.3 mandates *"For each stage of submittal, the Contractor shall prepare a Submission Response Request (SRR) carrying the date of submission, the submission reference number as defined above, the submission title, the stage of submission (e.g. Inception Report, Technical Design etc) and the signature of the Contractor's Representative to confirm that, in the opinion of the Contractor, the submission : (i) complies with all relevant requirements of the Employers Requirement; (ii) confirms to all interface requirements; (iii) contains, or is based on auditable and proven or verified calculations or design criteria; (iv) has been properly reviewed by the Contractor, according to the Contractor's Project Quality Assurance Plan, to confirm its completeness, accuracy, adequacy and validity; (v) has taken account of all requirements for consent / approval by statutory bodies or similar organizations, and that where required, such consent / approvals have been granted, and (vi) contains six (6) properly signed copies of the "Design Certificate", if necessary, as required in Appendix 7 [Quality Assurance] and Appendix 14 [Requirements for Design] to the Employer's Requirements, (vii) Om case of new products/technologies, certification from the client railway of the organized railway system certifying its established and proven record under similar atmospheric and operational conditions as specified in Clause 13.1.1 of Specifications (Volume III of Bid Documents)".*

Deliberations of the DAB

105. It is seen that the detailed requirement of the Inception Report is stated in Appendix 14 of ER (Functional) Clause 1.2 (Page 578 to 580 of Vol. 2 of Contract). As per CCP, submission of Inception Report in 43 documents was scheduled within 42 days of the Commencement Date i.e. by 18.07.16 and approval of Inception Report was to be done within 21 days. It is alleged by the Claimant that the Respondent took more than 2 months (para 2.1.2 d CD-5/07 page 511) and the final approval of the Employer was accorded on 25.02.17.


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106. The DAB noted that the Claimant did not provide all the 43 documents comprising of Inception Report together and instead 38 documents of the Inception Report were submitted by the Claimant in first stage. The DAB further noted that the Contract does not provide for submission of all the 43 documents of Inception Report in one go and as such, the Respondent could have reviewed 38 documents of Inception Report as and when submitted by the Claimant. However, it is noted that as per the CCP submitted by the Claimant, all items comprising of Inception Report are listed for submission on 18.07.2016 with target date for issue of NONO/C by the Engineer on 08.08.2016 (Ref. Exhibit CD-5/33, Page 8747 and 8788 of SoD). It is thus, noted that the intent of both the Parties was to have complete submission of all documents together.

107. The Respondent argued that the Engineer conveyed NONO/NONOC as and when any document of Inception Report was received and accordingly the Permanent Works did not suffer for want of approval of Inception Report. The DAB noted that the Respondent (Employer and not Engineer) was competent authority for approval of Inception Report who insisted for submission of all Documents of Inception report in one go and the Respondent accordingly accorded NONO/NONOC only after receipt of all Documents of Inception Report. The DAB further examined this aspect of piecemeal submission and it is noted that the Engineer returned the Inception Report to the Claimant on 09.08.2016 highlighting 07 missing items i.e. Sr. No. 3, 6, 11, 12, 24, 32 and 37 as listed in Appendix 14, Sub-Clause 1.2.1 of ER (Ref. RD-20, Page 887-888 of SoD). The DAB noted that out of the above listed missing documents, following documents were important for Engineer/Respondent to conduct a comprehensive review before according its approval:

- (i) Review of Right of Way (ROW) indicated in the alignment drawing (Sr. No. 3 of Appendix 14).
- (ii) Review of the structures indicated in the reference drawings (Sr. No. 6 of Appendix 14).
- (iii) Station and Integrated Maintenance Depot Planning Report as described in Clause 13 of Employer's Requirements – Design (Sr. No. 11 of Appendix 14).

108. It is further noted that the Claimant vide its letter dated 26.08.2016 (Ref. Annexure RD-21, Page 894-896 Vol. III of SoD) made a resubmission and withdrew some of the documents submitted by it earlier. As regards to the review of the structures indicated in the reference drawings, the Claimant stated in this letter, that it will be submitting the relevant documents soon. It is only after about 2 months, the


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Claimant submitted its review report of structures on 28.10.2016 (Ref. Annexure RD-22, Page 901-953 Vol. III of SoD) and the whole Inception Report was submitted on 15.12.2016.(Ref. Annexure RD-23, Page 954, Vol. III of SoD).

109. It is the contention of the Respondent that after the submission of the whole Inception Report by the Claimant on 15.12.2016, the Contractor submitted the compliance of Engineer/Employer's observations vide its letter dated 14.02.2017 (Ref. Annexure RD-24, Page 1061 Vol. III of SoD). Thereafter, NONO/C was issued to the Claimant on 25.02.2017 i.e. within a period of 10 days of Contractor's submission. Accordingly, the Respondent has pleaded that there is no delay on its part in issuing the NONO/C to the Claimant. The DAB observed from the references mentioned in Claimant's letter dated 14.02.2017 (Ref. RD-24 of the SoD) that all the communications made between the Engineer and the Claimant after submissions of whole Inception Report (i.e. 15.12.2016) are not submitted to the DAB. However, it is seen from the reference that letters were written by the Engineer/Employer on 15.12.2016, 24.01.2017, 27.01.2017 and 07.02.2017. Notwithstanding, the content of these letters which are not on record with the DAB, it is clear that the important document in the form of Structure Review Report was submitted by the Claimant on 28.10.2016 and as such, the Engineer/Employer had sufficient time to review the documents and seek clarification from the Claimant by the time it submitted its complete Inception Report on 15.12.2016. Thus, DAB is of the view that there has been delay in approving the Inception Report by the Respondent. This delay is quantified as under:

- (i) Date of submission of whole Inception Report – 15.12.2016.
- (ii) Date of approval of Inception Report – 25.02.2017.
- (iii) Time elapsed between (i) and (ii) above – 72 days.
- (iv) Less 21 days allowed for review/approval of Inception Report – 51 days (72 days - 21 days).

Since the delay for the demarcation of ROW is already accounted for till 24.12.2016, there is a overlapping period of 9 days (24.12.2016 – 15.12.2016). Therefore, the net delay on account of this Delay Event 3 is 42 days (51 days - 9 days).

The DAB is of the view that the Claimant is entitled for 42 days of excusable delay against Delay Event (DE-3).


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DE-4: Delayed approval of alignment designs:

Claimant's Arguments in support of Claim:

110. That due to the introduction of 140 number new structures and modification of 386 numbers existing structures, as a result of Skew/Square Variations, increase in vertical height and span to match IR structures in Parallel section, increase in vertical clearance and span of structures as per the requirements of the Authorities and the Engineer/Employer's decision for raising the Alignment levels at EHT line locations and non-depression of RUBs in entire Detour stretch, the finalization of the Alignment had undergone several changes (many of the alignment approval in detour were revoked and there were 6 to 16 revisions in most of the Alignment stretches), thereby consuming considerable time for approval of the Alignment drawings.
111. IR instructed to revise the track centreline distance with the existing IR track to incorporate a future IR line which had impacted 16.4 km of the alignment and to provide provision of future lines at 6 yard locations. These belated changes brought by the IR had impacted horizontal alignment and the Claimant had to rework the alignment design and construction works.
112. While the Parties agree on the tenability of this delay event, disagreement persists with respect to the magnitude of delay assessed by the Respondent.
113. The approval of the Alignment Designs was delayed due to the following factors:
- a. Engineer and/or Respondent's prolonged review periods of the vast majority of the Contractor's alignment design submissions.
 - b. Piece meal comments by the Engineer and/or the Employer.
 - c. Delays in the Employer obtaining approvals from the relevant state & IR.
 - d. Late introduction of IR revised requirements affecting finalization of alignment.
114. Revisions to the design submissions, requiring additional works by the Contractor;
- a. Route change following from centreline shift to make allowance for a future IR line.
 - b. Structural changes due to bridge size change as required by the Employer and/or by state authorities (through late issuance of Notice of NONOC).
 - c. Gradient changes to maintain accommodate RUB requirements.
115. The Claimant in CCP has considered 56 days for submission and approval of design submissions including one time resubmission.


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116. The Engineer has considered only delay in approval/review of the Claimant's submissions beyond 21 days for each of the submissions of the Contractor.
117. GC/PC Clauses 5.2 and ER clause 2.4 of Appendix 13 state that the Engineer shall review any submission within 21 days period.
118. **For Package F (Ch. 131000 to 139400):** On 24.07.2017, the Contractor submitted Alignment Design matching with vertical profile at intersection point of CTP-3R & CTP-13 contractors. On 2.8.2017, the Engineer instructed the Claimant to raise the alignment from start of CTP- 3R to start of Makarpura yard at 1:200, so that there is less depression of RUBs. The Contractor submitted Alignment Design Rev B, C & D matching with vertical profile at intersection point of CTP- 3R & CTP- 13 contract packages.

Alignment Design Submission Rev E dt. 31.3.2018 the Contractor raised the alignment as per Engineer's instruction. In interface meeting with CTP -13 contractor on 20-Jul-18, CTP-13 contractor refused to modify their alignment. During Interface Meeting dated 14.08.18, the Respondent instructed the Claimant to modify and resubmit the Alignment to match with CTP-13 Profile. The Engineer assessed only 68 days of EOT against the Contractor's entitlement of 341 days [386 days - 45 days (as per CCP)].

Respondent's arguments in support of his defence

119. The Contract being a DBLS Contract, entire responsibility of all aspects of the Works to be done under the Contract are that of the Claimant. Designs were not only in violation of the ER but also the statutory and codal provisions as well as basic good engineering practices.
120. ER Clause 9 of Appendix-7 lays down the responsibility of the Claimant's design team under the Chief Design Engineer for check and review of Claimant's design. Under Clause 3.2 (6) of ER (Functional), the scope of work of the Claimant included obtaining all the necessary approvals/clearances to work, relevant Certificates and/or Clearances from Local Authorities. Submissions of the Contractor qua Alignment Designs were de hors the Clause 9 of ER-Appendix 7 and Clause 3.2 (6) of ER-Functional provisions of the Contract and lacked material particulars.
121. The Engineer vide its letter dated 05.05.2017 provided the Contractor copies of NOC received from the Authorities categorically mentioning *"in all structures (RUBs), the clean height is to be kept above the existing ground level"*. While


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reviewing the Contractor's 1st Alignment design submission, the Engineer vide its letters dated 02.08.2017 and 09.10.2017 observed that RUBs shall not be depressed.

122. The Contractor delayed in complying with the Engineer/Authority's comments. The Engineer vide its letter dated 28.12.2017 and 08.02.2018 (RD-28) observed various discrepancies in the Contractor's alignment design submission. The Contractor vide letter dt. 08.02.2018 stated that the Contractor had wrongly recorded the ground levels which was jointly noted by the officials of all the three parties during joint site visit on 18.01.2018. The Contractor vide letter dt. 19.02.2018 (RD-30) admitted the errors in reporting wrong ground levels and agreed to rectify the same. Therefore, all submissions up to 19.02.2018 for the respective detour sections became redundant.
123. Deficiencies pointed out by the Engineer including packages 3A, 3B and 3F (RD-35) make it clear that there were multiple violations in the designs submitted by the Claimant from time to time.
124. Where-ever Contractual review period of 21 days exceeded by the Engineer, the same was assessed as excusable delay. The Respondent in para 272 of SoD has presented table of packagewise EOT accorded for delays ranging from 9 to 214 days in conveying NONO/NONOC for Claimant's alignment design submissions.
125. The Claimant's claim on account of purported delay due to the contractor being restrained from depressing the structures (mainly RUBs) below the existing ground/road levels while designing the Alignment due to the specific condition of NOC by the state authorities.
126. The Respondent in its Written Synopsis has stated "*Except for isolated locations, there was no change in the vertical profile of the Alignment and only the Horizontal clear openings (widening of the Bridges) were modified which did not affect the Alignment design.*"

Deliberations of the DAB

127. The DAB referred the Documents RD-81 submitted by the Respondent on 16.4.2024 which stipulate as under:
- Preliminary design of bridges (Important Bridges, ROB, RUBs/Subways, Minor Bridges (page 5145 and 5146) : Employer's Response/Recommendations states "*1. GADs of the Bridges shall be prepared only after the Alignment Drawing is finalized.*"


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- Preliminary design of Rail Flyovers including proposed GADs/span arrangements (page 5152) Employer's Response/Recommendations stipulates: "GADs of the bridges shall be prepared only after the Alignment Drawing is finalised"

From RD-81 of the Respondent, it is clear that GADs of the bridges and resultant design of the Bridges can not be submitted by the Claimant without finalisation of the Alignment Design. Finalisation of the Alignment Design was dependent upon fixing of missing ROWs in the parallel section and ROW all along in the alignment of the Detour section of the Project. It is important to note here that the entire work of this Contract was planned to be executed in 6 Packages (Package A to Package F) of varying length. Out of these, Package A and Package B were parallel sections to IR existing track with provision of connecting lines whereas Packages C, D, E and F were in Detour portion. The ground situation existing in all these Packages were different in so much so that the alignment in Package A and B was governed by the existing IR structures and other IR existing facilities whereas the alignment in Packages C to F was governed by other considerations such as level of RUBs, free board and HFL of bridges, obligation of matching the vertical levels of adjoining package (pertaining to other contractor) etc.

128. The DAB noted that the Claimant in Annexure-2 to its Written Submission has mentioned that discrepancy between ROW with that as per Attachment 1A to the Employer's Requirement and JMS seats ranges from (-) 48m to + 55m (negative indicates that width as per JMS is less than width as per Attachment 1A). This large deviation demonstrates importance of finalisation of ROW before finalization of Alignment Design. Without finalization of Alignment Design GADs for the bridges can not be submitted for approval of the Respondent and accordingly delay in ROW pillar fixation had cascading effect for completion of Permanent Works as a whole.

129. The DAB noted that due to increase in height of the embankment in Detour section the embankment quantity increased by about 38% and the Respondent (after DAB's decision in favour of the Claimant) paid for the increase in embankment extra beyond Lumsum Contract Price applicable for EPC contract. The Engineer issued Variation Orders to the scope of Works for execution of 140 new structures and the constant introduction of variations to the ER had a resounding impact on the overall Alignment Design. The increase in height of embankment had resulted for not depressing the RUBs as per requirement of the Authorities is variation to the ER. The Respondent agreed for payment of this additional payment post adjudication through DAB in favour of the Claimant.


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130. The Respondent, in para 267 of its SoD, has referred to Engineer's letter dated 05.05.2017 (RD-27) vide which the Claimant was provided with copies of NOC received from the Authorities which inter alia mentioned "*in all structures (RUBs), the clean height is to be kept above the existing ground level*". The DAB is of the view that the Alignment Design shall be based on Employer's Requirements and the ER does not expressly mention about the requirement of keeping RUBs above ground/road level (i.e. not depressed) as such, the same amounts to change in ER. It is a fact that approval of any variation order lies in the domain of Respondent as the Engineer cannot modify ER/Contract because as per GC/PC Clause 3.1 the Engineer is not authorized to issue variation orders with huge financial implications. However, the approval of the drawing lies fully within the domain of Engineer. It has been the consistent stand of the Engineer that the lowering of road level at the RUB locations is not permitted as the depression at RUB locations would lead to difficulties in all weather maintenance (Ref. Engineer's Letter dated 08.02.2018, Annexure RD-29, Page 1360-1363 Vol. IV of SoD). The DAB is of the view that the multiple submissions of alignment drawings on this account could have been avoided by the Claimant reserving its right for cost compensation due to increase in the road levels. The DAB further noted that the Claimant eventually got this compensation through another DAB decision on account of increase in quantity of embankment earth work. However, the present dispute referred to the DAB is to examine and settle the delay which took place in approval of the Alignment Designs and to decide whether these delays were on account of Respondent and should be termed as excusable. The Claimant contends that the delay in Alignment Design is on account of Respondent for the reasons as stated in Para 113 and 114 above. Various reasons for prolonged review and back and forth submissions of the alignment design will need to be examined package-wise as the Alignment Design submissions have been made separately for each package on different dates and also the considerations for Alignment Designs for each package were different. The reasons for delay are therefore required to be analyzed package-wise.

131. The DAB referred to Para 261 to 271 of the SoC wherein pleadings pertaining to this delay event are mentioned. It is the contention of the Claimant that out of the original 20 design submissions made, 19 submissions could not be completed within one review cycle and the Claimant subsequently made around 28 further design submissions. The Claimant had to further revise the already approved Alignment Designs owing to revision of the NOCs by the State Authority for some of the bridges. The Claimant has contended that it made at least 9 revised design submissions due to revision in NOCs. However specific impact of these revisions in NOC has not been explained in detail by the Claimant neither in its SOC nor in its Written Submission. The Claimant has referred various relevant letters in this regard submitted to the DAB as Exhibit CD-5/38 (Ref. Para 271, Page 147 of SoC).


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On perusal of Exhibit CD-5/38 (Page 8948 to 8988 of the SoC), it is seen that the Claimant has attached few letters pertaining to specific chainages /yards. This Exhibit does not provide comprehensive and detailed status of the issues leading to delay in Alignment Design package-wise. The DAB noted that the letter dated 19.07.2017 (Page 8948 to 8967 of SoC) pertains specifically to the approval of Chadotar part alignment, which proposed the gradient of 1 in 260 in Chadotar yard. It also provides Indian Railways schedule of dimension (attached as Annexure IV of the letter). From this document of IR (Ref. Page 8961 of SoC), it is noted that for new works and alteration to existing works, the recommended gradient is 1 in 1200 whereas the proposed gradient of 1 in 260 in Chadotar yard is quite restrictive so much so that it requires the condonation by the Commissioner of Railway Safety. This is one of the few objections taken by the Engineer to return the Alignment Design submitted by the Claimant. The DAB noted that the Respondent in its SoD, has submitted the detailed status of Alignment Design approval with details of contractor's submissions specific to each package along with the summary of Engineer's response/Recommendations for each of these submissions, placed as Annexure RD-35 of the SoD (Ref. Page 1555 to 1665). Based on the documents submitted by both the Parties, the reason for delays for each package are being analysed and concluded by the DAB in the following paras:

- (i) **Package A** – There have been 8 submissions by the Claimant with revisions to the Alignment Design. The reasons for each revision as tabulated in Annexure RD-35 (Ref. Page 1559-1569) can be summarised as less provision of free board, non-provision of recommended gradient in the yard, multiple gradient in the portion of Palanpur yard (which was subsequently revised in final submission), invalid Contractor's designer certificate (on account of the individual having already left the job) etc. These reasons are quite evidently attributable to the Claimant.

Accordingly, the DAB agrees with the EOT determination done by the Engineer.

- (ii) **Package B** – There have been upto 6 submissions with revisions in the alignment design. The reasons for each revision as tabulated in Annexure RD-35 (Ref. Page 1608-1622)) can be summarised as less free board for Bridge No. 121, 123 and 125, DFC Benchmark Establishment Report not submitted, shifting of alignment towards ROW, non-provision of recommended gradient of 1 in 1200 in Ghumasan yard, 12 design errors inspite of designer's certificate, etc. These reasons are quite evidently attributable to the Claimant.

Accordingly, the DAB agrees with the EOT determination done by the Engineer.


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(iii) **Package C, D, E and F (Detour portion)** - The DAB took note of the Claimant's submission at page 529 of its SoC which interalia mentions:

- i) Alignment Design was submitted by the Claimant to the Engineer on 09.10.2017 & 16.10.2017 without depressed RUBs. The Engineer forwarded the same for approval of Employer on 11.10.2017 & 25.10.12017.
- ii) On 08.02.2018 (after 120 days), the Engineer observed that providing RUBs at a level lower than existing road level was not admissible and the Contractor was directed to revise the Alignment Design accordingly.
- iii) The Contractor vide letter dated 19.02.2018 clarified "*Cl. 5.1 of ER - General reads that "the Reference Drawings are attached in Volume V in this Contract Package to express the Employer's concept and/or intent bearing functions, purpose and structural forms of the Permanent Works."*

Pursuant to Contractor's letters dated 19.02.18 & 26.02.18 would reveal that, in the reference drawings (which express the Employer's concept and/or intent bearing functions, purpose and structural forms of the Permanent Works) provided with Tender, 74 nos. of Structures in Detour were founded below the ground levels fortifying Contractor's philosophy of Alignment Design.

This clearly transpires that, Contractor's earlier submitted Design was in full compliance of Contract provisions and contentions raised by the Engineer/Employer were unfounded. Also adequate drainage arrangements were provided at RUB locations to address the issues of Storm water."

The Claimant, at page 1083 of its SoC, has claimed EOT towards Alignment Design to change instruction issued by the Engineer requiring resubmission of Alignment Design by the Contractor as under:

Package	DFC chainage		1 st submission of Alignment Design	Instruction of Change issued by the Engineer	Duration in Alignment Design in days
	From	To			
F1	139400	151000	01.07.2017	03.03.2018	245

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F1	151000	161220	01.07.2017	03.03.2018	245
E3	161220	162200	01.07.2017	03.03.2018	245
E3	162200	166988	01.07.2017	03.03.2018	245
E2	165960	195520	25.4.2017	15.9.2017	143
E1	195500	205334	10.7.2017	03.03.2018	236
D2	23785	39180	10.7.2017	03.03.2018	236
D2 & D1	39180	55500	10.7.2017	8.10.2018	455
D2 & D1	55500	61700	04.08.2017	8.10.2018	430
C3	61700	79000	04.08.2017	8.10.2018	430
C1	95000	112120	03.08.2017	8.10.2018	431
B3	0	15900	21.7.2107	8.10.2018	474

In view of above deliberations, it is clear that the Engineer's instruction for not depressing the RUBs is variation to the ER and accordingly Delay due to change in ER for not depressing RUBs needs to be appropriately compensated to the Claimant as excusable delay. For Section E2 the Contractor has claimed EOT of 143 days towards Alignment Design resulting from change instructions issued by the Engineer after submission of 1st Alignment Design with depressed RUBs. Thus, it should have been possible for the Claimant to resubmit the revised Alignment Design for all the Sections in about 143 days after 1st submission of the Alignment Design. The Engineer issued instructions for not depressing the RUBs resulted only change in vertical Alignment Design of the Section C, D, E and F, a duration of 120 days from the submission of 1st Alignment Design by the Contractor. The DAB is of the view that a duration of about 30 days can be considered to be adequate for Vertical Alignment Designment. The DAB accordingly considers EOT of (120+30) = 150 days towards Alignment Design. In addition the Package F is impacted with another issue, which is further examined in subsequent para.

- (iv) **Package F** – The DAB refers to Para 124 of the Written Submission made by the Claimant (Ref. Page 47-49) wherein the details of delay events pertaining to this Package have been explained. The DAB noted that the first submission of the Alignment Design for this Package was made on 24.07.2017. However, there was a difference in level of about 2 meter at the junction point of Package CTP 13 and CTP 3R. Since CTP 13 pertains to a separate contract, it was the obligation of the Respondent to decide this issue by co-ordinating between the two contractors i.e. CTP 3R and CPT 13. However, it took considerable time on the part of the Respondent and finally, the issue was settled by the Respondent during the interface

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meeting dated 14.08.2018. The DAB is therefore, of the view that the delay in this Package in finalization of Alignment Design is attributable to the Respondent and hence can be termed as excusable delay.

Accordingly, the DAB is of the view that the delay of 150 days (common to all detour packages) and 341 days (specific to Package F) is an excusable delay and the Claimant is entitled for it.

DE-5: Delays in design approval of bridges:

Claimant's Arguments in support of Claim:

132. As per approved CCP, total duration for review/approval of Claimant's GAD documents is 45 days, but the Engineer in its assessment has considered 21 days review period for each review cycle.
133. The reasons of delay in respect of Bridges designs are as under:
- Prolonged review period by the Engineer beyond 21 days.
 - The Engineer did not provide comprehensive comments on the design submissions but resorted to peace meal comments resulting in multiple submissions by the Contractor.
 - Insistence of NOC from the statutory authorities even after NONOC given by the Engineer.
 - Introduction of variations to the scope of work.
134. Protracted review periods by the Engineer, IR, State authorities and other relevant third parties when reviewing the Claimant's GAD submissions. Comments were issued on piecemeal basis and in many instances, comments were issued after the 21 days review period allowed for in the Contract. In some instances, the Claimant was instructed to provide further technical clarifications before approval. Such clarifications were either superfluous or not immediately accepted by the Engineer/ Respondent.
135. Delay in review/approval of Technical Design and Construction Design was not assessed by the Engineer and is required to be considered for EOT determination.
136. The size and span of the Structure was provided in Attachment-02 of ER and the Claimant had planned execution of the Works as per the data provided in the ER. Any change to the size and span from Attachment- 02 of ER by the Respondent / Engineer / IR / Concerned Authorities is not attributable to the Claimant and the Claimant is duly entitled for the delays incurred in this regard. But the Engineer has


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not considered the delay in this regard, wherein the concerned authority had provided the instructions at the later stages of the Project.

137. The Claimant was only responsible to get the Authority approval if the proposal was in line with Attachment-2 of ER, i.e. the original GAD and agreement between the Authority and the Employer. In case of any changed requirement by the Authority the Employer was required to obtain the necessary approvals and indemnify the Contractor as per GC/PC Clause 1.13 (a). Accordingly, the Claimant is entitled for EOT for the delays with respect to delay in review and approval by the Engineer, the Respondent and the Authorities. The Engineer has not considered the delay in finalization of the Span / GAD by other authorities in their assessment (except IR).
138. The Contractor made its 1st submission in Month-18 in line with NOC of Authority provided by the Employer for size mentioned in ER (1 x 12.2m x 5m) and the same was reviewed and approved by the Engineer. However, the Authority changed its requirement from single span to double span and increased the vertical clearance from 5 to 5.5m. (i.e., 2 x 12 x 5.5m) only in Month 45.

Respondent's Arguments

139. The Claimant is ineligible for EOT due to following:
- initial delay in submission of design/GAD with regard to CCP;
 - delay caused due to non-submission of GIR (Geotechnical Report), HIR (Hydrological investigation Report) and other preliminary documents required for review of GAD/Design of Bridges;
 - delay caused due to delay in obtaining approval from the Authorities as per ER;
 - delay caused due to need for multiple return and resubmission by the Contractor after rectification of defects in documents;
 - delays caused due to significant time taken by the Contractor in complying the Engineer/Employer/Authority comments/resubmissions.
140. The Engineer while assessing EOT has considered excess time taken for review by the Engineer/Respondent (over 21 days as stipulated in contract) as the excusable delay and the rest are the Contractor's delays. In addition, the delay on the part of Indian Railway, if any, has also been considered as Excusable delay (time taken by the IR for approval of GAD for major bridges/important bridges/RFOs in the sections where in IR is running parallel to the proposed DFCC alignment, the delay by IR has been considered as Employer's delay).


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141. The Contractor has failed to submit the Hydrological & Geological data in compliance with the ER, Codal provisions and best Engineering practices.
142. The Contractor failed to comply with GC/PC Clause 5.2 and 5.8, accordingly any delay in approval of Integrated GAD due to non-approval of prerequisite reports especially HIR for finalization of span arrangement shall solely be attributable to the Contractor.
143. There were multiple violations in the designs submitted by the Claimant from time to time. The designs were not only in violation of the ER but also the statutory and codal provisions as well as basic good engineering practices.
144. Delay in NONO of Design was primarily due to sub-standard quality of submissions and not complying to the ER and Minimum specifications provided in the submissions, even after repeated reminders and back references to the Claimant.

Deliberations of the DAB:

145. The DAB noted that entire work under this Contract, being executed in 6 packages, was further sub-divided into 16 sub-packages i.e. Sub-Package A1, A2, A3, B1, B2, B3, C1, C2, C3, D1, D2, E1, E2, E3, F1 and F2. It is further noted from the Claimant's submission (Ref. Para 281 to 286, Page 151-161 of SoC) that there were total 5 types of structures distributed over various packages. These structures are categorized as (i) RUB minor bridges (143 Nos.); (ii) RUB major bridges (52 Nos.); (iii) Rail Fly Overs (RFO) (13 Nos.); (iv) ROBs (6 Nos.); (v) Major bridges (MJB/Important Bridges (IMB) (108 Nos.).
146. The Claimant's intention is that approval of the General Arrangement Drawings (GADs) was delayed on account of protracted review periods by the Engineer, protracted review periods by the IR, State Authorities and other relevant third parties, changes in bridge sizes by the State Authorities, etc. This resulted in overall delay in achieving the respective milestones of the Project. The summary of over-review/delays on account of approval of GADs has been provided by the Claimant, package-wise structure-wise in its SoC in Para 282 to 286.
147. To substantiate its contention, the Claimant has cited one example of delay in approval of structure design of Bridge No. 271 (RUB Major-C1 Package) (Ref. Para 114.1 to 114.5 of the Claimant's Written Submission, Page 44). From the contents of these paras, it is noted that there was initially an issue of the skew/square length of the bridge between the Contractor and the Engineer. However, after its approval, the authority changed its requirement from single span to double span and increased the vertical clearance from 5m to 5.5m. (i.e. 2 x 12 x 5.5m) only on


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month 45. It is the contention of the Claimant that Engineer in this case did not agree in its EOT assessment, span modification brought in by the Authority (month 45), due to which the Contractor's submissions from month 18 onwards became abortive. The Engineer also did not authorize the Employer's delay in confirming the Authority's requirement (month 45 to month 51).

148. The DAB noted that the Claimant has provided details of the delays on account of Engineer, the Respondent and Authorities in Annexure-6 of its written Submissions (Ref. Page 188 to 245). It is seen that summary of the delays (in days) for 688 such structures is at Page 188 to 200 of Annexure-6. It is noted that the delay on account of authorities ranges from 45 days (for Structure SA-40, C2 Package, minor bridge) to 1435 days (for Structure-463, E1 Package, major bridge). However, this summary of delay does not provide the dates of submissions and approvals for various structures by the Authorities. It is however, seen that the Claimant has provided date-wise status with respect to Contractor's submissions, Engineer's response/ recommendation and Employer's response/ recommendation for few select structures at Page 201 to 245 of Annexure-6. However, even this statement does not provide the details of the comments of the Engineer or the Employer and also the compliance by the Contractor. In the absence of these details, it cannot be established as to whether the comments were given in piecemeal by the Engineer/Employer or the Claimant did not address the respective comments in one go leading to repeated submissions/ resubmissions.

149. On the other hand, the Respondent's contention is that it is the Claimant who is responsible for the delays in approval of the design of the structures on account of following:

- (i) Initial delay in submission of design/GAD with regard to CCP.
- (ii) Delay due to non-submission of Geotechnical Investigation Report (GIR), Hydrological Investigation Report (HIR) and other preliminary documents required for review.
- (iii) Delay in obtaining the approval from the authorities which, as per the contractual requirements, was the responsibility of the Contractor.
- (iv) Delay due to multiple return and resubmissions after the rectification of defects in the documents and significant time taken by the Contractor in complying with the comments of Engineer/ Employer/ Authorities.

150. As per the Respondent, out of these factors leading to delay, the excess time taken for review by the Engineer/Respondent (over 21 days) is only to be considered as excusable delay and the rest are the Contractor's delay. Further, with regard to the


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approval of Indian Railways, the delay on the part of Indian Railway, if any, has been considered as excusable delay.

151. The Respondent has provided details of these delays along with supporting material (Ref. Para 280-288, Page 125-152 of SoD in Annexure RD-56 for major RUBs (Page 4767), Annexure RD-57 for minor RUBs (Page 4792), Annexure RD-58 for MJB/IMB (Page 4823), Annexure RD-59 for RFO (Page 4880) and Annexure RD-60 for ROB (Page 4911). Some of the observations of the Engineer are; (i) bore holes locations shown in GAD not matching with GIR; (ii) GAD submitted was not as per IRC:SP:87 Clause 2.3; (iii) Joint Site Verification Report not submitted; (iv) Clear span provided is less than the ER; (v) Contractor not carrying out internal check/review as per ER, Appendix VII, Clause 9; (vi) HIR not submitted as per Joint Site Verification Report; (vii) Incorrect HFL considered in calculation, etc. In addition, delay in obtaining the NOC from the authorities was a common comment for most of the structures.
152. Most of these items of delays relate to the Contractor /Respondent except the delay in obtaining the NOC from the Authorities, for which the Contractor has no control. Accordingly, the delay in obtaining the NOC from authorities will be dealt with by the DAB separately in the subsequent paragraph. The DAB noted that the Claimant has not provided any rebuttal, specific to these pleadings of the Respondent in its Written Submission. However, the Claimant in its submissions, has in general held the Engineer /Respondent responsible for protracted reviews /piecemeal comments. Therefore, in absence of specific rebuttal by the Claimant, the DAB is not in a position to clearly distinguish these delays as either attributable to the Claimant or to the Respondent.
153. The DAB is of the view that the Claimant was responsible to get the approval of the concerned Authorities if the GAD proposal was in line with Attachment-2 of ER, i.e., the original GAD. It is observed that for some of the structures the Authorities modified the size and span of the structure compared to those mentioned in the ER and accordingly the same amounts to change in the ER. Change in the ER cannot be done based of 3rd parties requirements but only and only by the Respondent (not even the Engineer under GC/PC Clause 3.1). In case of any changed requirement by the concerned Authority, the Employer was required to obtain the necessary approvals from the concerned Authorities. Accordingly, for the structures where the Authorities modified the size and span of the structure, the Claimant is entitled for EOT for the delays with respect to delay in review and approval by the Engineer, the Respondent and the Authorities (i.e., IR, NHAI, State Road dept., Irrigation dept., IOCL etc.). As per the details submitted by the Claimant in Annexure 6 of the Written Submission (Ref. Page 188-245), the DAB notes that


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the approvals of the concerned authorities have been received in 2019 and 2020. A flip through this Annexure 6 indicates that the last approval of any structure in different packages is as under:

- (i) Package A (RUB major, Bridge No. 22-PCL) – 24.04.2019 (Page 219).
- (ii) Package B (Minor Bridge No. 16) – 16.03.2020 (Page 241).
- (iii) Package C (RUB 274) – 21.09.2019 (Page 208).
- (iv) Package D (Major Bridge No. 114) – 27.08.2020 (Page 217).
- (v) Package F (Major Bridge No. 289) – 14.10.2020 (Page 215).

154. The Contractor has considered execution period as per the durations applicable in the schedule for similar bridges. The DAB is of the opine that after submission of the GADs by the Claimant to the Engineer/Concerned Authorities the size and span for some of the Structure, as provided in Attachment-02 of ER, were modified by the Respondent / Engineer / IR / Concerned Authorities and as a result the Claimant was made to redesign/review of the concerned structure as per comments of the concerned agency. Time taken by the Claimant for redesign/review of the concerned the structure cannot be considered to be attributable to the Claimant.

Accordingly, the Claimant is entitled for the time period elapsed between 1st submission of the GAD to the Authority till its approval by the Authority as per actuals for each structures separately over and above the EOT already agreed by the Engineer. With respect to completion of respective Sub-Packages (such as A1, A2 etc.), the approval of the last structure by any authority falling in that Sub-Package/Package be considered to arrive at the EOT applicable to the respective Sub-Package/Package.

DE-6 Change in Law due to Covid-19 Pandemic

Claimant's arguments in support of his Claim

155. The Claimant is entitled to EOT and additional costs in accordance with Change in Law, i.e., GC/PC Clause 13.7 and Force Majeure under GC/PC Clause 19.1 as both co-exists providing remedy to the Claimant under such situations. The Claimant's primary case in that it is entitled to time and costs under Clause 13.7 of GC/PC. The Claimant's secondary case is that it is entitled to time under Clause 19.1 of GC/PC. If the Respondent considers the Covid-19 Pandemic as a *Force Majeure* event, it has incorrectly assessed the magnitude of EOT entitled to the Claimant.


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156. The Claimant is entitled to additional time and costs under Clause 8.4(d), Clause 8.5, Clause 13.7, Clause 19 and Clause 20.1 of GC/ PC of the Contract and under the laws of India.
157. The Local authorities/Government have issued various orders/decrees such as lockdowns, curfews, inaccessible quarantined areas amounts to modification of existing laws, which affect the Claimant in the performance of obligations under the Contract, thus qualifying as a change in law event as per GC/PC Clause 13.7 of the Contract.
158. The Claimant has submitted various Government notifications which provide up to 6 months (180 days) of EOT for the first wave of Covid-19, and 2.5 months (77 days) for the second wave of Covid-19.
159. The Claimant had presented various Government notifications as under:

Authority	Extension granted	Covid relief duration
Department of Expenditure	24 th Mar'20 to 30 th Sep'20	180 days
Ministry of Road Transport & Highways – NHAI	24 th Mar'20 to 31 st Dec'20	270 days
Indian Navy/Ministry of Defence	25 th Mar'20 to 24 th Jul'20	121 days [1 st wave]
	15 th Apr'21 to 30 th Jun'21	76 days [2 nd wave]

160. On account of the lockdown directives, regulations and guidelines issued by the relevant governmental authorities, the Claimant not only suffered from delays, but also incurred additional costs. These additional costs were solely the result of such directives, regulations and guidelines, and as such, Claimant is entitled to these costs under the provision of GC/PC Sub-clause 13.7.
161. First, these directives, regulations and guidelines fall under the definition of Law as per GC/PC Sub-clause 1.1.6.5. The lockdown directive, guidelines, and regulations were issued by a legally constituted public authority, and as such will fall under the definition of Law. Second, the Claimant is entitled to claim an adjustment to the Contract Price under clause GC/PC 13.7, on account of the costs incurred by it due to the restrictions imposed by governmental authorities during Covid-19. Fourth, in accordance with clause GC/PC 1.13, the Claimant was obliged to comply with the applicable laws and any changes made to such laws due to Covid-19. In complying with such changes to the applicable law due to Covid-19, i.e., the commencement of the lockdown period due to Covid-19, the Claimant had to incur additional costs. Fifth, FIDIC Guidance Memorandum in the event of Covid-19 Pandemic clearly commented on the above definition covering a wide range of legislation as well as

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regulatory actions from “any legally constituted public authority” and therefore can apply to national parliamentary acts through to state-wide action and down to very local levels, such as municipal orders. The FIDIC guidance memorandum states that if the contractor establishes that the actions by local authorities or government are changes in laws of the country, then the Contractor may seek remedy under GC/PC clause 13.7. FIDIC guidelines, directives and regulations issued by the Local Authorities/Government amounts to change in laws, and the Claimant is entitled to claim costs incurred due to the said change in law. The above FIDIC memorandum clearly stipulates that both full lockdown and partial lockdown shall be considered as Change in law.

162. Government had imposed new regulations and lockdowns to contain Covid-19 Pandemic which affected the Claimant’s work making him to incur additional costs. As a result of these regulations, the Claimant suffered from various issues like working with limited workmen, travel restrictions, night curfews, limited working hours, mandatory thermal scanning etc. These restrictions which were imposed as a result of various regulations introduced by Government on the account of Covid-19 crippled the progress of the Claimant’s works and faced idling/under-utilization of its resources which caused the Claimant to bear additional costs. The Claimant is entitled to claim these additional costs.
163. Hon’ble Supreme Court of India in case of “**Energy Watchdog v. Central Electricity Regulatory Commission**” dated 11 April 2017, held that even a letter issued by competent authority amending/ changing the provision of law amounts to change in law.
164. In “**NTPC Ltd. v. Tata Projects Ltd.**”, 2023 SCC OnLine Del 4560, the Notification dated 19.01.2017 resulting in an increase in cost of labour was held to constitute a change in law. It was observed that the increase in costs due to increase in the basic minimum wage rate was required to be compensated. JICA letter dated 20 August 2020 recommended additional time and cost due to COVID 19 unforeseeable circumstance.
165. The Claimant is not responsible for delay and disruption caused due to the Covid-19 Pandemic and is entitled for an EOT for 256 days (180 days + 76 days) for all milestones along with associated costs against the said delays.

Respondent’s arguments in support of his defence

166. As per GC/PC Clause 13.7 it is apparent that the Circulars / Notifications /Office Memorandums issued by the Central/concerned State Governments under the


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provisions of the Disaster Management Act, 2005 does not amount to change in law due to following reasons:

- a. The Claimant has deliberately remained silent regarding the head under which the alleged claim for cost and time has been raised.
- b. The Disaster Management Act, 2005 (Act), came into force w.e.f. 23 December 2005. The said Act was already in force before the Base Date i.e. 14.08.2015. National Disaster Management Authority (NDMA), constituted under the provisions of the Act, was also in existence as on Base Date of the Contract. Disaster Management Authorities were constituted in different States as well. The Act permits issuance of the Guidelines/Notifications/Circulars by the said Authorities under the provisions of the Act. Pursuant to the powers granted to the said Authorities by the Act the Authorities had issued Guidelines/Notifications during the Covid-19 Phase which does not constitute any changes / modifications in law by NDMA / State DMAs under GC/PC Clause 13.7.
- c. None of the conditions provided for in Clause 13.7 are satisfied for the Notifications/Guidelines issued by NDMA / State DMAs to be considered as a change in law situation in accordance with GC/PC Clause 13.7. The GC/PC Clause 13.7 relating to "Change in Legislation" is not applicable to the Claimant's claim.
- d. GC/PC Clause 19.1 defines force majeure event 'means' an exceptional event or circumstances which meets all the conditions mentioned in the ibid clause.

167. From a perusal of GC/PC Clause 19.4, it is clear that the Claimant is eligible for costs only if any event or circumstance qualifies as a Force Majeure event of the nature envisaged in sub-paragraphs (i) to (iv) specified in GC/PC Clause 19.1. Even if it is considered that Covid-19 situation is a Force Majeure under GC/PC Clause 19.1 (a) to (d), however, still Covid-19 event does not meet the criteria mentioned in sub-paragraphs (i), (ii), (iii) and (iv) of the GC/PC Clause 19.1. Covid-19 situation does not satisfy any of the situations contemplated in GC/PC Clause 19.1 sub-paragraphs (i) to (iv), so as to give rise to the entitlement of the Contractor to claim costs from the Respondent due to occurrence of any Force Majeure event.

168. The Engineer made re-assessment of EOT-7 at the Claimant's request and the Engineer noted that performance was affected for the period March-2020 to Sept-2020 on account of 1st wave of Covid-19. After considering the data provided by the Claimant and upon fairly assessing loss of productivity, EOT was assessed as


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86 days for shortage of labor and 82 days for structures affected, however, as the OM issued by MoF (No. F.18/4/2020-PPD) specified that *"Date for completion of contractual obligation which had to be completed on or after 20th Feb 2020 shall stand extended for a period not less than three months and not more than six months without imposition of any cost or penalty on the Contractor"*, the Engineer determined EOT of 3 months i.e., 90 days on account of 1st wave of Covid-19.

169. With respect to 2nd wave of Covid-19, no specific OM was issued by MoF, the Engineer has calculated the EOT for the period in which performance was affected due to Covid-19 second wave and EOT of 18 days for shortage of labour and 33 days for structures affected during the Covid-19 period and 33 days EOT was considered on account of 2nd wave.
170. The Claimant's works were miserably slow so that the question of disruption of work does not arise and secondly, subsequent to the national lockdown imposed on 25.03.2020, construction activities were permitted to resume as early as 20.04.2020 vide Notification dated 19.04.2020 issued by MHA.
171. As regards FIDIC Guidance Memorandum of April 2020 (Scenario 3 and 4), the Guidance clarifies that *"this Guidance Memorandum has been prepared to assist users understand the contractual mechanisms that operate in the FIDIC standard forms of contract and does not provide advice specific to any project. The comments in this Guidance Memorandum are not exhaustive. They should not be relied upon in a specific issue or situation."* As the guidance itself states not to place any reliance on this guidance, over reliance by Claimant in asserting its COVID claims bear no ground.
172. As regards the judgment of the Hon'ble Supreme Court in the matter of *Energy Watchdog v. Central Electricity and Regulatory Commission & Ors.* the facts and circumstances of the said case are in no manner applicable to the facts and circumstances of the present dispute. The judgment in the matter of *Energy Watchdog* is related to the Electricity Act and the Contract in the said case was that in the nature of a Power Purchase Agreement and not in any manner related to FIDIC in the present dispute.
173. As regards the notifications issued by MORTH and NHAI the present project is a railway project and the Respondent falls under the Ministry of Railways. Therefore, what is applicable is what has been instructed by the Ministry of Railways which has made the Ministry of Finance notification No. F.18/4/2020-PPD applicable. Even otherwise, construction works of roads, highways etc. is materially different from works of railways and any notification issued by the NHAI or MORTH would


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be on completely different considerations and thus cannot be applied to the present case.

174. The Engineer has assessed delay on account of Covid-19 as 86 days and the Engineer granted 90 days EOT on the basis of OM issued by the Ministry of Finance. However, since the said OM does not provide for any costs, therefore, no costs were given.

Relevant Contract Conditions

175. **GC/PC Clause 1.13** *"The Contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Particular Conditions:*

(a) the Employer shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Employer's Requirements as having been (or being) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and

(b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the design, execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so."

176. **GC/PC Clause 13.7:** *"The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.*

If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws or in such interpretations, made after the Base Date, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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

(b) payment of any such Cost, which shall be included in the Contract Price.

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


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177. **Clause 19.1 (Force Majeure):**

'In this Clause, "Force Majeure" means an exceptional event or circumstance:

- (a) which is beyond a Party's control,*
- (b) which such Party could not reasonably have provided against before entering into the Contract,*
- (c) which, having arisen, such Party could not reasonably have avoided or overcome, and*
- (d) which is not substantially attributable to the other Party.*

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,*
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub contractors,*
- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and*
- (v) Natural Catastrophe which may include earthquake, volcanic activity, floods, & storms of high intensity such as typhoons and hurricane."*

178. **GCC Sub-Clause 19.2 (Notice of Force Majeure):**

"If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure. The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract."


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179. **GCC Sub-Clause 19.4 (Consequences of Force Majeure):**

"If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and*
- (b) if the event or circumstances is of the kind described in sub-paragraph (i) to (iv) of Sub-Clause 19.1 [Definition of Force Majeure] and in case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.*

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

Deliberations of the DAB

180. From the pleadings of Claimant and Respondent, it is noted that the contention of the Claimant is to deal with the consequences of the occurrence of COVID-19 under GC/PC Clause 13.7 of the Contract (change in law) whereas the Respondent's contention is that the consequences of COVID-19 occurrence are covered under GC/PC Clause 19 (Force Majeure clause).

181. The DAB examined provisions of GC/PC Clause 19 of the Contract pertaining to Force Majeure Clause as already reproduced in Para 177-179 above. It is seen that for an exceptional event or circumstance to be classified as Force Majeure due to occurrence of which the Party's respective obligations get suspended until effect of Force Majeure event lasts, the Contract lays down four conditions as stated in GC/PC Clause 19.1 (a) to (d) (Ref. Para 177 supra). Under GC/PC Clause 19.2 *the Contractor shall be excused from performance of its obligations so long as such Force Majeure prevents it from performing them.* The DAB is of the view that the occurrence of COVID-19, resulting into complete prevention of the performance of its obligation(s) by the contractor, satisfies all the conditions as contained in GC/PC Clause 19.1 (a) to (d) and accordingly, can be considered to qualify as Force Majeure event. Further, the GC/PC Clause 19.4 (Ref. Para 179 supra) entitles the Contractor for time extension for any such delay on this account [GC/PC 19.4 (a)]. This Contract Clause also entitles the Contractor the time extension plus costs for all such events listed in GC/PC Clause 19.1 (i) to (iv) (further subject the condition that the event listed in GC/PC Clause 19.1 (ii) to (iv) should occur in the Country where Permanent Works are located).


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182. It is also a fact that the effect of occurrence of COVID-19 was spread over a period of time. However, for certain period, there was a complete disruption to construction activities (complete lockdown period) and for other period, there was a partial disruption to construction activities. Under full lockdown circumstances, the occurrence of COVID-19 event prevented the Contractor from performing its obligations under the Contract fully and accordingly qualifies as Force Majeure event. Under partial lockdown circumstances, the occurrence of COVID-19 event it was possible for the Contractor to perform its obligations under the Contract in restricted manner with reduced productivity and accordingly the applicability of GC/PC Clause 19.2 needs to be examined to qualify as Force Majeure event. In this regard, a reference is also drawn to Department of Expenditure, Ministry of Finance Office Memorandum F.18/4/2020-PPD dated 19.02.2020 circulated to all the Central Ministries and Departments, which is reproduced as under:

*“A Force Majeure (FM) means extraordinary events or circumstances beyond human control such as an event described as an act of God (like **a natural calamity**) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in in the clause). AN FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party’s non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is prevented or delayed by any reason of FM for a period exceeding 90 (Ninety) days either party may at its option terminate the contract without any financial repercussion on either side.*

A doubt has arisen if the disruption of the supply chains due to spread of corona virus in China or any other country will be covered in the Force Majeure clause (FMC). In this regard it is clarified that it should be considered as a case of natural calamity and FMC may be invoked, wherever considered appropriate, following the due procedure as above.”

From the above, it is quite evident that the occurrence of COVID-19 event resulting into full lockdown and/or completely preventing the performance of one or more obligations can be considered as a Force Majeure event.


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183. The DAB also examined the contention of the Claimant for dealing with this occurrence of COVID-19 as per the Contract provisions applicable to change in law. As per the Claimant, the local authorities/government issued various orders such as lockdowns, curfews, inaccessible quarantine area, which tantamount to modification of existing laws which affected the Claimant in performance of its obligation under the Contract, thus, qualifying as a change in law of event as per GC/PC Clause 13.7.
184. The Claimant's argument is that the Disaster Management Act (2005) was in existence before the base date, however, same was made effective after the base date of the Contract in the wake of COVID-19 pandemic, wherein the Government/public authority (i.e. National Disaster Management Authority) had exercised power under Section 6 (2) (i) and Section 10 (2) (i) of Disaster Management Act, 2005. In exercise of these powers NDMA had implemented various 'guidelines'/'effective measures' which will come under the 'rules and regulations' issued by the authority/Government (Ref. Para 301, Page 165 of SoC).
185. The Contractor further referred the FIDIC Guidance Memorandum to say that the Guidance Memorandum clearly states if the Contractor establishes that the actions by local authorities or Government are changes in laws of the Country, then the Contractor may seek remedy under GC/PC Clause 13.7. The Contractor further emphasized that the FIDIC Memorandum clearly stipulates that full lockdown period qualifies as Force Majeure event the both full lockdown and partial lockdown shall be considered as change in law (Ref. Para 142 of the Claimant's Written Submissions).
186. In support of its arguments, the Claimant referred two judgments as under:
- (i) Energy Watchdog Vs. Central Electricity Regulatory Commission dated 11.04.2017 of the Supreme Court of India which held that even a letter issued by Competent Authority amending /changing the provision of law amounts to change in law.
 - (ii) NTPC Ltd. Vs. Tata Projects Ltd., 2023 SCC Online DEL 4560 dated 19.01.2017 wherein an increase in cost of labour was held to constitute a change in law.
187. The DAB noted that GC/PC Clause 1.1.6.5 provides that "*laws mean all National or State legislations, statutes, ordinances and other laws and regulations and bylaws of any legally constituted public authority.*" Therefore, the meaning ascribed to the word "*laws*" with stringent view may be restricted to what is stated in GC/PC


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Clause 1.1.6.5 above but with liberal view it can be considered to cover the Claimant's assertion that the 'guidelines'/'effective measures' issued under Disaster Management Act will come under the 'rules and regulations' issued by the authority/Government. The DAB is of the view that the Office Memorandum of Department of Expenditure, Ministry of Finance as referred in Para 182 supra, is applicable for the goods contracts wherein complete suspension of supply chain got completely disrupted and accordingly the event of COVID-19 shall be treated as Force Majeure event for goods contracts but may be considered to be equally applicable for the Works Contracts under the reference. The two judgments of the Court cited by the Claimant in this regard, may not relate to the similar circumstances as prevailing in the instant case, as can not be conclusively established that the Contract conditions as stipulated in the instant case were similar to the contract conditions of the cases to which these judgments relate to. It is noted that the conduct of the Parties had been as if the event of COVID-19 gets qualified under both GC/PC clauses 19 as well as 13.7 otherwise EOT for the partial lockdown periods on pro-rata basis of number of labours deployed could not have been considered in the EOT. The DAB is therefore, of the view that the occurrence of COVID-19 event during full lockdown period is under GC/PC Clause 19 as Force Majeure and the resultant costs are expressly barred under GC/PC 19 whereas it may be impliedly covered under Change in Law under GC/PC 13.7 so making the issue contentious. With stringent interpretation of the Contract GC/PC clause 19 can be applied but with liberal view Clause 13.7 also becomes applicable for the duration of delays resulting from COVID-19 pandemic.

188. The DAB noted that the Respondent has accorded EOT of 90 days for 1st wave taking note of MoF's OM dated 13.05.2020 which interalia stipulates for EOT for minimum 90 days and maximum duration of 180 days. The DAB took note of MOST No. COVID-19/RoadMap/JS(H)/2020 dated 6th October 2020 which interalia extended EOT for COVID-19 event from 6 months to 9 months. Similarly, MoD has allowed EOT for 4 months for 1st wave and 2.5 months for 2nd wave. The DAB is of the view that DFC Project under the Contract Package is similar to NHAI Projects because regulated entry of people cannot be controlled for both NHAI as well as DFC Project and accordingly EOT for COVID-19 for DFC Project can be considered to be justified if EOT of 6 months is considered for 1st wave similar to NHAI. For 2nd wave EOT can be considered same (33 days) as that determined by the Engineer. Thus total EOT for COVID-19 can be considered to be 180 days (1st wave) + 33 days (2nd wave) = 213 days against 123 days EOT accorded by the Respondent.

The DAB therefore, consider it appropriate to allow time extension of 213 days to the Contractor under Delay event DE-6.


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189. As regards to the cost compensation for this period, the DAB notes that the Contract provides for cost compensation under Clause GC/PC 19.4 (b) of the Contract for the events and circumstances described in GC/PC Clause 19.1 (i) to (iv) and provides no cost compensation for events listed under Clause 19.1 (v). Though GC/PC Clause 19.1 clearly provides that the force majeure event will not be limited to only those events as listed in GC/PC Clause 19.1 (i) to (v), which means that there could be other events which can be classified as Force Majeure, but the cost remedy of such events is not specifically provided under this Contract. Further no equivalence can be drawn between Covid 19 event and the events specified in GC/PC clause 19.1 (i) to (iv), so as to consider the cost compensation. Therefore, considering the above, no cost compensation can be granted in favour of the Claimant for this excusable delay period of 213 days.

DE-7 Additional time required for implementation of Variations:

Claimants' Arguments in support of his Claim


190. That the Engineer issued Variation Orders for 140 new structures out of which 74 Variations were ordered until 30.9.2022. Modifications to structures listed in ER were as under:

- 58 % of Major Bridges undergone modifications (61 out of 106)
- 61% of RUB Majors undergone modifications (30 out of 49)
- 100% of ROBs undergone modifications (8 out of 8)
- 94% of RFOs undergone modifications (15 out of 16)

191. The Claimant raised EOT and costs claims for multiple variations to the ER ordered by the Respondent due to the following reasons:

- **Skew/Square Bridge spans:** During the design approval process, the Claimant was directed to change the span configurations of Structures as square/skew increasing the bridges length of the said structures vis-a-vis that specified in the ER for which Variation instructions (114 structures) were issued after DAB's award in Claimant's favour after 37 months of notice.
- **Matching height and length of IR Structures:** Bridge span for all the proposed bridges provided in Attachment 2 – (List of Structures of ER - Functional) were modified to match the height & length of corresponding existing IR structures resulting increase in length and height of the said structures (86 structures).


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- **Increase in span and height of Structures as per Authority Requirement:**
During the execution of the works, various Authorities (IR, NHAI, State Highway , Irrigation dept., IOCL etc.) instructed to increase the length and height of 196 structures after the designs were approved by the Engineer in Attachment-2 of ER. 16 nos. Structures were converted into Steel Superstructures which required approval of RDSO thereby extending the design review process of GADs.
- Such changes affected GAD design, which in turn required changes to the horizontal and vertical alignment.
- The Contractor was restrained to depress RUBs below the existing ground/road levels while designing the alignment due to the Employer's requirement to raise the vertical profile of alignment in detour stretch by mandatorily providing the RUBs at the existing ground/road levels. Due to this revised requirement, NONOC issued to the alignment design submitted by the Claimant for the Detour stretch were revoked and the design submissions became infructuous and were redesigned. The Engineer issued Variation instructions after 38 months of notice for raising the level of RUBs at EHT line locations and after 48 months of notice for raising the level of RUBs at Detour stretch.

192. Change in requirements by IR to accommodate their future capacity increase of traffic, requirements at 6 yard locations and to revise the track centreline distance with the existing IR track to incorporate a future IR line which impacted 16.4 km of the alignment.

193. 386 out of 847 structures were modified, from Q2 of 2018 to till Q3 of 2022. In addition to 386 modified structures, 140 new structure were ordered out of which 74 nos. were ordered till 30.9.2022. There was overall 38% increase in bridge length, whereas increase in Package E, D and F was 126%, 45% and 57% respectively. The total length of Bridges increased from 10,344 R.m in ER (Attachment-2) to 14,278 R.m in actual (increase of 38%). Embankment quantity increased by 34% across the project and 92%, 71% and 53% in Package F, E and D respectively. Concrete quantity increased by 38% across the project and 85%, 70% and 37% in Package E, F and D respectively.

Respondents' arguments in support of his defence

194. Variations occurred on account of following:

- Demand of Authorities for providing additional openings for roadways etc.
- Demand from the farmers where the alignment is crossing and dividing the farms in 2 portions and disrupting their irrigation drainage and access.


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- Increased/reduced openings as demanded by the Authorities.
- In case of Earthwork alignment, the vertical profile/Embankment was required to be kept to maintain the full height of the RUBs considering no depression of the roads.

195. **The effects of variations:**

- Assessment of the openings as provided in the Scope of works was outdated in just about 2-3 years from the date of framing the tender document till the execution by the Contractor giving rise to several modified/new demands by several State Govt. Authorities.
- Execution of the modifications/new structures could have been managed more efficiently had the Contractor timely action of taking NOCs and coordinating with the Authorities.
- Except for isolated locations, there was no change in the vertical profile of the Alignment and only the Horizontal clear openings (widening of the Bridges) were modified which did not affect the Alignment design.

196. That the Contractor is not entitled to additional EOT for constructing new structures since the Contractor was already aware of the methodology of constructing new structures. That the new structures (under variation) were to be constructed parallelly with other structures in the package-section as a part of the scope of Contract, and the variation orders for new structures were framed considering that the new bridge shall be constructed without effecting the progress of the existing structures in the package. This is achieved by allocating the cost of all plant & Machinery, labour, materials for temporary as well as permanent work etc. independently of the existing resources used for structures as part of Scope of Work. Thus, any new structure should be completed within the time allocated by the Claimant itself for other bridges in its CCP, obviating the need for any extra time.

197. That the Contractor is not entitled to any further time and cost towards construction of new structures for the reasons that (i) the Contractor already sufficiently compensated by granting cost towards such new constructions, (ii) reasons for delay in constructing new structures are not attributable to the Employer, (iii) the Contractor ought to have used its expertise to construct such new structures within the time considered for construction of similar structures already provided in the CCP; the new structures were not such which had any adverse effect on the time already considered by the Contractor.


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198. The Contractor did not submit the detailed design and construction schedule. As per Cl.1.4 of Appendix-14, the Contractor was under Contractual obligation to submit the detailed construction schedule along with the CDP of each structure. Failure in submitting the detailed construction schedule is on account of Contractor.
199. New structures are considered to have been completed parallelly along with the other structures in the respective Package within the assessed EOT for the section.
200. The Contractor could not complete the construction of many Varied structures within the additional time claimed by the Claimant.
201. The facts w.r.t arising of new structures are not disputed. Also, the need for construction of new structures and/or modifications to the structures arose primarily due to the reasons attributable to the demands raised by locals and administrative/local authorities. The Contractor started carrying out earthworks in in PKG-D, PKG- E and PKG- F only in 2022 and 2023, accordingly the need of new structures arose late in 2022 and 2023 only.
202. CCP provided the Time for Completion for group of structures in any particular Package and separate time schedule for individual structure has not been provided therein.
203. No additional time was allotted for the modified structure and the same is considered to have been completed parallelly along with the other structures in the respective Package within the assessed EOT for the section.
204. There was no change in the design alignment from the 1st approved designs. The same was designed considering the NOC from the state authorities not allowing any depression of road under the RUBs. The Contractor approached the road authorities for revised decisions allowing them some depression which was not agreed by the State Authorities, thus there was huge delay in finalization of the Alignment of the detour section. In terms of the Contract, specifically referring to GC/PC Clause 1.13b the work was to be carried out as per the NOC obtained by the Contractor, which was strictly followed and the drawings were approved accordingly.
205. The Contractor approached DAB for dispute resolution related to depressed RUBs. The delay in design was exclusively caused by the Contractor. Claim for time was neither asked nor awarded by the DAB. DAB gave claimant relief of cost for certain unimportant RUBs.


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206. Claim for additional time at this juncture is an after thought which was not considered earlier and also not accepted by DAB. Cost however, has been compensated to the Contractor as per the decision of the DAB.
207. On 19.02.2018, Contractor had agreed to the errors made by the Contractor in reporting wrong ground levels and had agreed to rectify the same being the Contractor's risk & responsibility (GC Clause 5.8). Accordingly, all the submissions and approvals before 18.01.2018 became abortive due to fault of the Contractor. After correcting the ground levels by the Contractor, the final plan and profile (Alignment) for the last Package in detour could only be approved in April-2018.
208. While approving the Inception Report in Feb-2017, it was conveyed that the detour Alignment shall be designed without depressing the RUBs. The Engineer had provided Contractor the copies of NOC received from the Authorities wherein it was clearly mentioned that "*In all structures (RUBs), the clean height is to be kept above the existing ground level*". The Engineer while reviewing the Contractor's 1st Alignment submission had commented that the RUBs shall not be depressed. The Engineer has been of the same view from the start of the project that RUB shall not be depressed.
209. Issue of Non-depression of RUBs was referred to DAB only w.r.t cost claim. Alignment designs were approved and sufficient works fronts were available. This did not prevent the Contractor to start the work at site and Contractor delayed the works.
210. In the Tender drawings, bridges were shown with Skew wherever required. However, in Attachment-2 of ER functional, the column of Skew was missing and Bridge length in Attachment-2 was square clear span and was not matching with the Skew span. All the Bridge drawings were timely approved by the Engineer with skew wherever required in reference to the Tender drawings and in accordance with the NOCs received from the authorities. The issue of Skew/Square was referred to DAB only w.r.t. Cost Claim. As all the drawings were approved by the Engineer whenever it was complied with ER, therefore the works should have been started by the Contractor soon after the approval.

Deliberations by the DAB

211. The DAB observed that numerous Variations orders were issued by the Respondent upto March, 2024 against authorised EOT upto 06.05.2023 whereas the DAB has been referred to the issue of EOT for the hinderances upto 30.9.2022.


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212. For new structures ordered by the Respondent, for the purpose of EOT, the Respondent has considered the following periods:
- Date of addition of new structure has been identified w.r.t. RFI/Engineer's instruction/GAD submission.
 - For investigation (GTI, hydrology etc.): 21 days.
 - For design of structure: 49 days.
 - Mobilisation of resources by the Contractor: 7 days.
 - Review period by the Engineer/Employer: 21 days.
 - Construction period for new structure: On the basis of similar structure.
 - New structure has been considered to be parallelly constructed with other structures in the respective Packages within the assessed EOT for the Section.
213. The DAB is of the opinion that 7 days mobilisation period considered by the Respondent in its EOT determination for new structures cannot be considered to be adequate for the nature of works and corresponding mobilisation of resources required for accomplishing the task. The DAB is of the opinion that mobilisation period of 28 days (deemed to be subsumed in actual time taken for construction of structure limited to that claimed by the Claimant) can be considered for the purpose of determination of EOT.
214. As per para 404 of the SoC, upto September 2022, 390 number Variation Orders were issued for an amount of Rs. 1494.54 crores. As per Annexure-15 to the Claimant's Written Synopsis 450 number Variation Orders covering Variation orders upto 21.9.2023 (beyond sanctioned EOT for MS-3 as 6.5.2023) were issued for an amount of Rs.1581.55 crores. The amount of Variation orders stand already agreed between the Parties whereas time required for execution of the varied structures was not agreed between the Parties.
215. The Respondent did not consider any EOT for the modified structures whereas the DAB is of the view that if the modification to the structure is such that the modified structure required determination of new cost for the modified structure then EOT for the modified structure should also be considered appropriately. Best measure of EOT for the variations, be it new structure or modified structure, is the actual time taken by the Contractor for execution of the Varied structure provided the actual time taken for the same is reasonable and does not exceed the time demanded by the Claimant. The Engineer's determination of EOT for almost all the Variation orders is less than that demanded for by the Claimant. Time duration required for design & construction of such ordered variations submitted by the Claimant to the Engineer with the cost proposal was not agreed to between the Parties despite agreement between the Parties for the cost proposal. In strict legal


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sense the Parties should have agreed for Time required for the Varied structures ordered by the Respondent alongwith the cost agreement for the Varied structures. But for the Respondent's ordered Varied structures, the Parties have agreed for cost claim and kept the Time claim open implying as if the parties by their own conduct were in agreement for considering reasonable time required for execution of the Variation orders. The DAB is of the view that for Employer's ordered Variations, the construction time if not agreed between the Parties at the time of agreement for cost thereof then the actual time taken by the Contractor for design & construction becomes at large and accordingly the actual time taken for construction of such ordered Variations shall become the admissible EOT for all purposes. Annexure- 13 and Annexure-14 to the Claimant's Written Synopsis provide actual time taken by the Claimant for construction of the modified structures and new structures respectively. Based on submissions made by the rival parties to the DAB, the DAB observed that for the Varied structures the Time period claimed by the Claimant for most of the structures is less than that actually taken by the Claimant. Accordingly the DAB considers that actual time taken for Design & for construction shall be limited to that claimed by the Claimant for each of the Respondent's ordered Variations.


216. The Respondent on one hand had argued that *"New structures is considered to have been completed parallelly along with the other structures in the respective Package within the assessed EOT for the section"* whereas on the contrary had itself accorded EOT for the ordered new structures, as such, by its own conduct the Respondent negated its argument towards parallel working by the Claimant for the ordered variations including new structures.

217. The DAB awards EOT claimed for each of the Variation order provided the same are less than actual construction time taken by the Claimant. In case claimed EOT is more than actual time taken by the Claimant then the EOT claimed by Claimant shall be limited to actuals. The DAB has flipped through the submissions made by the Claimant and noticed that baring a few almost all the ordered Variations took more than that claimed by the Claimant and DAB accordingly awards the EOT claimed by the Claimant for the Dealy event DE-7 as under:

Construction Duration (New Structures) - Claimed vs Actual

S.No.	Str. No.	Package	Construction Duration		Admissible EOT in Days
			EOT Claimed in Days	Actual Time taken Days	
1	10 PCL N	A	90	140	90
2	11 PCL N	A	90	136	90


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3	12 PCL N	A	90	398	90
4	18 PCL N	A	90	209	90
5	LC 171	A	144	305	144
6	LC 177	A	125	134	125
7	LC 179	A	125	104	104
8	MCL 2N	B	508	538	508
9	SA 11N	C	222	458	222
10	SA 23N1	C	90	40	40
11	SA 23N	C	90	198	90
12	SA 34N	C	135	55	55
13	140N	D	135	72	72
14	160N	D	180	293	180
15	166N	D	90	70	70
16	168N	D	150	82	82
17	171N	D	100	58	58
18	173N	D	90	134	90
19	176N	D	90	122	90
20	176N1	D	90	386	90
21	176N2	D	180	188	180
22	177N	D	150	238	150
23	105N	D	90	481	90
24	110N	D	90	344	90
25	124N	D	135	305	135
26	82N	D	100	100	100
27	480N	E	271	719	271
28	397N	E	318	369	318
29	375N	E	80	455	80
30	372N	E	80	274	80
31	345N	E	80	334	80
32	355N	E	80	303	80
33	310N	E	90	374	90
34	305N	E	292	706	292
35	302N	E	249	728	249
36	313N	E	80	446	80
37	300CN	E	80	647	80
38	309N1	E	90	90	90
39	347N	E	90	90	90
40	372N1	E	60	133	60
41	398N1	E	100	184	100

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42	461N	E	60	60	60
43	487N	E	60	80	60
44	487N1	E	100	285	100
45	488N	E	90	46	46
46	483N	E	171	129	129
47	386N	E	127	315	127
48	413N	E	60	66	60
49	416N	E	60	112	60
50	421N	E	60	105	60
51	468N	E	60	458	60
52	351N	E	90	90	90
53	221N	F	180	181	180
54	222N	F	234	763	234
55	289N	F	80	127	80
56	290N	F	80	78	78
57	MDN 8N	F	273	517	273
58	209N	F	140	185	140
59	211N	F	90	90	90
60	285AN	F	80	172	80
61	MDN 2N	F	116	291	116
62	294N	F	90	90	90
63	294N1	F	90	290	90

218. Admissible EOT for Package F will be worked out from bridge number 300A ordered/rescoped by the Respondent on 09.09.2022 as deliberated hereunder.

DE-07 - Delay due to variations Bridge 300A variation

Claimant's arguments in support of his claim

219. As per Contract (Attachment - 2 of ER), Bridge 300A are 2 x 6.1m span (RUB Minor) at DFC Ch. 1,60,647 (Package F- Detour). Bridge 300A first span (IOCL pipeline portion) was descoped on 13.08.2020 and 2nd span (RUB portion) was descoped on 25.03.2021. The Engineer reiterated descoping of Bridge 300A on 31.03.2022. A new 300A bridge as a portal frame of size (1 x 25.695m) was instructed on 09.9.2022.

220. The Claimant has calculated his EOT entitlement from the variation instruction date 09.09.2022 based on the duration of similar structure as per approved DWP Rev-1


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(Detailed Works Programme) and compared the same with the EOT accorded by the Respondent as per the below table.

Bridge 300A Activity Durations			
S.No.	Activity	Duration as per approved DWP (in days)	Duration considered by Respondent in EOT Assessment (in days)
1	Design	219*	249
2	Construction	215* (200#)	170
3	Track laying works (Package F) [Completion of MS-1]	91*	68
4	Duration between MS-1 and MS-2	112 [§]	98
5	Duration between MS-2 and MS-3	84 [§]	7
Total		721 (706#)	592

- * - As per Approved programme (DWP Rev 1)
- § - As per Cl. 8.2 of GC/PC
- # as per proposal submitted by Claimant for portal frame structure.

221. **Design duration** - As per approved programme, the design duration considered for bridge 300A is 219 days.
222. **Construction duration** - As per approved programme (DWP Rev1), the design duration considered for bridge 300A is 215 days for original size. However, for revised portal frame, 200 days was proposed by the Claimant, which is less than the already approved 215 days in the approved programme.
223. **Track laying duration** – As per approved programme (DWP Rev1), the duration considered for bridge 300A is 91 days.
224. **Milestone duration between MS-1 and MS-2** – As per GC/PC Clause 8.2, the agreed duration between MS-1 and MS-2 is 112 days. **Milestone duration between MS-2 and MS-3** – as per GC/PC Clause 8.2, the agreed duration between MS-2 and MS-3 is 84 days. As per Claimant, impacting all the above, duration of 706 days (219 +200 +91 +112+84) days from 09.09.2022, it will take the MS-3 (completion date for the Permanent Works to 20-Aug-2024).

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Respondent's arguments in support of his defence

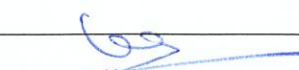
- 225. The Contractor had delayed 1st submission of GAD for original Bridge 300 A [2 x 6.1m span (RUB Minor)] by 684 days. Even though the structure was descoped on 13.08.2020, the Contractor did not carry out the embankment construction at this location. The delay of 767 days (from 13.08.2020 to 09.09.2022) in non-execution of embankment/earthwork activities for the available work front is totally attributable to the Contractor. The Respondent has deducted the above delays while calculating Contractor's entitlement. While doing so, Respondent is considering variation instruction from 15.03.2019.
- 226. The Claimant has delayed other bridges such as RFO 322, RFO 251 and IMB 222 which got completed after the completion of Bridge 300A. Therefore, the Claimant would not have achieved MS-3 on account of his own delays.
- 227. Impacting above duration of 592 days from date of instruction of variation (09-Sep-2022), as per Respondent, the impacted completion of MS1, MS 2 & MS 3 are as follows.

Milestone	Impacted date	Impacted Duration [in days]
MS-1	28-Aug-20	285
MS-2	04-Dec-20	271
MS-3	11-Dec-20	194

Deliberations of the DAB

- 228. The DAB noted that, the rival Parties did not dispute that the Bridge 300A, as a portal frame structure of size 1 x 25.695m, was introduced as a Variation on 09.09.2022. However, the dispute is that, from when the design and construction of the Bridge is to be considered for the purpose of determination of EOT resulting from Variation order dated 09.9.2022 related to Bridge 300A.
- 229. The DAB is of the considered view that, the Bridge 300A (Major RUB) when it was descoped on 13.08.2020 and later a portal frame structure was instructed on 09.09.2022 with a new dimension of 1 x 25.695m span as a variation, time required for design, construction and subsequent activities should be considered only from 09.09.2022 when the bridge was rescoped with new span of 25.695m against 6.1m as per ER.


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230. It is understood that, the Claimant in his analysis of EOT, has considered the durations for subsequent activities different from those included in the approved DWP R1 and contract conditions. The Parties are in agreement for the total duration of the design and construction period amounting to 419 days. The DAB is of the view that duration of track laying (91 days); duration between MS-1 and MS-2 (112 days) as well as between MS-2 and MS-3 (84 days) may have to be kept same as that specified in the Contract. However, for all other purposes including incentive for early completion, the durations of 706 days for the Variation order related to bridge 300A shall be limited to actuals. Therefore, in the view of the DAB, the durations required for completion of MS-3 can be considered as 706 days reckoned from 09.09.2022.

231. As regards the Respondent's argument that, the Contractor has delayed the bridges nearby to 300A which will only affect the MS-3 and not 300A is concerned, according to prevention principle and GC/PC Clause 8.4, the EOT is to be granted when the causes identified in sub-clause GC/PC 8.4 is or will delay the completion of the Works. Bridge 300A has potential to shift the MS-3 completion date beyond the current EOT date of 06.05.2023, the Claimant will be entitled for an EOT 706 days from 09.09.2022. Impacting above duration of 706 days from date of instruction of variation (09.09.2022), Claimant's entitlement for MS-3 completion is up to 20.08.2024 as under.

Milestone	Impacted date	Impacted Duration [in days]
MS-1	04-Feb-24	1540
MS-2	27-May-24	1541
MS-3	20-Aug-24	1542

232. The Claimant's submission of EOT applications and the Engineer's Determination of the same as per summary prepared by the Claimant in para 95 of its SoC the following emerges:

The Claimant's Interim EOT applications							
EOT-Let. Ref. No.	Submission Date	Cut-off Date	MS	EOT Claimed		Engineer's Determination	
				Days	Revised MS Completion Date	Days	Revised MS Completion Date
EOT 1	16-Oct-17	15-Jul-17	1	359	09-Sep-20	NIL	17-Nov-19
			2	359	01-Mar-21	NIL	08-Mar-20
			3	357	22-May-21	NIL	31-May-20

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The Claimant's Interim EOT applications							
EOT-Let. Ref. No.	Submission Date	Cut-off Date	MS	EOT Claimed		Engineer's Determination	
				Days	Revised MS Completion Date	Days	Revised MS Completion Date
EOT 2	05-Nov-18	30-Jun-18	1	623	31-Jul-21	302	14-Sep-20
			2	623	21-Nov-21	305	07-Jan-21
			3	623	13-Feb-22	303	30-Mar-21
EOT 3	10-Feb-20	30-Jun-19	1	920	23-Mar-23	447	06-Feb-21
			2	917	13-Jul-23	451	02-Jun-21
			3	919	05-Oct-23	448	22-Aug-21
EOT 4	21-May-21	31-Mar-20	1	1137	28-Dec-22	506	05-Apr-21
			2	1134	16-Apr-23	504	24-Jul-21
			3	1132	07-Jul-23	505	17-Oct-21
EOT 5	01-Oct-21	31-Mar-21	1	1384	01-Sep-23	813	06-Feb-22
			2	1376	14-Dec-23	841	26-Jun-22
			3	1385	16-Mar-24	839	16-Sep-22
EOT 6	23-Jul-22	31-Dec-21	1	1608	12-Apr-24	1102	23-Nov-22
			2	1601	26-Jul-24	1081	22-Feb-23
			3	1603	20-Oct-24	1005	02-Mar-23
EOT 7	19-Apr-23	30-Sep-22	1	1775	26-Sep-24	1161	21-Jan-23
			2	1790	31-Jan-25	1147	29-Apr-23
			3	1788	23-Apr-25	1070	06-May-23

From the above summary it can be seen that for MS-3 under EOT-5 application the Claimant increased his claim compared to EOT-4 i.e. [EOT 5- EOT 4]= (1385-1132) days = 253 days.

Engineer's determination against EOT 5 = (839-505) days = 334 days.

Under EOT 5 for MS-3, the Engineer's Determination of 334days against Claimant's demand of 253 days indicates as if Engineer's determination was inconsistent.


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Similarly for MS1 under Claimant's application for EOT 6, the Claimant increased his claim compared to EOT5 i.e. (1608-1384) days =224 days
 Engineer's Determination is for = (1102 – 813) days = 289 days against Claimant's claimed duration of 224 days.

Thus the Engineer's Determination for MS-1 of 289 days against Claimant's claimed duration of 224 days indicates as if Engineer's determination was inconsistent.

Based on the details of bridge 300A and delay events upto 30.09.2022, the DAB considers that the Claimant is entitled to overall time extension for MS-1 upto 04.02.2024, MS-2 upto 27.05.2024 and for MS-3 upto 20.08.2024.

233. **Summary of excusable delays considered by the DAB:**

As per discussions in the foregoing paras by the DAB has considered the following excusable delay period (without any overlapping period).

- (i) Missing ROW pillars/demarcation of the ROW- 106 days (Ref. Para 46 above)
- (ii) Delay in site handover, land issues and obstructions (Ref. Para 79 above).
- (iii) Delay in approval of Inception Report – 42 days (Ref. Para 109 above).
- (iv) Delayed approval of alignment designs – 150 days (considering the common period of delay in Detour Section packages, Ref. Para 131 above).
- (v) Additional time required for implementation of variations – 318 days (considering the Detour portion, this additional time ranges between 40 to 318 days, Ref. Para 217 above).
- (vi) Delay in design approval of bridges – based on the details furnished by the Claimant in Annexure 6, the last date of approval of the authority for the major bridges in the Detour packages is 14.10.2020 (major bridge – 289, Package F, Ref. Page 215 of Annexure 6 of the Written Submissions by the Claimant, Ref. Para 154 above). Considering the construction period of 620 days (as per CCP, Ref. Page 8835 of SoC), this time delay gets subsumed in the time delay considered for variation orders for the contract as a whole.
- (vii) **Total Excusable Delay Period – (106+42+150+318) = 616 days say 20.25 months.**

Deliberations of the DAB on cost claims:

105. The Claimant has preferred cost claims amounting to Rs.1779,34,30,917 under the following 5 heads:

Claim No.	Description of cost Claim	Claim Amount in Rupees
1	Prolongation Cost (Time related cost)	7,11,90,88,007

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2	Disruption Cost (earthworks, blanket, and concrete works)	7,56,00,09,668
3	Track laying resources idling cost	14,68,15,114
4	ROW demarcation cost	61,22,465
5	Early Completion Incentive	2,96,13,95,664
	Total claim amount	1779,34,30,917


Each of the above cost claims are deliberated hereunder separately.

Claim No. 1: Prolongation Cost (Rs. 7,11,90,88,0070)

Claimant's position

234. The Claimant have followed the principles laid down in the Society of Construction Law (SCL) protocol and have claimed the time related cost incurred during the delayed period by the Respondent in execution of the works from 06th June 2016 to 30th September 2022.
235. The Claimant have carried out Window-wise delay analysis and have presented the cause of critical delay in each window in Table 23 (Claimant's Written submission). The Claimant has carried out concurrent delay analysis as well and has foregone the Overheads cost in Window 7 and 15 where there are concurrent delays and mitigation by the Claimant.
236. The Claimant have divided the prolongation cost into 3 categories and have computed based on actuals as per accounting cost ledger or by using Emden Formula:
- Onsite Overheads of consortium partners – Cost accounting ledger
 - HQ Overheads – Emden Formula
 - Loss of Opportunity – Emden Formula
237. The total cost claimed by the Claimant is Rs. 711.90 Crores and the breakup for the same is as under:
- Onsite Overheads of consortium partners – Rs. 291 Crores.
 - HQ Overheads – Rs. 151 Crores.
 - Loss of Opportunity – Rs. 269 Crores.


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238. The Claimant have deducted the amount received towards the Overheads @ 7.5% of the value of Variation orders issued by the Respondent (Rs. 84 Crores).

Respondent's position

239. The Respondent has informed that there were various concurrent delays by the Claimant themselves and accordingly the Claimant are not entitled to cost claims.

240. The Claimant has not demonstrated any actual loss incurred to it by supporting documents and these are theoretical losses.

Deliberations of the DAB

241. Contract under the following General Conditions and particular conditions makes express provision entitling the Contractor for additional Time and Cost resulting from the operations of above Contract conditions:

- GC/PC clause 2.1 (Right of Access to the Site),
- 4.24 (Removal of fossils);
- 7.4 (Testing) delay in by DFC;
- 8.9 (Consequences of Suspension) ordered by DFC;
- 17.4 (Consequences of Employer's Risks); and
- 19.4 (Consequences of Force majeure).

The Contract does not make any express mention of the term and philosophy of concurrent delays but refers to Contractor's entitlement towards extension of Time for Completion (EOT) and Cost eventuating from the conditions stipulated in the Contract referred to hereinabove and or under the extant applicable laws. Contract provides for EOT and resultant Costs eventuating from some of the events listed in the Contract cited above. The Contract also stipulates for levying of Delay Damages for the period beyond extended Time for Completion and upto the substantial Completion Date specified in the Taking Over Certificate. The Contract recognises determination of excusable delays (the delays not attributable to the Contractor and EOT is admissible under GC/PC clause 8.4) by the Engineer. The Contract does not recognise for determination of inexcusable delays (the delays attributable to the Contractor) by the Engineer. There is no provision in the Contract for determination of inexcusable delays.

Due to various delay events for which EOT was granted the Engineer as well as delay events deliberated by the DAB hereinabove for which EOT is admissible to the Claimant, the DAB is of the view that the delays are not attributable to the


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Claimant but are attributable to the Respondent. These excusable delays are on account of breach of contract by the Respondent. Considering the above and as per provisions of clause 20.1 of GC/PC and Section 73 of Indian Contract Act, 1872 reproduced below the Claimant is entitled for compensation for damages.

“Section 73. Compensation for loss or damage caused by breach of contract. —When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract. —When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract. Explanation. — In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

242. The Claimant has claimed Rs. 7,11,90,88,007 as prolongation cost including loss of profit of Rs. 2,69,18,12,686 for the cutoff till 30th Sept. 2022 (EOT-07). Loss of profit is not payable as per Clause 17.6 of GC/PC. The balance total prolongation claim from Claimant is Rs. 4,42,72,75,321. The Claimant has claimed the amount based on their books of accounts which is audited by the Chartered Accountants.
243. As per the SCL principles, the Claimant has submitted the claims during the original contract period as well as during the extended period. However, the Overhead cost during the contract period is already factored in their contract value and so they will not be entitled for the same.
244. Since the claim relates to the period till 30th Sept. 2022, accordingly the actual cost incurred during the period from scheduled completion date i.e. 01st June 2020 to 30th Sept. 2022 needs to be considered as compensable period of prolongation and


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the amount of overheads received through the Variation Orders needs to be deducted from this amount.

245. The Respondent has issued Variation Orders amounting to Rs.14,94,54,00,266 till the cut-off date of this claim (Ref. Pg. 7154 of SoC). The total project value of Rs. 47,44,00,00,000 Crores was to be executed within a period of 48 months (approx. Rs. 100 Crores of works to be executed in a month). Therefore, the time required for completing the above-mentioned variation works comes out as 15 months [i.e., $(1494 * 48) / 4744$].
246. Accordingly, the Claimant can not be considered to be entitled for Overheads cost during this period of 15 months out of total excusable delay period of 28 months (i.e., from 31-May-2020 to 30-Sept.-2022). Therefore, the Claimant will be entitled for Prolongation cost for 13 (28-15) months only upto this cutoff date 30-Sept.-2022.
247. Hence, the compensation towards Prolongation cost works out as under:
The overheads cost for 13 months is equal to Rs. 4744 Crores * $(13/48)$ * (7.5%) = Rs. 96.36 Crores.

The 7.5% as referred above has been considered as overheads from the 15% mentioned in Clause 13.3 of GC/PC.


Therefore, the DAB is of the view that the Claimant is entitled for the prolongation cost of Rs.96.36 Crores only.

Claim No. 2: Disruption Cost claim (Rs. 7,56,00,09,668)

Claimant's Position:

248. Execution of the works was delayed and disrupted due to the Respondent's various delay events and have calculated the costs of direct labour and equipment impacted due to loss of productivity.
249. The Claimant undertook disruption analysis using Measured Mile Analysis method by comparing the productivity achieved in various activities during the impacted and non-impacted periods of delay or disruption events for the period from commencement date to 30.09.2022.


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250. The Claimant has carried out the disruption analysis on activities like Earthworks, Blanket works and Structures works and to analyse the cause and effects of disruption events they have relied on Monthly Progress Reports and Programme.
251. The Claimant in Annexures of its Written Submission (Annexure-10 & 11 Pg. no. 317 to 410) had demonstrated the cause and effect of Disruption to Earthwork activity based on Work front availability for all the Packages.
252. The Claimant has claimed Rs. 756 Crores as Disruption cost against Labour and P&M equipment upto the cut-off date till 30th Sep 2022. (SOC Pg. ref. 7665)
253. The total Disruption cost claimed by the Contractor is Rs. 756 Crores as follows:
- Rs. 233 Crores Against Labour and
 - Rs. 453 Crores Against the Plant & Machinery and
 - INR 70 Crores Against loss of profit

The Claimant has claimed the amount as per their books of accounts & for the construction company like L&T, the same cannot be denied straight away as all the accounts of the company are audited by the auditor's company.

Respondent's Position:

254. The Respondent, in his submissions, has stated the following reasons and rejected the Claimant's claim for disruption:
- the Claimant neither demonstrated the non-availability of work front nor the work-stoppage-instruction by the Engineer,
 - progress of works were disrupted due to the Contractor's own inefficiency,
 - the Contract is Design Built Lump Sum (DBLS) Contract and is not the Item Rate Contract or Bill of Quantity (BOQ) based Contract. Hence in the absence of BOQ, the actual loss and detailed records to demonstrate loss of productivity or reduced efficiency in performance of the works or the actual impact in terms of losses are not established, and
 - the guidelines of SCL protocol are not part of Contract and same is not binding on the Respondent.

Deliberations of the DAB

255. As per the deliberations of DAB various delay events entitle for EOT to the Claimant towards excusable delays for which the Claimant's works got disrupted. The DAB is of the view that the various cited delay events do not fall within the obligation

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of the Claimant and as such, amounts to breach in obligation of the Respondent entitling cost claim to the Claimant. Accordingly, the Claimant is entitled for cost of damages/losses suffered due to idling of Claimant's resources (Plant & machinery as well as manpower) deployed during period of 28 months upto cutoff date of 30.9.2022 beyond scheduled completion of 31.5.2020 as per provisions of Section 73 of Indian Contract Act, 1872 referred to in para 233 supra.

256. Since the claim relates for the period till 30th Sept. 2022, accordingly the actual cost incurred during the period from scheduled completion date i.e., 01st June 2020 to 30th Sept. 2022 i.e. 28 months period needs to be considered as compensable period of Disruption.

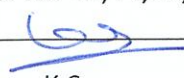
257. The DAB noted that as per RD-78 of the Respondent's submission to DAB during its hearing on 16.4.2024 provides date of commencement of various activities as under:

Package	Start of Embankment construction	of Start of Sub-grade construction	Start of Blanket construction
Package A	19.4.2017	22.9.2017	6.2.2018
Package B	23.6.2017	7.3.2017	12.6.2017
Package C	27.1.2018	14.3.2019	23.2.2021
Package D	30.10.2017	5.2.2018	3.8.2018
Package E	25.6.2019	12.6.2019	15.3.2021
Package F	19.10.2017	10.5.2019	17.3.2021

From the above table it is clear that the very first activity of earth work in all the 6 Sections (Section A to F) could not commence as per CCP but got delayed. In essence the activity of earth work got shifted by an average about 13 months for Section A to F and accordingly the Claimant's cost of deployment of Claimant's Plant & Equipment as well as labour can not be considered to have been incurred for this period of 13 months.

258. Further, Claimant's Plant & Equipment as well as labour could get their cost recovered through the Variation Orders issued upto 30.9.2022 amounting to Rs. 1494 crores and accordingly the pro-rata period for the Variation Orders is also required to be deducted from the Disruption claim period of 28 months. The Respondent had issued Variation Orders amounting to Rs.14,94,54,00,266 till the cut-off date of this claim. The total project value of Rs. 47,44,00,00,000 Crores was to be


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executed within a period of 48 months (approx. Rs. 100 Crores of works to be executed in a month). Therefore, the time required for completing the above-mentioned variation works comes out as 15 months [i.e., (1494 * 48) / 4744]. Accordingly, in addition to initial delay period of 8 months (ref para 257 supra) the Claimant can not be considered to be entitled for Disruption costs during the period of 15 months out of total excusable delay period of 28 months (i.e., from 31-May-2020 to 30-Sept.-2022). Therefore, the Claimant will not be entitled for this Disruption period of 15 months upto this cutoff date 30-Sept.-2022.

259. From deliberations of the DAB as per para 257 to 259, the following period can not considered towards Disruption Costs:

- (i) Initial average period of Delay in commencement of activities on the Site: 13 months.
- (ii) Time period on pro-rata of Accepted Contract Amount from Variations ordered upto 30.9.2022: 15 months.

In view of above deliberations, the admissible cost of labour and machinery otherwise admissible for 28 months is not payable due to various factors in para 257 to 259 hereinabove.

Therefore, DAB decides nil amount against Claim No. 2 (Disruption Costs).

Claim No. 3: TRACK LAYING RESOURCES IDLING COST CLAIM (Rs. 14,68,15,114):

Claimant's arguments in support of his claim

260. The Claimant provided details of the location and the reason for idling of track laying resources along with the contemporary documents that have been notified to the Engineer as under:

DE No.	Reason for Idling	CCP Pkg.	DFC Ch.	Date of Idling		Idle Days	Notice to the Engineer	
				From	To		Ref.	Date
1	Belated instruction for modification of Alignment design Near Sidhpur ROB and LC 189A, thereby instigating reworks of the	A3	82700	09.09.20	22.09.20	14	9587	30.09.20

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DE No.	Reason for Idling	CCP Pkg.	DFC Ch.	Date of Idling		Idle Days	Notice to the Engineer	
				From	To		Ref.	Date
	Claimant's already executed works.							
2	<p>Stoppage of Works at LC 179 by the Respondent due to IR obstruction (OHE Mast line) at the location of proposed DFC Box.</p> <p>Clearance from the Engineer for construction of Part 2 of the Box was provided on 29.09.20 (due to IR obstructions at Site). Construction of the same was completed on 06.11.20. However, the Claimant could only resume the track laying on 26.11.20.</p>	A3	95950	15.10.20	25.11.20	42	9754	22.10.20
3	Delay in construction of ROB at LC 177 by IR thereby disruption to the track laying works.	A3	98200	01.12.20	20.01.21	51	10307	24.12.20
4	Disruption due to obstruction at LC 174 & LC 170.	A2	104200	24.02.21	28.02.21	5	10866	27.02.21

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DE No.	Reason for Idling	CCP Pkg.	DFC Ch.	Date of Idling		Idle Days	Notice to the Engineer	
				From	To		Ref.	Date
5	Disruption due delay in construction of Br. No. 102	B2	46100	15.05.21	31.05.21	17	11555	29.05.21
6	Disruption due to delay in Design & Construction of RFO 86.	B2	40555	10.07.21	29.08.21	51	12233	13.08.21
Total Idle Days						180		

261. The Claimant submitted additional cost expenditure on account of idling of Track laying resources due to various delay or disruption events amounting to RS. 14.68 Crores as below.

Sl. No.	Particulars	Idle days	Idling Amount (INR)
1	Labour and Supervisory Staffs	180	80,08,005
2	Machinery / Equipment	180	11,33,26,800
3 = (1+2)	Total charges of Manpower and Equipment deployed at site -		12,13,34,805
4	Indirect Cost and Over heads- @10% of (3)-		1,21,33,481
5=3+4	Direct & Indirect Cost - Sub-total -		13,34,68,286
6	Loss of Profit / Opportunity due to prolonged retention of resources at Site - @10% of (7)-		1,33,46,829
7=5+6	Total		14,68,15,114

Respondent's arguments in support of his defence

262. The Respondent in his submissions has rejected the Claimant's claim for disruption on account of following:

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- The Contractor neither demonstrated the non-availability of work front nor the work-stoppage-instruction by the Engineer.
- The Contractor has not notified the Engineer on the same day or the next working day of the disruption start date.

Deliberations of the DAB

It can be understood from the documents that the Claimant had contemporaneously notified the idling of track laying resources at various point of time due to the delay events of the Respondent.

263. RD-5 at Page 257 of SoD, mentions NTC depot at Bhandu and Timba. Due to commissioning of parallel track by the Respondent the NTC depot at Bhandu was dismantled and both the NTCs were stationed at Timba leading to reduction of productivity owing to limitation of rail loading capability for the NTC.
264. The Engineer has considered 90 days for post track works similar to CTP-1 & 2 Packages and deviated from approved CCP. Post track duration for completed CTP 3R had been similar to CCP and accordingly Claimant requested to consider duration of 150 days in Package- F2 towards post track laying.
265. The DAB has flipped through the Notifications issued by the Claimant to the Engineer and placed in the documents attached to the SoC (CD-5/27 SOC Pg. 6785 to 6809) and is of the view that the Claimant Track laying resources were subjected to idling by the events covered in the aforesaid notifications of the Claimant which does not fall under the obligation of the Claimant and accordingly entitles the Claimant for idling costs.
266. The DAB observed that the above cited delay event has not been commented/contested by the Respondent. The DAB is of the view that the above cited delay events do not fall within obligation of the Claimant and as such, amounts to breach in obligation of the Respondent entitling costs claim to the Claimant. The DAB is of the view that the claim is towards idling of Claimant's resources and not extra item of work and as such, overhead costs claimed at Sr. 4 (Rs. 1,21,33,481) above are not admissible to the Claimant. Further, the Claimant could not conclusively establish about Loss of Profit and accordingly claim under Sr. 6 (Rs.1,33,46,829) above is also not admissible to the Claimant. The DAB accordingly awards Rs. 12,13,34,805 against the claim.


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Claim No. 4: ROW Demarcation / ROW pillar erection Cost:

Claimant's arguments in support of his claim

267. The Contractor has claimed Rs. 0.61 Crores towards ROW pillar fixation as in entire ROW pillars were missing in detour section for (218 Km). The Claimant's asserts that, it was the Respondent's obligation to provide physically stacked ROW along the entire alignment. However, it was missing in entire detour portion and for about 60% in parallel section, which necessitated the Claimant to do the additional work of fixing the ROW pillars.

268. The Claimant has preferred additional Cost for ROW Demarcation as under:

Sr. No.	Item Description	Unit	Amount
1	ROW Demarcation using JMS provided by the Respondent	INR	32,55,000
2	Service Tax, Swachh Bharat Cess & Krishi Kalyan Cess @15%	INR	4,88,250
3	Total Sub-Contractor Costs =	INR	37,43,250
4	Cost for provision of 1 nos. of JCB (full time) by Main Contractor to Sub-Contractor for ground clearance and access for fixing of ROW Pillars.	INR	15,80,632
5	Add. Claimant's Overhead and Profit @15% in terms of PC/GC – Cl.13.3	INR	7,98,582
6	Total Claim Amount for Variation Works of ROW Demarcation using JMS	INR	61,22,464

Respondent's arguments in support of his defence

269. As deliberated in Delay event DE-1, the Respondent denied the claim that fixing of missing ROW pillars and validation of the ROW was part of the Claimant's obligation and accordingly the claim is inadmissible.

Deliberations of the DAB

270. As per DAB's deliberations against Delay Event DE-1, the Respondent failed in its express obligation under Clause 5.2 of ER (General) and Clause 4.1 of ER (Functional) that, to provide physically stacked pillars along entire alignment of the DFC track while handing over of land. The Claimant has fixed the ROW pillars along entire ROW in detour and also 60% missing ROW pillars in parallel section of track

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and accordingly the same can be considered as additional work entitling the Claimant towards additional time and cost. Fixing of ROW pillars is an additional work carried out by the Claimant beyond his scope of obligations and accordingly the same is required to be paid to the Claimant. The overhead cost @ 15% claimed by the Claimant is as per Appendix to Tender and is accordingly admissible. The Respondent has not commented/disputed the quantum of amounts claimed towards ROW Demarcation and deployment of one JCB and accordingly the DAB awards the amounts as claimed (Rs. 0.61 crores).

Claim No. 5: Early completion incentive (Rs. 2,96,13,95,664)

Claimant's arguments in support of his claim

271. As per the instructions of the Respondent, they had completed substantial works from Iqbalgarh to Sanand North including the Palanpur, GSN & SSN Connecting lines. Subsequently, the Respondent commenced commercial operations for the above-mentioned completed sections progressively between 30th Mar 2021 and 29th Nov 2022 amounting to 52% of project stretch.

272. The details of the incentive entitlement under the contract are as under:

Section	Section Length (Rkm)	Contract Price (Eq. INR)	Commissioning Date	completion as per Engineer's Determination of EOT-7 (MS-3)	No. of weeks of early completion	Early completion Incentive
Iqbalgarh to Palanpur	15.9	2,77,97,80,557	30-Mar-21	06-May-23	109.6	76,14,61,317
Palanpur to Mehsana	62.2	9,32,82,18,170	10-Jun-22	06-May-23	47.1	1,09,93,97,141
Palanpur Connecting Line	14.1	3,58,33,16,348	07-Sep-22	06-May-23	34.4	30,84,21,157
Mehsana to Sabarmati North	73.4	13311368650	29-Nov-22	06-May-23	22.6	75,11,41,517
Ghumasan - Sabarmati North	6.2	46,84,15,530	29-Nov-22	06-May-23	22.6	2,64,32,019

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Section	Section Length (RKm)	Contract Price (Eq. INR)	Commissioning Date	completion as per Engineer's Determination of EOT-7 (MS-3)	No. of weeks of early completion	Early completion Incentive
Connecting Line						
Sanand - Sabarmati North Connecting Line	3.1	25,77,15,420	29-Nov-22	06-May-23	22.6	1,45,42,513
Total	174.9	29,72,88,14,676				2,96,13,95,664

273. The Claimant is entitled for early completion bonus amounting to INR 296,13,95,664 in accordance with Clause 8.7 of the Contract.

274. The Claimant informed that these sections are deemed to be Taken over as per GC/PC Clause 10.1(a) from the respective commercial operation commencement dates.

275. The Respondent started the commercial operation of completed sections between Iqbalgarh to Sanand North including GSN & SSN Connecting Lines and Palanpur Connecting Line before the extended completion date as per EOT-7 assessed by the Engineer and approved by the Respondent, the Claimant is also entitled to incentives for early completion of works at a rate of 0.25% of Contract Price per week as per GC/PC Clause 8.7.

276. As per Cl. 8.7 of GC/PC, the Claimant computed the incentives at the rate of 0.25% of Contract Price per week between the dates of commercial operation and the Engineer's determination of EOT-7 i.e. 06.05.2023.

Respondent's arguments in support of his defence

277. As per GC/PC Clause 10.1 there is no provisions for part Taking Over of the Works. Also, GC/PC Clause 8.7 provides that the Claimant is entitled to an early completion incentive only on account of achieving MS-3 upon completion of all the Works. Provision towards Taking Over of the Section of Works under GC 10.2 has been

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deleted and accordingly incentive is not applicable for completion of Section of Works. The Balance works in the above-mentioned sections are yet to be completed and there is no question of completion of works as defined in MS-3.

278. GC/PC clause 8.7 refers to application of incentive only upon completion of all the works before original date for MS-3 specified in Appendix to Tender and not extended Time for Completion for MS-3 as being claimed by the Claimant and Works were not completed within Time for Completion specified in Appendix to Tender and accordingly incentive is payable to the Claimant.

Contract Provisions

279. *“8.7 Delay Damages
Provided further, in case, Contractor achieves Milestone-3 (MS-3; Completion of all works and Taking Over of the Works) within a period less than as stipulated in ATB and PC 8.2, an incentive equivalent to 0.25% of the contract price per week would be payable to the Contractor.”*

Deliberations of the DAB

280. The DAB is of the view that all the Works under the Contract have not been completed yet and accordingly the Claim under the head has not matured of now and accordingly defers the Claim No. 5 at this stage with liberty to raise at appropriate time.

DAB Decision:

281. The Claimant is entitled for Extension of Time for completion for the delay events up to the cut-off 30th -Sept-2022, as provided in below table.

Milestone	EOT entitled date for Claimant
MS-1	04-Feb-24
MS-2	27-May-24
MS-3	20-Aug-24

282. As deliberated above, the Contractor is entitled for following claims as under:

S. no.	Description	Claimed Amount (In Crs.)	DAB award Amount (in Crs)
1	Prolongation Cost	711	96.36

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1.1	On-site and HQ overheads	374	
1.2	Overheads during Covid period	68	
1.3	Loss of profit	269	-
2	Disruption Cost (2.1 + 2.2 + 2.3)	756	0
2.1	Labour component	233	0
2.2	Equipment component	456	
2.3	Loss of Profit	70	-
3	Track laying resources idling cost	14	12.13
4	ROW Demarcation	0.61	0.61
5	Early completion incentive	296	Deferred
	Total (1 + 2 + 3 + 4 + 5)	1779	109.10

283. GST as applicable of the awarded claim amounts as above, as per actuals, shall be reimbursed by the Respondent.

284. Interest on the cost claims is not awarded by the DAB.


26/06/2024.

Shri Achal Khare
Member


26/6/24

Shri Kanwar Singh
Member/Chairman


26/6/24

Shri Dinesh Kumar
Member

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