IN THE MATTER OF A DISPUTE BOARD ADJUDICATION

UNDER A CONSTRUCTION CONTRACT

PURSUANT TO FIDIC CLAUSE 20.4 OF THE CONTRACT

Between

Between

JV SBI International Holdings AG & Reynolds Construction Company Ltd — "Referring Party"

And

Uganda National Roads Authority "UNRA" — "Responding Party"

In connection with

Civil works for Design and Build Project for rehabilitation of Mukono-Kayunga and Bukoloto - Njeru Roads (95km)

DECISION OF DISPUTE BOARD IN FIRST DISPUTE REFERRAL

in respect of

FINANCIAL CLAIM FOR IDLE CHARGES, DISRUPTION COSTS, NON-PAYMENT FOR EXTENDED ENGINEER'S MAINTENANCE COSTS; PLUS, NON-PAYMENT OF COSTS ALLEGEDLY INCURRED IN ANTICIPATION OF OMITTED WORK.

Dispute Board

Henry M Musonda FCIArb

Decision Date: 30 May 2022

PURSUANT TO CLAUSE 20.4 OF THE CONDITIONS OF CONTRACT

DAB DECISION - REFERRAL No 1

In respect of

FINANCIAL CLAIM FOR IDLE CHARGES, DISRUPTION COSTS, NON-PAYMENT FOR EXTENDED ENGINEER'S MAINTENANCE COSTS; PLUS, NON-PAYMENT OF COSTS ALLEGEDLY INCURRED IN ANTICIPATION OF OMITTED WORK.

1. INTRODUCTION

Preamble

1.1. The **Uganda National Roads Authority** (hereinafter referred to as **"UNRA"** or "**the Employer**" or "the **Responding Party**") entered into a Contract for Civil Works for Design and Build Project for Rehabilitation of Mukono - Kayunga and Bukoloto - Njeru (95Km) Roads using the Cold Foamed in Place Recycling Technology with MIs **SBI International Holdings AG** (hereinafter referred to as **"SBI"** or "**the Contractor**" or "the **Referring Party**") on 9th January, 2015 at a Contract Price of UGX 233,126,164,344 including all applicable local taxes for a duration of 910 calendar days (30 months) and Defects Liability Period of 730 days. The Contract Sum was payable in two currency proportions, that is, 26% in Uganda Shillings and 74% in United States Dollars.

1.2. The Referring Party, JV SBI International Holdings & Reynolds Construction Co. Ltd, Fill Courts, Plot 88 Luthuli Avenue, Kampala, Uganda are referred to in this decision as JV SBI & RCC, as Referring Party, as Contractor, and the Responding Party, the Uganda National Roads Authority, Plot 3-5 New Portbell Road, Nakawa Business Park, PO Box 28487, Kampala, Uganda are referred to in this decision as UNRA, as Responding Party, and the Employer.

1.3. The works commenced on 29th January 2015 with an initial implementation period of 910 days to be completed on 28th July 2017. The completion period was revised to 996 days following extensions of time for completion of works by 86 calendar days resulting in an extension of the completion date to 22nd October 2017.

1.4. The Design Review and Construction Supervision was undertaken by M/s Aarvee Associates Architects Engineers & Consultants Pvt Limited, in Association with Multiplan Consulting Engineers (hereinafter referred to as "The Engineer").

1.5. The Conditions of Contract comprise the FIDIC "**"The General Conditions of Contract for Plant and Design Build for Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor,** First **Edition, 1999 as prepared by the**

Federation International Des Ingeniers-Counseils **(FIDIC)"** as modified by the Particular Conditions. The FIDIC Conditions of Contract, as modified by the Particular Conditions, are referred to herein as "the GCC" (General Conditions of Contract).

1.6. As specified in GCC Sub-Clause 1.4, the governing law of the Contract is the Law of the Republic of Uganda.

1.7. The following chronology of key events has been taken from the Contract documents:

Date of Contract Agreement	:	9th January, 2015
Commencement Date	:	29th January 2015
Time for Completion	:	910 days
Contractual Completion Date	:	28th July 2017
Extension of Time for Completion (EoT)	:	86 days
Revised Time for Completion (Original + EoT)	:	996 days
Revised Completion Date	:	22nd October 2017
Defects Notification Period	:	24 Months (Expired 21 October 2019)

The Contractor completed his obligations under the Contract and was issued the Performance Certificate by the Engineer.

1.8. The Parties chose to appoint a one - person Dispute Board (DAB) in accordance with GCC Clause 20.2, the General Conditions of Dispute Board Agreement in the FIDIC Pink Book, and the Procedural Rules annexed thereto, as modified and agreed between the Parties and the DAB. I was duly appointed as the Sole DAB member with effect from 24 November 2021:

<u>DAB's Terms of Reference & Jurisdiction</u>

1.9. GCC Clause 20.4 provides that:

> "If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause."

And,

> "Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause…"

1.10. In terms of GCC Clause 3.5, the Engineer shall:

> "… make a fair determination in accordance with the Contract, taking due regard of all circumstances".

1.11. I believe the duty of the DAB is to make a decision on the same basis. Therefore, the DAB decision must be reasoned; and must be fair in accordance with the contract, taking due regard of all the circumstances.

1.12. In terms of the Procedural Rules, the DAB is empowered, *inter alia*, to decide upon the scope of any dispute referred to it, establish the procedure to be applied, is not bound by any rules or procedures other than those contained in the Contract and the Procedural Rules. The DAB may take the initiative in ascertaining the facts, may use its own specialist knowledge (if any), may decide upon provisional relief such as interim or conservatory measures, and may also open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer relevant to the dispute.

1.13. The purpose of adjudication is to provide the Parties with a relatively quick and inexpensive independent, impartial decision on the matter in order to settle the dispute. The DAB is not acting as an Arbitrator.

1.14. The DAB's Decision is binding upon the Parties as a matter of contractual agreement. Should either Party be dissatisfied with the DAB's Decision, after giving notice of such to the other Party within 28 days of the DAB Decision, and after attempting amicable settlement, it may refer the matter to Arbitration. Neither Party may commence Arbitration unless a notice of dissatisfaction has been given in accordance with Clause 20.4. If no such notice of dissatisfaction is given within the stipulated 28 day period after receiving the DAB's Decision, the DAB's Decision becomes final and binding.

1.15. Neither Party has raised any challenge to the DAB's jurisdiction. Having reviewed the Contract, the Parties' submissions and correspondence attached thereto, the DAB considers that it has jurisdiction to decide the issues in Dispute.

DAB Dispute Resolution Process and Timetable

1.16. The Dispute arises from the Employer's rejection of the Engineer's determination of the Contractor's claims No. 1 and 2 for payments arising from Idle Charges of Equipment. It also arises from the rejection by both the Engineer and the Employer of the Contractor's claims No. 3,4 and 5 for disruption costs, costs of maintaining the Engineer, and Contractor's non-

implementation of the Resettlement Action Plan respectively. The Contractor has previously submitted five (5) Claims to the Engineer and a number of Determinations were issued which after review, were all rejected by the Employer, in line with the Contract provisions.

1.17. Accordingly, the Contractor declared a dispute for which a Dispute Adjudication Board (DAB) was appointed to resolve the dispute and the DAB Agreement signed on 24th November 2021 in accordance with Sub- clause 20.4 of the General Conditions of Contract (GCC).

1.18. Consequently, on 21st January 2021[1] the Employer notified the Contractor of my appointment as sole member of the Dispute Board.

1.19. On Friday 31st January, 2022 the DAB held a virtual Preliminary meeting and the Parties agreed to the following timetable:[2]

	Description	Time (days)	Due Date
•	Contractor's Referral	+14 days	14 Feb 22
•	Employer's Response	+21 days	07 Mar 22
•	Contractor's Reply	+14 days	21 Mar 22
•	Employer's Rejoinder	+14 days	04 April 22
•	Hearing	+24 days	28 April 22
•	Closing pleadings	+16	14 May 22
•	DAB Decision	+16 days	30 May 22

1.20. In accordance with the Procedural Timetable, the Contractor submitted its Referral to the DAB on 14 February 2022. The Contractor referred the matter to the DAB pursuant to GCC Clause 20.4. A "soft copy" of the Contractor's Referral Submission was e-mailed to the DAB on 14 February 2022 and a hard copy couriered and received by the DAB.[3]

1.21. The Employer submitted his Response on 7 March 2022.

1.22. The Contractor duly submitted his Reply on 21 March 2022, after an agreed extension.

1.23. Consequently, the Employer submitted his Rejoinder on 4th April 2022 in compliance with the agreed Timeline.

1.24. The Parties complied with the above revised timetable. Submission to the DAB were sent via e-mail and hard copies were couriered and received by the DAB.

[1] Employer's letter UNRA/PR124/200
[2] DB Procedural Order No.1 dated 17 July 2021
[3] Contractor letter dated 14 February 2022VJ/SBI-UNRA/1521/19.

1.25. The Parties agreed to a virtual hearing. The date of 28 April 2022, was set aside for the virtual hearing, starting at 10.00hrs, Kampala time.

1.26. The Contractor was allowed 14 days to submit a Referral after the date of Notification. Parties also confirmed that the DAB would be afforded 30 days from the date of the Hearing within which to issue its Decision, and consequently agreed the greater than 84 days provided for in GCC Clause 20.4.4. Accordingly, the due date for the DAB Decision on Referral No. 1 was extended taking into account the above including the request of the Parties via emails dated 31 March, 04 and 05 April 2022, to shift the date for the virtual hearing from 08 April to 28th April 2022, to:

	Time	Due Date
DAB Decision	119 days	30 May 2022

1.27. In summary, the submissions received by the DAB comprised letters, attachments (overview and Appendices, Tables, and Works Contract Agreement"[4].

1.28. The DAB has carefully studied and considered all the submissions made to it and now makes its Decision based on these submissions, documents and communications. The DAB shall provide a basic reasoning in order to give the Parties a general understanding of how it arrived at its Decision. The DAB does not intend to traverse each and every point made in the Parties'' submissions, preferring to focus on the salient points. The fact that I may not have addressed any particular point should not be taken as an oversight or that I agree or disagree with it.

1.29. Conduct of the virtual Hearing

1.29.1. The virtual hearing was held on 28th April 2022, between 10.00hrs to 1400hrs, and followed the Agenda issued by the DAB, and the "Order No.4 - Notes on the Conduct of Hearings" previously issued by the DAB.

1.29.2. At the Hearing the Parties were represented as follows:

1.29.2.1. The Contractor's team:

Mr. Sharly Buchbut- Managing Director.
Mr. Slobodan Blagojevic, Technical Manager.
Mr. Raymond Ndyagambaki, Legal Representative

1.29.2.2. The Employer's team:

Mr Titus Kamya – Head Litigation
Eng. Jackson Nawaswa- Contract Manager

[4] "Copy of the signed contract for works – GCC and PCC and a copy of the UNRA General & Special Specifications for Roads and Bridges -Volume IIIA (January 2005)

Ms. Philo Nyadoi - Legal Representative

Mr Pecos Mutatina - Legal Officer Litigation

1.29.3. At the close of the virtual Hearing both Parties were asked whether they were satisfied that they had had sufficient opportunity to deal with all the issues, and if they were satisfied with the conduct of the Hearing. Both Parties answered in the affirmative, and the hearing was adjourned thereafter.

2. THE DISPUTE

2.1. During the course of the contract and on various occasions, the Engineer granted to the Referring Party, extensions of time due a number of delays.

2.1.1. On 16 January 2017, the Referring Party submitted a financial claim for Idle Charges of equipment due to reduction in the rate of works in 2016 (Claim No.1). The claim was determined by the Resident Engineer who recommended a sum of UGX 358,374,840. The Employer rejected the Engineer's determination and accordingly the Contractor declared a dispute.

2.1.2. On 6 April 2017, the Referring Party submitted another financial claim for idle charges of equipment due to reduction in the rate of work. The claim was determined by the Resident Engineer who recommended a sum of UGX 443,157,791. The Employer rejected the Engineer's determination and accordingly the Contractor declared a dispute.

2.1.3. The Project was scheduled to end on 28th July 2017 but was extended by 86 calendar days with a revised completion date of 22 October 2017. The Contractor claimed for disruption costs in the sum of UGX 11,350,260,766 (Claim No. 3). The Resident Engineer made a determination rejecting the claim. The Contractor thereafter declared a dispute.

2.1.4. Due to the extension of time for the completion of the project, the Resident Engineer was required to be maintained on site for an extended period. The Contractor claimed for compensation costs for Engineer's Maintenance in the sum of UGX 339,582,738 (Claim No. 4). The Resident Engineer did not make any determination. Consequently, the Contractor declared a dispute.

2.1.5. The Contractor claimed for disruption costs of UGX 11,346,339,502 (Claim No. 5) due to the omission of the resettlement works for Project Affected People, which claim was rejected by the Employer, therefore, the Contractor declared a dispute.

2.2. The Contractor declared a dispute and in various letters dated 30th January 2020, 18 March, 7th May, 7th and 28th October 2020, requested for the appointment of an Adjudicator.

2.3. On 21 January 2021, the Employer responded to the Contractor's notice and acknowledged that the matter be referred to the DAB for a decision.

3. The Parties Pleadings

3.1. The Contractor's Case

In accordance with the Procedural Timetable, the Contractor submitted its Referral (Statement of Case) to the DAB on 14 February 2022. The principal issues in dispute are:

1) **Issue 1:** Charges for idle equipment due to reduction in rate of work in 2016.
2) **Issue 2:** Charges for idle equipment due to reduction in rate of work in 2017.
3) **Issue 3:** Disruption Costs for Extension of Time for Completion by 86 days.
4) **Issue 4:** Payment towards Engineer's Maintenance beyond the Contract Period - 246 days.
5) **Issue 5:** Non-implementation of the Resettlement Action Plan (RAP) on the Project

3.1.1 CHARGES FOR IDLE EQUIPMENT IN 2016

On this issue, the Contractor's position is as follows:

3.1.1.1 The Employer breached Sub Clause 14.7 (Payments) of Interim Payment Certificates (IPCs) 5, 6,7,8,9 and 10. In a letter[5] dated 19th April 2016, the Contractor notified the Resident Engineer of a reduction in the rate of work due to nonpayment of UGX 31,158,084,797 for certified IPCs in accordance with Sub Clause 16.1 of the General Conditions of Contract (GCC).

3.1.1.2 By another letter[6] dated 25th May 2016, it notified the Resident Engineer of a claim for extension of time and for costs in accordance with Sub Clause 8.4 and Sub Clause 20.1 of the General Conditions of Contract (GCC).

3.1.1.3 That he submitted the cost claim in a letter[7] dated 16th January 2017 for an amount of USD 376,713 for idle equipment and manpower during the period between 25th May 2016 and 18th July 2016.

3.1.1.4 Following discussions held with the Resident Engineer he submitted modified calculations and a revised claim of USD 356,588 via letter[8] dated 15th March 2017.

[5] Contractor's letter ref SBI/RE/0416/215 in Appendix 2 of the Referral
[6] Contractor's letter ref SBI/RE/0516/257 in Appendix 2 of the Referral
[7] Contractor's letter ref SBI/RE/0117/242 in Appendix 2 of the Referral
[8] Contractor's letter ref SBI/RE/0317/464 in Appendix 2 of the Referral

3.1.1.5 On 17th May 2017, the Resident Engineer scrutinized the claim and determined, under Sub Clause 3.5 of the GCC[9] that the Contractor was entitled to an additional cost of UGX 358,374,840.

3.1.1.6 On 28th June 2019, the Resident Engineer informed the Contractor that the Employer had requested for alternative computations using the Uganda Revenue Authority (URA) equipment depreciation rates.[10]

3.1.1.7 The Contractor's response was that the Rental Rate Book for Construction Equipment is used as a standard in the construction industry with a long history of use. The Contractor, therefore, maintained the Resident Engineer's determination and requested for payment.

3.1.1.8 The Contractor further submitted that due to the nonpayment of the aggregate sum of UGX 31,158,084,797 for certified Interim Payment Certificates (IPCs) 5, 6, 7, 8, 9 and 10, it reduced the rate of work pursuant to SFC 16.1 of the General Conditions of Contract which stated:

> *"If the Engineer fails to certify in accordance with Sub Clause 14.6 [issue of interim payment certificates] or the Employer fails to comply with Sub Clause 2.4 [Employer financial arrangements] or Sub Clause 14.7 [Payment], the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice."*
>
> *"If the Contractor suffers delay and/or incurs cost as a result of suspending work (or reducing the rate of work) in accordance with this sub clause, 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 pi us reasonable profit, which shall be included to the Contract Price."*
>
> *"After receiving this notice, the Employer shall proceed in accordance with Sub Clause 3.5 [determinations] to agree or determine these matters."*

3.1.1.9 To further fortify its case, the Contractor submitted that it duly notified the Resident Engineer of its claim in accordance with SC 20.1 which stated that:

[9] Engineer's Determination AA/1862/17-18/20 dated 17 May 2017 in Appendix 2 of the Referral.
[10] Letters ref AA/1862/19-20 and UNRA/PR 125/200 in Appendix 2 of the Referral.

"If the Contractor considers himself to be entitled to <u>any extension of time for completion and/or additional payment</u>, under any clause of these conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware of the event or circumstance."

3.1.1.10 In further support of its argument, the Contractor submitted that its methodology, calculations, and rates are based on the Rental Rate Book for Construction Equipment USA used universally by FIDIC Engineers for over 50 years. The Contractor contends that the Employer belatedly and unjustly seeks to rely on the Uganda Revenue Authority (URA) rates for equipment not provided for in the contract agreement.

3.1.1.11 It is the Contractor's position that the Employer should pay the sum determined by the Engineer, of **UGX 385,374,840** as charges for idle equipment due to reduction in rate of work in 2016.

3.1.2 **CHARGES FOR IDLE EQUIPMENT IN 2017**

On this issue, the **Contractor's position** is as follows:

3.1.2.1 The Resident Engineer was notified of a reduction in the rate of work due to nonpayment of UGX 25,755,304,880 for certified Interim Payment Certificates (IPCs) 19, 20,21 and 22 in accordance with Sub Clause 16.1 of the GCC.[11]

3.1.2.2 The Resident Engineer was further notified of a claim for extension of time and for costs in accordance with S.C 8.4 and S.C 20.1 of the GCC.[12]

3.1.2.3 That this was followed by a claim submission for an amount of USD 490,478 for idle equipment and manpower during the period between 7th April 2017 and 28th May 2017.[13]

3.1.2.4 This claim was revised and resubmitted following the Resident Engineer's request to reduce the rate from 15% to 5% following the rental rate Blue Book for Construction Equipment.

3.1.2.5 the Resident Engineer scrutinized the claim and determined that the Contractor was entitled to an additional cost of **UGX 443,157,791.**[14]

[11] Contractor's letter ref SBI/RE/0317/465 dated 15 March 2015 in Appendix 3 of the Referral
[12] Contractor's letter ref SBI/RE/0417/478 dated 6 April 2017 in Appendix 3 of the Referral
[13] Contractor's letter ref SBI/RE/0717/555 dated 11 July 2017 in Appendix 3 of the Referral
[14] Engineer's Determination AA/1862/19-20 dated 8 July 2019 in Appendix 3 of the Referral.

3.1.2.6 It is the Contractor's position that the Employer should pay the sum determined by the Engineer, of **UGX 443,157,791** as charges for idle of equipment due to reduction in rate of work in 2017.

3.1.3 **DISRUPTION COSTS FOR 86 DAYS**

On this issue, the Contractor's position is as follows:

3.1.3.1 Due to delays in payment of IPCs 5, 6,7,8,9 and 10 by more than 56 days as stipulated in S.C 14.7 (b) of the GCC, the Contractor reduced the rate of work[15] in accordance with S.C 16.1 of the GCC and that this was notified to the Engineer on 19th April 2016.

3.1.3.2 On 25th May 2016, the Contractor issued a further notice[16] in accordance with S.C 20.1 and S.C 8.4 indicating that he was going to suffer delay and be entitled to compensation.

3.1.3.3 On 30th August 2016, the Contractor submitted a claim seeking extension of time.[17]

3.1.3.4 The Engineer issued a determination to the effect that the Contractor was entitled to **14 calendar days** extension of time.

3.1.3.5 On 3rd February 2016, the Resident Engineer initiated a variation to extend 40mm thick Superpave Asphalt Concrete Wearing Course onto the shoulders[18] On 8th March 2016, the Contractor submitted his cost proposal for the requested variation.

3.1.3.6 On 14th March 2016, the Resident Engineer confirmed that the variation extended to accesses and junctions. The Contractor further avers that this position was ratified by the Employer via its letter dated 15 Apri12016.[19]

3.1.3.7 On 22nd April 2017, the Contractor sought an extension of time for 152 days.[20] Subsequently, the Resident Engineer issued a determination[21] that the Contractor was entitled to **41 calendar day's** extension of time.

3.1.3.8 On 22nd September 2015, the Contractor submitted to the Resident Engineer the requirement for 50 cm thick rock fill plus 20 cm thick CRR capping layer seeking a variation under Clause 13 of the GCC.[22] The Contractor's submission is that this

[15] Contractor's letter ref SBI/RE/0416/215 dated 19 April 2016 in Appendix 4 of the Referral.
[16] Contractor's letter ref SBI/RE/0416/215 dated 19 April 2016 in Appendix 4 of the Referral.
[17] Contractor's letters ref SBI/RE/0816/357 and SBI/re/1116/384 dated 30 August 2016 and 2 November 2016 respectively in Appendix 4 of the Referral.
[18] Engineer's letter ref AA/1862/15-16/189 dated 3 February 2016 in Appendix 5 of the Referral.
[19] Employer's letter ref UNRNPR 125/200 in Appendix 5 of Referral.
[20] Contractor's letter ref SBI/RE/0417/490 dated 22 April 2016 in Appendix 5 of the Referral.
[21] Engineer's letter ref AA/1862/1 7-18/17 dated 17 May 2017 in Appendix 5 of the Referral.
[22] Contractor's letter ref SBI/RE/915/51 dated 22 September 2015 in Appendix 6 of the Referral.

variation was approved by the Employer[23] following a recommendation by the Engineer[24].

3.1.3.9 On 9th February 201 7 the Contractor sought extension of time of 203 days[25] and that on 17th May 2017 the Resident Engineer issued a determination that the Contractor was entitled to **31 calendar days** extension of time**.**

3.1.3.10 Following the granting of above variations and extensions of time totaling 86 days, the Contractor submitted a SC 20.1 Claim for disruption costs in the sum of **UGX 11,350,260,766** in its letter dated 6th December 2017**.** The Contractor provided further clarifications via letters dated 5th July 2018. On 30th November 2018, the Claim was reviewed by the Engineer's Claim Specialist who recommended a sum of UGX 6,741,611,160.

3.1.3.11 The Contractor avers that the Resident Engineer belatedly carried out a further review of the claim and in a letter No. HW/1862/19-20/3174 dated 19th July 2019 rejected the claim stating that the Contractor is not entitled to any payment for the cost of **UGX 11,350,260,766**.

3.1.3.12 The Contractor contends that S.C 8.4 of the General Conditions of Contract provides that:

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

(a) A variation (unless an adjustment to the Time of Completion has been agreed under Sub Clause 13.3.)

b) A cause of delay giving an entitlement to extension of time under a Sub Clause of these conditions'

If the Contractor considers himself to be entitled to an extension of time for completion, the Contractor shall give notice to the Engineer in accordance with Sub Clause 20.1 [Contractor's claims]. When determining each extension of time under Sub Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time."

[23] Employer's letter ref UNRA/PR 125/200 dated 3 January 2017 in Appendix 6 of the Referral.
[24] Engineer's letter AA/1862/15-16/120 dated 14 November 2015 in Appendix 6 of the Referral.
[25] Contractor's letter ref SBI/RE/0217/439 dated 9 February 2017 Appendix 6 of the Referral.

3.1.3.13 The Contractor further relies on the first paragraph of S.C 13.1 of the contract which provides that:

"Variations may be initiated by the Engineer at any time prior to issuing the taking over certificate for the works, either by instruction or by a request or the Contractor to submit a proposal."

3.1.3.14 To augment its case, the Contractor further quoted parts of S.C 13.3 of the GCC which provided that:

"If the Engineer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting.

(a) A description of the proposed design and/or work to be performed and a programme for its execution'

(b) The Contractor's proposal for any necessary modifications to the programme according to Sub Clause 8.3 [programme] and to the Time for completion, and

(c) The Contractor's proposal for adjustment to the Contract Price.

Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub Clause 3.5 [determinations] to agree 'or determine adjustments to the Contract Price and the Schedule of Payments. These Adjustments shall include reasonable profit and shall take account of the Contractor's submissions under Sub Clause 13.2 [value engineering] if applicable."

3.1.3.15 The Contractor submitted that it was justified to seek disruption costs in Claims No. 3 for the following reasons.

(i) The Contractor was granted an extension of time for completion for 14 days in accordance with Sub Clause 8.4 of the GCC due to reduction in the rate of progress of works following the Employer's late payments pursuant to Sub Clause 16.1 of the GCC.[26]

(ii) Due to this extension of time of completion by 14 days, the Contractor was entitled to disruption costs in accordance with Sub Clause 20.1 of the GCC.

[26] Engineer's letter ref 4 AA/1862/17-18/18 dated 17 May 2017 in Appendix 4 of the Referral.

(iii) The Employer approved a variation in accordance with Sub Clause 13 of the GCC to extend 40mm thick Superpave Asphalt Concrete Wearing Course onto the shoulders, accesses and junctions.[27]

(iv) The Engineer issued a determination pursuant to Sub Clause 3.5 of the GCC, that the Contractor was entitled to 41 calendar day's extension of time in accordance with Sub Clause 8.4 of the general conditions of contract.[28]

(v) Due to this extension of time of completion by 41 days, the Contractor was entitled to disruption costs in accordance with Sub Clause 20.1 of the GCC.

(vi) The Employer also approved a variation for rock fill for treatment of wet areas of road construction in accordance with Sub Clause 13 of the GCC.[29]

(vii) The Engineer issued a determination pursuant to Sub Clause 3.5 of the GCC, that the Contractor was entitled to 31 calendar day's extension of time in accordance with Sub Clause 8.4 of the GCC.[30]

(viii) Due to this extension of time of 31 days, the Contractor was entitled to disruption costs in accordance with Sub Clause 20.1 of the GCC.

(ix) The claim of **UGX 11,350,260,766** is for disruption costs for the entire 86 days extension of time for completion of the project and is for; (1) Labour costs of UGX 1,975,322,018, (2) Site office Costs of UGX 130,442,679, (3) Equipment costs of UGX 5,709,213,532, (4) head office overheads of UGX 3,304,755,517, (5) increased costs of UGX 197,532,202, and (6) Finance Costs of UGX 32,994,818 in accordance with Sub Clause 20.1 of the GCC.[31]

(x) The Contractor relies on the Resident Engineer's claims specialist and Local partner who recommended the sum of UGX 6,741,611,160 in accordance with Sub Clause 3.5 of the GCC.[32]

(xi) The Contractor also submits that the Resident Engineer's determination made on 19th July 2019 in response to the Contractor's claim dated 6th December 2017. (**1 Year and 7 Months later**) is in breach of Sub Clause 20.1 of the GCC.

[27] Employer's letter ref UNRA/PR 125/200 dated 12 December 2016 in Appendix 5 of the Referral.
[28] Engineer's letter ref AA/1862/17-18/17 dated 17 May 2017 in Appendix 5 of the Referral.
[29] Employer's letter ref UNRA/PR 125/200 dated 3 January 2017 in Appendix 6 of the Referral.
[30] Engineer's letter ref AA/1862/17-18/19 dated 17 May 2017 in Appendix 6 of the Referral.
[31] Contractor's letter ref SBI/RE/1217/604 dated 6 December 2017 in Appendix 7 of the Referral.
[32] AA Claims Specialist Letter dated 30 November 2018 in Appendix 7 of the Referral.

3.1.4 **PAYMENT TOWARDS ENGINEER'S MAINTENANCE**

On this issue, the **Contractor's position** is as follows:

3.1.4.1 On 20th December 2017, the Employer notified the Resident Engineer that although the contract date of completion was 22nd October 2017, the Resident Engineer was required to stay on site for inspections and supervision of rectification of defects by the Contractor.[33]

3.1.4.2 The Resident Engineer accepted to continue[34] staying on site and on 11th January 2018 the Contractor notified the Resident Engineer of his intention to claim once the period of extended stay ended.[35] The Contractor submitted that the Notice of the Claim was acknowledged by the Resident Engineer on 12th January 2018.[36]

3.1.4.3 The Contractor argues that the Resident Engineer's facilities were maintained on site beyond the time for completion for 246 calendar days, that is, from 23rd October 2017 to 26th June 2018. The Contractor submitted his claim for **UGX 339,582,738** pursuant to S.C 20.1 of the GCC.[37] The Contractor's position is that this was a variation of the contract which was executed by instruction from the Engineer and Employer in accordance with S.C 13.1 of the GCC.

3.1.4.4 The Contractor's contention is that the Engineer was required to determine this claim within 42 days from 5th July 2018 in accordance with S.C 20.1 of the GCC but to date the Contractor has never received a determination in breach of both S.C 3.5 and S.C 20.1 of the GCC.

3.1.4.5 The Contractor cited paragraph 6 of S.C 20.1 of the GCC which provided that:

> *"Within 42 days after receiving the claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars but shall nevertheless give his response on the principles of the claim within such time."*

3.1.4.6 He further contended that his cost claim for **UGX 339,582,738** was based on the Contract documents, including Volume 1- Addendum 3, Appendix C, Employer's

[33] Employer's letter ref UNRA/PR 125/200 dated 20 December 2017 in Appendix 8 of the Referral.
[34] Engineer's letter ref AA/1862/1 7-18/157 dated 27 December 2017 in Appendix 8 of the Referral.
[35] Contractor's letter ref SBI/RE/0118/611 dated 11 January 2018 in Appendix 8 of the Referral.
[36] Engineer's letter ref AA/1862/1 7-18/161 dated 12 January 2018 in Appendix 8 of the Referral.
[37] Contractor's letter ref SBI/RE/0718/629 dated 5 July 2018 in Appendix 8 of the Referral.

Requirements, Price Breakdown and Schedules and on Bill No. 1 for a similar project in the same area, that is, the Mukono-Kyetume-Katosi Kisoga-Nyenga Road Project which method had previously been approved as a basis for the rock fill variation.

3.1.5 **NON-IMPLEMENTATION OF THE RAP**

On this issue, the **Contractor's position** is as follows:

3.1.5.1 On 10th November 2017[38], the Resident Engineer enclosed the Employer's letter[39] and notified the Contractor that UNRA will be undertaking the Implementation of the Resettlement Action Plan (RAP) for the entire project.

3.1.5.2 That on 16th November 2017[40], the Contractor notified the Resident Engineer that pursuant to SC 4.1 S.C 14.2 (A) of the PCC, it was the Contractor's obligation to implement the RAP for Project Affected People. Furthermore, in accordance with SC 13.5 of the GCC and Addendum No.3 Section IV -Bidding forms -Form D.4.2.5 (a)/the Contractor was entitled to overhead charges and profit.

3.1.5.3 The Contractor added that on 1st October 2018[41], he notified the Employer of his readiness to implement the RAP and to effect payment to Project Affected People. On 28th November 2018, the Employer informed the Contractor that the implementation would be done by UNRA.[42]

3.1.5.4 The Contractor submitted that following a meeting and discussions held on 28th March 2019 at UNRA, the Employer requested that the Contractor submits a claim detailing the costs incurred in the implementation of the RAP. On 1st October 2019 the contractor detailed the claim and requested for the sum of **UGX 4,055,954,145** as compensation costs. [43] The Employer rejected this claim stating that the Contractor had not done the works.

3.1.5.5 The Contractor then submitted a revised claim in the sum of **UGX 11, 346,339,510** including a claim for overheads. According to the Contractor, this was in accordance with S.C 4.1, S.C 14.2 (A), S.C 13.5 of the PCC and Addendum No.3 Section IV -Bidding forms - Form 0.4.2.5 (a).

3.1.5.6 The Contractor submitted that the Employer purportedly instructed a variation which was in breach of S.C 4.1 and S.C 14.2A of the PCC. He added that the Employer's

[38] Engineer's letter ref AA/1862/1 7-18/142 dated 10 November 2017 in Appendix 9 of the Referral.
[39] Employer's letter ref UNRA/PR125/200 dated 18 October 2017 in Appendix 9 of the Referral.
[40] Contractor's letter ref SBI/RE/1117/600 dated 16 November 2017 in Appendix 9 of the Referral.
[41] Contractor's letter ref SBI/MKBN/UNRA/0918/633 dated 1 October 2018 Appendix 9 of the Referral.
[42] Employer's letter ref UNRA/300/LNMKBN/006/18 dated 28 November 2018 in Appendix 9 of the Referral.
[43] Contractor's letter ref letter SBI/MKBN/UNRN0918/634 dated 1 October 2019 Appendix 9 of the Referral.

instruction which omitted work relating to the implementation of the RAP was in breach of S.C 13.1 of the GCC, which provided that the works cannot be omitted.

3.1.5.7 It was the Contractor's contention that it incurred direct costs and expenses in undertaking the RAP Study and preparing for the implementation by among other things opening up a bank Account with United Bank for Africa and providing a Bank Guarantee for the Advance Amounts.[44]

3.2. **Remedies Sought by Contractor**

The Contractor seeks the DAB to decide in its favour the following Claims:

3.2.1. **Payment of amounts as claimed**: A declaration that JV SBI&RCC is entitled to payment of:

3.2.1.1 **UGX 385,374,840** arising from Claim No.1

3.2.1.2 **UGX 443,157,791** arising from Claim No.2

3.2.1.3 . **UGX 11,350,260,766** arising from Claim No.3

3.2.1.4 **UGX 339,582,738** arising from Claim No.4

3.2.1.5 **UGX. 11,346,339,502** arising from Claim No.5

3.2.2. **Financing charges and/or interest.** A declaration that JV SBI & RCC is entitled to payment of financing charges and/or interest at the rate in the contract in accordance with **Sub Clause 14.8** compounded monthly in relation to the above.

3.2.3. **Any other relief:** A declaration that JV SBI & RCC is entitled to any other reliefs as the Dispute Adjudication Board may determine.

3.3. **The Employer's Case**

The Employer asked me to FIND in its favour that the Contractor was not entitled to payment or recovery of costs or any financing charges nor interest applicable to the claims:

3.3.1. The Employer rejects the Contractor's claim for **Charges for Idle Equipment in 2016** and argues that the Contractor was aware of the event of reducing the rate of progress of work on the 25th of May 2016 and should have in accordance with S.C 20.1, within 42 days sent to the Engineer a fully detailed claim including full supporting particulars of the basis of claim and of the extension of time and/or additional payment claimed.

[44] Contractor's letter ref SBI/MKBN/UNRA/0918/633 dated 1 October 2018 in Appendix 9 of the Referral.

3.3.2. According to the Employer, if the Contractor had felt that the event giving rise to the claim had a continuous effect, the fully detailed claim would have been considered as, interim and the Contractor should have sent further interim claims at monthly intervals, giving the accumulated amount of claim with further particulars, as the Engineer would have required. He adds that the Contractor should have sent a final claim within 28 days after the end of the effects resulting from the event.

3.3.3. The Employer contends that having been aware of the event giving rise to the claim on 25th May 2016, the Contractor should have sent the final claim with supporting particulars before 15th August 2016. That is 42 days following the period of reduced rate of work which ended on 18th July 2016.

3.3.4. The Employer's argument that the Contractor did not adhere to the above timelines, as stipulated under S.C 20.1; rather submitted their full claim belatedly on 16th January 2017, that is 236 days after becoming aware of the event.

3.3.5. The Employer concludes that the Contractor's claim should be disallowed for not complying with the Contractual terms adding that the requirement to give notice of entitlement to an extension of time and describe the event giving rise to the claim within 28 days of the event is a condition precedent to the Contractor's entitlement. According to the Employer, the Contractor is also obliged to submit a fully detailed claim of the extension of time claimed within 42 days of the event.

3.3.6. The Employers further argues that the Contractor has not properly demonstrated that it tried to mitigate the loss claimed.

3.3.7. As regards the Contractor's claim for **Charges for idle equipment in 2017**, the Employer argued that having been aware of the event giving rise to the claim on 6th April 2017, the Contractor should have sent his final claim with supporting particulars before 25th June 2017, that is, 28 days following the period of reduced rate of work which ended on 28th May 2017.

3.3.8. Similarly, the Employer argued that the Contractor's claim should be disallowed for not complying with the Contractual terms under S.C 20.1.

3.3.9. On the issue of disruption costs in the sum of **UGX 11,350,260,766** arising from the extension of time for completion by 86 days, the Employer has argued that:

3.3.9.1 The Contractor did not submit any record of evidence in support of the labour costs and site office costs shown in his calculation and in the absence of such vital evidence, the Contractor's claim remains unsubstantiated and only hinged

on speculations which the DAB should not accept.

3.3.9.2 It is not enough for the Contractor to assume that it would have let out/hired its equipment. It must show that there was an opportunity which was missed because of the prolongation of the Contract period.

3.3.9.3 The Contractor has not furnished any evidence in form of the number of employees that were employed at its Head Office, the rent payable and the period of time spent on account of the Contract in issue which resources were ready to be employed elsewhere but for the multiple extensions of time issued, they could not.

3.3.9.4 The lack of any form of evidence by the Contractor to substantiate its claim cannot be deemed reasonable.

3.3.9.5 The cases cited by the Contractor in the Statement of Claim, namely; ***Ellis Don Limited V. The Parking Authority*** *of Toronto* ***(1985) 28 BLR 98 and JF Finnegan V. Sheffield City Council (1989) 43 BLR 124*** clearly stipulate that:

> *"it is generally accepted that, on principle, a Contractor who is delayed in completing a contract due to default of his Employer, may properly have a claim for head office or offsite overheads during the period of delay, on the basis that the work-force, but for the delay, might have had an opportunity of being employed on another project which would have had the effect of funding the overheads during the overrun period".*

3.3.9.6 The Employer argued that contrary to the above case, the Contractor has not demonstrated loss of funding to warrant payment of any Head Office Overheads.

The DAB notes that, the Contractor never cited the above case in his submissions. Therefore, I have not considered the merits/demerits of the Case in this referral.

3.3.9.7 The Employer contends that the Contractor's claim, said to be in accordance with SC 20.1 of the GCC as a result of S.C 8.4 is not appropriate. According to the Employer, S.C 20.1 provides a procedure for dealing with notification, timelines, submission of a claim, with detailed particulars, for extension of time for completion and/or additional payment for occurrence of any event or circumstance that would entitle the Contractor to any extension of time for completion and/or additional payment under any clause of these conditions or

otherwise in connection with the Contract.

3.3.9.8 The Employer added that S.C 8.4 of the GCC describes the causes by which the Contractor is entitled to extension of time for completion, if and to the extent that completion for the purpose of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed.

3.3.9.9 He, therefore, argues that the Contractor's claim for additional costs because extension of time for completion has been granted, is not correct, without deriving any such entitlement to additional costs from the Contract clauses.

3.3.9.10 The Employer avers that, although the Contractor's detailed claims were submitted outside of the 42 days' time limit as specified under S.C 20.1, the Engineer assessed the cost claims in accordance with S.C 3.5 and made a determination in respect of:

- charges for idle equipment due to reduction in the rate of works in 2016.
- charges for idle equipment due to reduction in the rate of works in 2017.

3.3.9.11 According to the Employer, the Contractor's current claim submitted on 6th December 2017 for further additional cost claim in the sum of **UGX 11,350,260,766** in executing varied work to the shoulder construction with AC Wearing Course in place of single seal surface dressing was paid for by the UNRA for which the Contract Price was adjusted by an increased amount of UGX 15,153,781,729.

3.3.9.12 The Employer argues that the Contractor had not indicated any expected change to the Variation price, which it previously submitted or stated the necessity of additional time for executing the Variation works. He adds that, in fact, while submitting it's claim for extension of time for carrying out the works under this Variation, the Contractor was not asking for additional cost; but only for the TIME of 152 calendar days.

3.3.9.13 Furthermore, it is the Employer’s submission that under Sub-Clause 20.1, if the Contractor considers himself to be entitled to any additional payment, under any Clause of the Contract, the Contractor shall give a notice to the Engineer, describing the event or circumstance giving rise to the claim and the notice shall be given not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

3.3.9.14 According to the Employer, no such notice was given to the Engineer within the said 28 days' time limit. He adds that even if the Contractor had considered himself to have become aware of this circumstance on 22nd April 2017, while submitting the extension of time, within 28 days from that date, that is before 20th May 2017, the Contractor would have given notice under Sub-Clause 20.1 for claiming any additional cost and the detailed particulars of such a cost claim should have been sent to the Engineer within 42 days from 22nd April 2017. The Employer concludes that the Contractor did not fulfill the Contractual requirements of Sub-Clause 20.1.

3.3.9.15 It is the Employer's view that in accordance with the second paragraph of Sub-Clause 20.1 which provides that the Contractor shall not be entitled to additional payment if he fails to give notice within such period of 28 days, it meant that the Employer was discharged from all liability in connection with this claim.

3.3.9.16 The Employer further submitted that additional costs approved for the Variations are deemed to have covered the contractor's indirect costs even for the extended period, and that the Contractor's additional claim for costs due to extension of time has no contractual basis.

3.3.9.17 The Employer added that the Contract Price excluding the provisional sums was UGX 159,987,121,712 and the period of execution was 910 days. It considers this amount to have included all the indirect costs for executing this work if the Contractor completed the works within 910 days. Thus, the indirect costs on this Contract can be considered as having been realized if the amount generated per day through execution of works was UGX 175,810,024. Furthermore, by virtue of the variations instructed, the Contractor generated an additional revenue of UGX 18,535,033,416 (15,153,781,729 and 3,381,251,687) and this amount catered for the Contractor's indirect costs for a period of 105 calendar days, which is more than the extended period of 86 calendar days.

3.3.9.18 On this claim, the Employer concludes that notwithstanding the lack of Contractual basis for the Contractor's entitlement to any further claim of additional costs, it also proves that the increased Contract Price by UGX18,535,033,416 covered the Contractor's indirect costs on this project for the extended period of 86 calendar days.

3.3.10. Regarding the claim for additional costs due to the extended maintenance of the Resident Engineer, the Employer contends that:

3.3.10.1 The Contract for Design Review and Supervision signed between UNRA and the Consulting Engineers commenced on 14th July 2015 for a duration of 54 months. That is, 30 months of Construction Supervision plus 24 months of Defects Notification Period (DNP). Completion was scheduled for 14th January 2020. However, the completion period was revised to 996 days following extensions of time for completion of works by 86 calendar days. This revised the completion date to 22nd October 2017.

3.3.10.2 In accordance with Item H (*Facilities to be provided to UNRA's nominated Representative /Engineer*) paragraph 36 of the Employers Requirements, the Contractor was required to provide and maintain facilities for the exclusive use of the Engineer for the entire duration of the Contract (Refer to Appendix 20).

3.3.10.3 The Employer in a letter dated 20th December 2017 notified the Resident Engineer of his Contract obligations which included among others, obligations under the Defects Notification Period where the Consultant was required to oversee;

(i) inspection of the completion of all outstanding works to ensure that they are satisfactorily completed and within the agreed timelines

(ii) conduct quarterly inspections or as may be required to ensure proper performance of the road, and supervise rectification of any defects,

(iii) carry out final inspection before the end of DNP and prepare the necessary reports (Refer to Appendix 21).

3.3.10.4 In a meeting held with the Contractor on 2nd July, 2020, the Contract Manager noted that the Resident Engineer only commenced services after a period of 6 months from the date of signing the Civil Works Contract, the Contractor having commenced works on 29th January 2015 whereas the Resident Engineer commenced services on 14th July 2015. The Contractor was nonetheless paid a lump sum which included the Engineer's maintenance costs for the 6 months' period (when the Engineer had not yet reported) (Refer to Appendix 22). During the 6 months' period for which the Engineer had not yet been appointed, the works were being supervised by the Employer (Refer to Appendix 22).

3.3.10.5 In view of the above, the Contractor is not entitled to any further claim in respect to the Engineer's maintenance.

3.3.11. Regarding the claim for costs amounting to **UGX 11,346,339,502** arising from **non-implementation of the RAP** on the project, the Employer contends that:

3.3.11.1 Out of the Contract cost components, it was only the lump sum amount of UGX 159,987,121,712 which the Contractor could claim full entitlement. Within this lump sum amount, there was a cost for preparation of the Resettlement Action Plan (RAP) for which the Contractor received a sum of UGX 799,935,609 for undertaking the RAP study which was part of the project design.

3.3.11.2 The Provisional Sum of UGX 5,580,000,000 included in the Contract Price comprised a Provisional Sum of UGX 3,000,000,000 for land cost as provided for in the Bid Price Breakdown (Form 0 4.2.2) **(Refer to Appendix 23).** The Provisional Sum for land cost was for payment of Project Affected Persons and the Land Agency, in relation to Permanent Works in accordance with Sub-Clause 14.2 (A) of the Conditions of Particular Application.

3.3.11.3 In response to the Contractor's assertion that the Employer instructed a variation which omitted work in breach of Sub-Clauses 4.1 and 14.2 (A) of the Conditions of Particular Application and Sub-Clause 13.1 of the General Conditions, the Employer argues that RAP implementation which was to be handled by UNRA was in respect to the road reserve which was outside the permanent works corridor as communicated in the Employer's letter dated 29th November 2019 (Refer **to Appendix 24).**

3.3.11.4 The General Obligations of the Contractor are spelt out in the Contract under Sub-Clause 4.1 and these obligations relate to the Works. The Contractor was fully paid for the Works executed and has no contractual basis to claim for expenditure in respect to provisional sums that was never instructed.

3.3.11.5 According to Sub-Clause 13.5 of the GCC each Provisional Sum shall only be used, in whole or in part, in accordance with the Engineer's instructions. The Provisional Sum can only be used where there is an Engineer's instruction, and the Contractor receives payment for only the work done to which the Provisional Sum relates. It should be noted that the Resident Engineer vide letter dated 10th November 2017 enclosed the Employer's letter dated 18th October 2017 and notified the Contractor that the Employer would be undertaking the implementation of the Resettlement Action Plan (RAP) for the

entire project themselves **(Refer to Appendix 25).** The Contractor did not receive any instructions to utilize the provisional sums for purposes of implementing the RAP therefore there is no merit in the Contractor's claim.

3.3.11.6 According to the Employer, a Provisional Sum is an amount identified as such in a construction Contract against a particular item of work, where the work is only to be performed should the Contractor be instructed to perform it, and only in that circumstance will the Contractor become entitled to payment for the work *(Source: Julian Bailey; Construction Law; Volume 1, 2nd Edition, Paragraph 6.20, Page 447).*

3.3.11.7 The Employer further submitted that a Contractor will not (unless the Contract in question provides otherwise) be entitled to be compensated by the owner for loss of profit on the provisional sum work in the event that no instruction is given to perform the work. Provisional sum work is, therefore, work for the performance of which is in the nature of a contingency (***Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited*** (No 6) [2008] EWHC 2220 (TCC) at [1017]).

3.3.11.8 The Employer further relied on the case of **Amec Building Limited v Cadmus Investments Co. Ltd (1996) 51 Con LR 105** at 125-126, and submitted that as per Mr. Recorder Kallipetis QC., a Provisional Sum is defined as an amount that is an estimate of the cost of providing particular contracted services.

3.3.11.9 The Employer added that the nature of provisional sums was further articulated in the case of ***Hampton v Glamorgan County Council [1917] AC 13 at 19***, per Earl Loreburn:

> *"It may be permissible (subject to the terms of the applicable contract) for an owner to instruct the Contractor to perform the provisional sum work, not to instruct the work at all, to perform the work itself or to arrange for it to be performed by another Contractor".*

3.3.11.10 The Employer submits that, in a meeting held with the Contractor on 2nd July, 2020, the Contract Manager reported that the payment for preparation of the RAP had been fully made. The next phase of implementation of the RAP was halted following a directive from Committee on Commissions, Statutory Authorities and State Enterprises (COSASE). Therefore, there were no costs incurred by the Contractor in respect to implementation of the RAP.

3.3.11.11 According to the Employer, the Contract Manager noted that the staff that were on site were associated with the Civil Works project only. He was not aware of any additional staff deployed to specifically implement the RAP and requested the Contractor to furnish written instructions from UNRA, if any, instructing the Contractor to implement the RAP. The Contractor was also requested to furnish proof of expenditure incurred in RAP implementation. This would enable the Employer to justify any payment for costs associated with RAP implementation.

3.3.11.12 The Employer acknowledges that the Contractor, in a letter dated 1st October 2019, submitted a claim in the sum of UGX 4,055,954,145 for costs incurred including costs for Project Offices, Land Economists/Valuers, Social Gender Specialists, Land Surveyors, Environmental Specialists, Support Staff and accommodation for a period of 678 calendar days. The Employer, however, argues that the Contractor did not submit any record of evidence in support of the labour costs or site office costs shown in his calculations **(Refer to Appendix 26).** There is no evidence that the Contractor submitted any revised claim in the sum of UGX 11,346,339,510 as alleged in the Contractor's Statement of Claim.

3.3.11.13 According to the Employer, there is also no proof provided by the Contractor that he incurred any expenses in opening a bank account for obtaining bank guarantees for the advance payments in accordance with Sub-Clause 14.2(A) of the Conditions of Particular Application. In their letter dated 1st October 2018, the Contractor only expressed willingness to provide guarantees equivalent to 100% of the approved land value prior to disbursement of the payments upon the Employer's written instruction (Refer to Appendix 27).

3.3.11.14 In view of the above, the Employer has asked the DAB to find that the Contractor is not entitled to any further claim in respect to the non-implementation of the Resettlement Action Plan.

3.3.12. As a result of the foregoing, the Employer seeks the following decision(s) from the DAB, that the Contractor is not entitled to:

3.3.12.1. The sum of **UGX 358,374,840** in respect of charges for idle equipment due to reduction in the rate of works in 2016 (Claim No.1).

3.3.12.2. The sum of **UGX 443,157,971** in respect of charges for idle equipment due to reduction in the rate of works in 2017 (Claim No.2).

3.3.12.3. The Contractor is not entitled to the sum of **UGX 11,350,260,766** arising from the extension of time for completion by 86 calendar days (Claim No.3).

3.3.12.4. The sum of **UGX 339,582,738** for the Resident Engineer's maintenance for 246 days (Claim No.4).

3.3.12.5. The sum of **UGX 11,346,339,502** due to the non-implementation of the Resettlement Action Plan (RAP) on the Project (Claim No.5).

3.3.12.6. Any financing charges or interest.

3.4. The Issues to be Determined

Issues formulated by the parties in their Statements were put to the DAB for a Decision. As such the DAB's jurisdiction is restricted to the determination of these issues only and are not permitted to stray beyond. There are as follows:

3.4.1. **Issue 1:** To determine whether the Contractor is entitled to payment of **UGX385,374,840** in respect of charges for idle equipment due to reduction in the rate of works in 2016 (Claim No.1).

3.4.2. **Issue 2:** To determine whether the Contractor is entitled to payment of **UGX 443,157,971** in respect of charges for idle equipment due to reduction in the rate of works in 2017 (Claim No.2).

3.4.3. **Issue 3:** To determine whether the Contractor is entitled to payment of **UGX 11,350,260,766** disruption costs arising from the extension of time for completion by 86 calendar days (Claim No.3).

3.4.4. **Issue 4:** To determine whether the Contractor is entitled to payment of **UGX 339,582,738** for the Resident Engineer's maintenance for 246 days (Claim No.4).

3.4.5. **Issue 5:** To determine whether the Contractor is entitled to the sum of **UGX 11,346,339,502** due to the non-implementation of the Resettlement Action Plan (RAP) on the Project (Claim No.5).

3.4.6. **Issue 6:** To determine whether the Contractor is entitled to payment of financing charges and/or interest on any monies due pursuant to sub-clause 14.8 of the conditions of contract?

4. Analysis and Findings

4.1. The DAB's Deliberations & Findings:

4.1.1. The DAB has studied and considered the Parties' oral and written submissions and relevant documentation made available during the course of the Referral. The DAB has reached its Decision based on these submissions.

4.1.2. The DAB does not intend to traverse each and every point that has been raised, preferring to focus on the points we consider germane to issues to be decided. The fact that the DAB does not expressly address any particular point or line of argument presented by a Party should not be taken as an oversight, nor that the DAB agrees or disagree with it.

4.1.3. A reasoned decision of the issues under dispute is provided to give the Parties a general understanding of how the DAB arrived at its decision(s).

4.2. **Issue 1: Charges for idle equipment due to reduction in the rate of works in 2016**

Whether or not the Contractor is entitled to payment of **UGX385,374,840** in respect of charges for idle equipment due to reduction in the rate of works in 2016?

DAB's findings and decision

4.2.1. It is not in dispute that payments totaling UGX 31,158,084,797 for certified IPC's 5,6,7,8,9,10,19,20,21 and 22 were delayed. That on 19th April 2016, the Contractor notified the Employer of its intention to reduce the rate of work pursuant to S.C 16.1 of the GCC. In the same letter, the Contractor notified the Employer of its entitlement to claim compensation for extension of time and payment for any such costs. Between 25th May 2016 and 18th July 2016, the Contractor reduced the rate of work for *Crushed stone base and foam Bitumen stabilization* following a further Notice dated 25th May 2016. In this letter the fourth paragraph read as follows:

> *"Consequently, under sub-clause 20.1 of the Conditions of Contract (FIDIC) and in accordance to clause 16.1, the contractor has suffered and will suffer delay due to reduced rate of work and we shall be entitled to exercise our rights to be compensated for:*
>
> *a) An extension of time for such delay, under Sub Clause 8.4 (extension of time of completion), and*
>
> *b) Payment of any such cost-plus reasonable profit, which shall be included in the contract price.*

c) Recovery of costs incurred due to idle and/or underutilized plant, equipment and labour, and recovery of costs incurred by lost productivity due to disturbances to the planned program of works.

d) Recovery of costs of field office and head office overheads and profits incurred due to the prolongation of the works" …..

4.2.2. On 16th January 2017, the Contractor submitted his cost claim for an amount of USD 376,713 for idle equipment and manpower during the period of reduced rate of work. That is, 172 days after resuming normal working.

4.2.3. On 17th May 2017, the Engineer made a determination that the Contractor was entitled to an additional cost of UGX 385,374,840. That is, 121 days after receiving the Contractor's detailed claim.

4.2.4. The Employer has asked me to reject the Claim and argues that following the Contractor's Notice, a fully detailed claim must have been submitted to the Engineer 42 days after 18th July 2016 pursuant to S.C 20.1 of the GCC. That is to say by 6th July 2016 and not 16th January 2017.

4.2.5. The starting point in determining this issue is a consideration of the provisions of the Contract with regard to notification and submission of Contractor's Claims under S.C 20.1. Because of the importance of the sub clause, I shall quote it in full here:

> *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.*
>
> *If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.*
>
> *The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.*
>
> *The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.*

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

a. this fully detailed claim shall be considered as interim;

b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

4.2.6. It has already been established that on 19th April 2016 and 25th May 2016 the Contractor submitted its notice of intention to claim entitlement to additional payment. Therefore, the claim cannot be said to be excluded by the second paragraph of the sub-clause which bars claims where a notice is not given within 28 days after the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim.

4.2.7. The Employer has relied on the fifth paragraph of the sub-clause to argue that having served a notice of intention to claim additional payment, the Contractor should have submitted a detailed claim within 42 days. By way of Reply to the Employer's Statement of Defense, the Contractor contended that he submitted his interim claims within 42 days after the notice and that daily records of idle equipment and manpower where being kept and submitted to the Engineer.

4.2.8. However, the Contractor could not lead the DAB to any evidence of the said submission and by its own admission in the same reply, he admitted that a fully detailed claim was only submitted to the Resident Engineer on 16th January 2017. The Contractor's contention is that, in accordance with Sub Clause 3.5 of the conditions of contract, a number of site meetings and discussions were held with the Engineer before submitting the fully detailed claim. This, according to the Contractor, extended the timelines beyond the 42 days.

4.2.9. I perused through the provisions of Sub Clause 3.5 which provided that:

> *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*
>
> *The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration]"*

4.2.10. My reading of the above Sub Clause is that it operates after the Contractor has submitted a fully detailed claim. The Engineer is then required to consult with each Party before proceeding to make a determination. I am alive to the fact that it is common practice for a Contractor to engage the Engineer and strive to reach an agreement before submitting its detailed claim. However, the Engineer is at liberty to accept a delayed submission if

he considers that he has not been prejudiced in making a proper review/assessment of the Claim.

4.2.11. While the Contractor contends that he did comply with the submission timelines, perusal through the documents suggests that he did not. This is because, the event giving rise to the claim was the reduction in the rate of work which occurred on 25th May 2016. I have to agree with the Employer that in accordance with paragraph 5 of Sub Clause 20.1, the Contractor was required to submit a fully detailed but interim claim, 42 days after 25th May 2016. That is to say by 6th July 2016.

4.2.12. Since the event giving rise to the claim had a continuing effect, the Contractor was required to send further interim claims at monthly intervals, giving the accumulated amount claimed, and such further particulars as the Engineer may have reasonably required. Thereafter, he should have sent a final claim, 28 days after the date of resuming normal work. That is to say 18th July 2016 + 28 days or by 15th August 2016. This was not done. Evidence submitted by both parties suggests that the first fully detailed claim was submitted to the Engineer on 16th January 2017. Following discussions, a revised claim was sent on 15th March 2017 resulting into the Engineer's Determination dated 17th May 2017.

4.2.13. **Therefore, the question as I see it is for me to determine whether having submitted its fully detailed claim beyond the 42 days window stipulated in the fifth paragraph of Sub Clause 20.1, the Contractor can still be entitled to the amounts determined by the Engineer.**

4.2.14. To answer this question, the last paragraph of Sub Clause 20.1 becomes important, and I shall quote it in full here. It provided that:

> *"The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause."*
> **[Emphasis added]**

4.2.15. From the above, it is clear that unless a claim is excluded under the second paragraph of the sub-clause which expressly makes it clear that:

> *"If the contractor fails to give **notice** of a claim within such period of 28 days, the Time for Completion shall not be extended, the contractor shall not be entitled to*

additional payment, and the employer shall be discharged from all liability in connection with the claim." **[Emphasis added]**

failure to submit a fully particularized claim within 42 days where a notice has been served, would only be "TIME BARRED", to the extent to which "…any such failure has prevented or prejudiced proper investigation of the claim".

4.2.16. This is so, because the Sub Clause does not make it plain by express language that unless a fully detailed claim is served within 42 days the party making the claim will lose its rights under the Sub Clause. I am of the view that the serving of a notice enabled both the Employer and the Engineer to investigate the matters while they were still current.

4.2.17. I have not received anything from the parties to lead me into accepting that the late submission of a particularized claim prevented or prejudiced proper investigation of the claim.

4.2.18. Both parties were aware of the reduction in the rate of works between 25th May 2016 and 18th July 2016. The Engineer in his determination acknowledged receipt of notices and indicated that he had scrutinized the claim and attached a detailed assessment report. He then proceeded to make a determination to the effect that the Contractor was entitled to payment of **UGX 385,374,840**.

4.2.19. Under paragraph 5 of SC 20.1, the following is stated:

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, ***or within such other period as may be proposed by the Contractor and approved by the Engineer****, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed.(****Emphasis added****)*

4.2.20. The Contractor's detailed claim was submitted to the Engineer on 16th January 2017. Following discussions, a revised claim was sent on 15th March 2017 resulting into the Engineer's Determination dated 17th May 2017. Therefore, the Engineer, had an opportunity to reject the Claim or take into account the extent to which the late submission prejudiced his ability to make an accurate assessment of the Claim. By agreeing to proceed to make the Determination long after the expiry of the 42 days, and in the absence of any correspondence to the contrary, it is reasonable to assume that the delay was agreed or acceptable and approved by the Engineer.

4.2.21. During the hearing, the Contractor further contended that by taking more than the 42 days allowed, to assess and determine the claim, the Employer breached the contractual provisions. The Contractor relied on a number of cases, namely:

a) Alghussein Establishment v. Eton College [1988] 1 WLR 587
b) Doosan Babcock Limited (formerly Doosan Babcock Energy Limited) v. Comercializadora de Equipos y Materiales Mabe Limitada (previously known as Mabe Chile Limitada) [2013] EWHC 3201 (TCC).

The Contractor submitted that; these cases apply the principle that a party to a contract cannot benefit from its own wrong (*nullus commodum capere potest de injuria sua propria*)

4.2.22. I read the cases referred to. All I can say is that the Employer cannot insist on the Contractor's compliance to a claim procedure or obligation when the Engineer also failed to observe the determination procedure. In my view, what is good for the Employer/Engineer is also good for the Contractor.

4.2.23. Furthermore, by proceeding to make his Determination under SC 3.5, the Engineer is required to:

> *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter,*
>
> *…,* ***the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances****."(Emphasis added)*

4.2.24. I have considered the Parties' submissions on this issue. I am persuaded by the Contractor's submission that a number of site meetings and discussions were held with the Engineer before submitting the fully detailed claim which, according to the Contractor, extended the timelines beyond the 42 days. Notwithstanding, the delayed submission, the Engineer had an opportunity to address the late submission of the detailed claim in his Determination.

4.2.25. Under Sub-Clause 3.5, the Engineer's role or obligation as defined, … ***"is to fairly determine"***, the Contractor's entitlements in accordance with the Contract conditions, and this obligation or requirement of (quasi) independence (only when making decisions) should not be subject to influence or control by the Employer. The Engineer has an overriding duty to act fairly. ***(Emphasis added)***

4.2.26. Consequently, I reject the Employer's submission that the Contractor's claim should be disallowed on the basis of not having been submitted its detailed claim within 42 days of the event.

4.2.27. **It is accordingly my FINDING and DECISION that the Claim for Charges for Idle Equipment due to reduction in the rate of works in 2016 was NOT time-barred. I FIND and DECIDE that the Engineer made a "FAIR" Determination, therefore, the Contractor is entitled to the payment of UGX 385,374,840.**

4.3. Issue 2: Charges for idle equipment due to reduction in the rate of works in 2016

To determine whether or not the Contractor is entitled to payment of **UGX 443,157,971** in respect of charges for idle equipment due to reduction in the rate of works in 2017 (Claim No.2)?

4.3.1. The Contractor asked me to FIND in its favour that it is entitled to the above amount as compensation for charges for idle equipment and manpower.

4.3.2. The Employer asked me to reject the claim in its entirety arguing that the Contractor did not follow the timelines, as stipulated under Sub-Clause 20.1; rather submitted their full claim belatedly on 11th July 2017, 96 days after becoming aware of the event.

4.3.3. I perused the submissions, as acknowledged by both parties, the Contractor, under Sub-Clause 20.1 of the GCC, gave a notice to the Engineer through his letter dated 6th April 2017 expressing his entitlement to exercise the right to be compensated for:

a. extension of time,

b. payment of any such cost-plus profit,

c. recovery of costs incurred due to idle and/or underutilized plant, equipment and labor, and recovery of costs incurred by lost productivity due to disturbances to the planned program of the works,

d. Recovery of costs of field office and head office overheads and profits incurred due to the prolongation of the works.

4.3.4. However, a detailed claim was only submitted on 11th July 2017. This is more than 42 days after the Contractor became aware of the event giving rise to the claim. The Engineer, however, proceeded and made a determination that the Contractor was entitled to an additional cost of **UGX 443,157,791** arising from reduced rate of work.

4.3.5. It was already the DAB's DECISION in issue 1 above that **failure to submit a fully particularized claim within 42 days where a notice has been served, would only be "TIME BARRED", to the extent to which "…any such failure has prevented or prejudiced proper investigation of the claim".**

4.3.6. I have not received anything from the Employer to lead me into accepting that the late submission of a particularized claim prevented or prejudiced proper investigation of the claim. Both the Employer and the Engineer were aware of the reduction in the rate of works between 7th April 2017 and 28th May 2017. The Engineer in his determination acknowledged receipt of notices and indicated that he had scrutinized the claim and attached a detailed assessment report. He then proceeded to make a determination to the effect that the Contractor was entitled to payment of **UGX 443,157,791**.

4.3.7. Therefore, I reject the Employer's submission that the Contractor's claim should be disallowed on the basis of not having been submitted within 42 days of the event.

4.3.8. **Under paragraphs 4.2.2.0 to 4.2.2.6 above, I have made reference to the obligations of the Engineer under SC 3.5, and the Contractor's submission as regards delayed Determination by the Engineer. For reasons already stated thereunder, it is accordingly my FINDING and DECISION that the Claim for Charges for Idle Equipment due to reduction in the rate of works in 2017, was NOT time-barred.**

4.3.9. **I FIND and DECIDE that the Engineer made a "FAIR" and valid Determination, therefore, the Contractor is entitled to the payment of UGX 443,157,791 (exclusive of VAT).**

4.4. Issue 3: Payment for Disruption Costs

To determine whether or not the Contractor is entitled to payment of UGX 11,350,260,766 arising from the extension of time for completion by 86 calendar days.

4.4.1 The Contractor avers that the project was scheduled to end on 28th July 2017 but was extended by 86 calendar days with a revised completion date of 22 October 2017. Therefore, in this referral, the Contractor asked me to FIND in its favour that it is entitled to disruption cots in the sum of UGX 11,350,260,766.

4.4.2 The Claim arises from 86 days extension of time (EOT) granted by the Employer as broken down as follows:

4.4.2.1 **14 calendar days** EOT for delayed payments.

4.4.2.2 **41 calendar days** EOT for variation to the road shoulders wearing course.

4.4.2.3 **31 calendar days** EOT for variation to wet areas treatment.

4.4.3 The Contractor has broken down its claim as shown in the table below:

Item No.	Item Description	Contractor's Claim (UGX)
1	Additional Manpower Costs	1,975,322,018
2	Site Office Costs	130,442,679
3	Equipment Costs	5,709,213,532
4	Additional Head Office Overheads	3,304,755,517
5	Increased Costs	197,532,202
6	Finance Costs	32,994,818
	Total cost due to disruption (excl. VAT)	**11,350,260,766**

4.4.4 The Employer rejects the claim in its entirety arguing that the Contractor has not demonstrated entitlement to additional costs from the Contract clauses.

DAB's findings and decision

4.4.5 I must first set out, so far as I can, the factual history of this matter from the submissions before me.

4.4.6 Due to delayed payments of IPC's 5,6,7,8,9,10 and 11, the Contractor on 25th May 2016 submitted a Notice to reduce work and indicated that he was entitled to claim for extension of time and costs of idle equipment and labour and lost productivity due to disruption. He further indicated entitlement to field and head office overheads and profit due to prolongation. Following payment, the Contractor resumed work on 28th July 2016. Thereafter, on 30th August 2016, the Contractor submitted a claim for 68 calendar days extension of time. On 17th May 2017, the Engineer determined that the Contractor was entitled to **14 days** extension of time.

4.4.7 Following a variation to the scope of works which extended the 40mm Asphalt concrete wearing course on to the shoulders, the Contractor on 22nd April 2017 submitted a claim requesting for 152 calendar days as extension of time. On 17th May 2017, the Engineer made a determination and awarded the Contactor **41 days** extension of time.

4.4.8 On 22nd September 2015 the Contractor proposed a 50cm thick rock fill plus 20cm thick CRR capping layer in some wet areas which exhibited excessive movements under normal compaction. On 24th September 2015, the Contractor issued a Notice to claim under sub-clause 20.1 for extension of time and additional payments.[45] The Employer's

[45] Contractor's letter ref: SBI/RE/0915/059 dated 24th September 2015 Appendix 6 of the Contractor's Referral

Requirements did not specify any rock fill and the Contractor's Method Statement specified that excavation, rock fill, and stabilisation works in swamps are not included in the Lump Sum.[46] Therefore, on 14th November 2015, the Engineer recommended that this be treated as a variation under Clause 13. On 3rd January 2017 the Employer approved the proposal and advised that the swamp treatment should be admeasured at an approved cost of UGX 3,381,251,687. This was to be based on the rates from the *Mokono – Katosi – Road Project.* Subsequently, on the same day, the Engineer instructed a variation amounting to UGX 3,381,251,687 for treatment of what he termed swamps with rock fill.[47] On 9th February 2017, the Contractor submitted a claim requesting for an extension of time for completion by 203 calendar days. On 17th May 2017, the Engineer made a determination awarding the Contractor **31 days** extension of time due to the variation of rock fill in Swamps.

4.4.9 Following these three extensions to the completion time which amounted to 86 calendar days, on 6th December 2017, the Contractor submitted a monetary claim demanding payment of UGX 11,350,260,766 as prolongation costs. This amount was broken down as shown in Table 1 above. After what I would consider a long delay, on 19th July 2019, the Engineer proceeded to review the claim and made a determination that the Contractor was NOT entitled to any additional payment. The reasons advanced by the Engineer for rejecting the cost claim where that:

a. *The Engineer had already made a determination with regard to the claim arising from disruption due to delayed payments. It followed that the Contractor was NOT entitled to any further claim due to this cause.*

b. *The Contractor did not give any Notice of intention to claim for additional prolongation costs arising from variations as prescribed under Sub Clause 20.1*

c. *The additional costs approved for the variation to shoulders and rock fill in swamps are deemed to have covered the contractor's indirect costs even for the extended period.*

4.4.10 The Employer has maintained the reasons advanced by the Engineer and rejects the claim in its entirety adding that the Contractor has not demonstrated entitlement to additional costs from the Contract clauses.

4.4.11 Before proceeding to consider the various heads of claims, I must first set out to review the contractual provisions with regard to claims for prolongation costs. In particular Sub

[46] Engineer's letter ref AA/1862/16-16/120 dated 14th November 2015 Appendix 6 of the Contrator's Referral
[47] Engineer's letter ref AA/1862/16-17/271 dated 12th January 2017 Appendix 6 of the Contrator's Referral

Clause 20.1. Because of the importance of the sub clause, I shall again quote it in full here. It provided that:

"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

a. this fully detailed claim shall be considered as interim;

d) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

e) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim,

the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

4.4.12 The Contractor has lumped his prolongation Claim arising from three (3) different Events and subsequent extensions of time (EOT) granted by the Engineer. These are:

a) **14 days** prolongation arising from reduced rate of work due to delayed payment of IPC's No.5, 6,7,8,9 and 10.

b) **41 days** prolongation arising from variation to the road shoulders wearing course.

c) **31 days** prolongation arising from variation to wet areas treatment with rock fill.

4.4.13 I turn therefore to consider each Event in detail, and to make my findings in respect of the claim procedure and entitlement.

a. 14 days disruption cost arising from reduced rate of work due to delayed payment of IPC's No.5, 6,7,8,9 and 10.

4.4.14 The Employer has argued that the Contractor has not demonstrated entitlement to additional costs from the Contract clauses.

4.4.15 This head of claim relate to reduced rate of work due to delayed payment of IPC's No.5, 6,7,8,9 and 10 in 2016. It is already my finding in Issue 1 above that;

4.4.15.1 between 25th May 2016 and 18th July 2016, the Contractor reduced the rate of work for *Crushed stone base and foam Bitumen stabilization* due to delayed payment of IPC's No. 5,6,7,8,9 and 10.

4.4.15.2 on 25th May 2016, the Contractor notified the Engineer of his intension to claim for extension of the Time for Completion and additional payment.

4.4.15.3 the Contractor submitted a detailed monetary claim to recover what it termed costs incurred due to idle and/or underutilised plant, equipment, labour and lost productivity.

4.4.15.4 the Engineer made a determination awarding the Contractor **UGX 385,374,840.**

4.4.16 I have already DECIDED that the Contractor is entitled to payment of UGX 385,374,840 exclusive of VAT being idle charges for equipment and manpower arising from reduced rate of work due to delayed payment of IPC's No.5, 6,7,8,9 and 10.

4.4.17 It would appear to me from the Contractor's submissions that he also claims disruption costs arising from the same event. That is delayed payments of IPC's 5, 6,7,8,9 and 10.

4.4.18 It is a requirement under Sub Clause 20.1 that for a Contractor to be entitled to extension of time or additional payment:

- The Contractor must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance.
- Any claim to time or money will be lost if there is no notice within the specified time limit.
- Supporting particulars should be served by the Contractor and the Contractor should also maintain such contemporary records as may be needed to substantiate claims.
- The Contractor should submit a fully particularised claim after 42 days.
- The Engineer is to respond, in principle at least, within 42 days.
- The claim shall be an interim claim. Further interim updated claims are to be submitted monthly. A final claim is to be submitted, unless agreed otherwise, within 28 days of the end of the claim event.

4.4.19 The question is whether the above contractual procedure was followed. After review of the submitted evidence from the Contractor, it does not appear to me that there was any other Notice issued relating to this head of claim after that of 25th May 2016. However, despite this Notice being within the 28 days from the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim, the particularised claim which followed did not include details or contemporary records relating to prolongation costs now claimed. The Contractor only claimed for UGX 385,374,840 which has already been decided. He only followed up with

a claim for UGX 11,350,260,766 prolongation costs on 6th December 2017 but also tied to the same Event. That was 560 days from the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim.

4.4.20 The provisions of Sub Clause 20.1 above require the Contractor to submit a fully particularised claim within 42 days after he became aware (or should have become aware) of the event or circumstance giving rise to the claim. This was not done. I already decided in issue 1 above that in accordance with the last paragraph of Sub Clause 20.1, failure to submit a fully particularized claim within 42 days where a notice has been served, would only be "TIME BARRED", to the extent to which *"…any such failure has prevented or prejudiced proper investigation of the claim".* For a claim of this nature to be properly investigated, the Contractor was required to maintain contemporary records and submit the same to the Engineer. In its reply to the Employer's Response, the Contractor argues that he has relied on the Resident Engineer's Claims specialist and local partner who reviewed daily records kept and the interim claims and recommended a sum of UGX 6,741,611,160 in accordance with Sub Clause 3.5. The Contractor further argued in its reply that it kept daily records of equipment and labour and that the same were submitted to the Resident Engineer's claims specialist who acknowledged them.

4.4.21 I reviewed the recommendation from the said Claims specialist, one Eng. Albert D Muloiti, dated 30th November 2018. There is nothing in the said letter to suggest that he received or reviewed any daily records. He however seems to have relied on the Contractor's claim details which were prepared after the works had been completed and only submitted on 6th December 2017. This was 560 days from the date when the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim.

4.4.22 I therefore reject the Contractor's assertion that daily records were submitted and reviewed. In any case, even if I was to find that this was true, I have to accept the Employer's submission in its reply to the Contractor's Rejoinder, that the determination of claims in accordance with Sub-Clause 3.5 is a preserve of the Engineer. It follows that, in accordance with the provisions of sub clause 20.1 of the conditions of contract, contemporary records are supposed to be submitted to the Engineer or a person specifically delegated under sub clause 3.2. There is nothing from the Contractor's submission to lead the DAB into believing that Eng. Albert D Muloiti had delegated authority to receive daily records on behalf of the Engineer. Even in that case, unless otherwise agreed by both Parties, the Engineer is barred from delegating the authority to determine any matter in accordance with Sub-Clause 3.5 [*Determinations*]. Therefore,

the recommendation from one Eng. Albert D Muloiti which the Contractor has relied on would still remain invalid and was not an Engineer's Determination envisaged under Sub Clause 3.5.

4.4.23 Therefore, on the balance of probability, I FIND that the Engineer was *prejudiced* from properly investigating this claim. In this referral the Contractor has not furnished any contemporary records to aid in substantiating the particulars of his claim submitted on 6th December 2017.

4.4.24 **It is accordingly my FINDING and DECISION that the Claim for prolongation costs arising from reduced rate of work due to delayed payment of IPC's No.5,6,7,8,9 and 10 is time-barred.**

b. <u>41 days Disruption costs arising from variation to the road shoulders wearing course.</u>

4.4.25 This variation was approved by the Employer on 2nd February 2016. On 8th March 2016, the Contractor submitted the variation costs which were subsequently approved at UGX 15,153,781,729. On 22nd April 2017, the Contractor requested for 152 days Extension of Time for Completion. The Engineer made a determination and awarded the Contactor 41 days extension of time.

4.4.26 In this referral, the Contractor asked me to FIND in its favour that it is entitled to additional payment for disruption costs due to 41 days extension of time in executing the variation works for the road shoulders' wearing course.

4.4.27 The Employer argues that this claim is due to a variation for which the Contractor was paid additional costs in accordance with Sub Clause 13.3 and that he is not entitled to any additional payment. He adds that the Contractor never indicated to the Employer that he would be claiming for extra payment in addition to what was paid for variations.

4.4.28 In its reply to the Employer's Response, the Contractor argues that the Notice to claim was submitted promptly. I reviewed the factual evidence submitted by both parties. The Contractor has not laid any evidence before me to support his assertion that the Notice to claim disruption costs in respect to the variation to the road shoulders was given. It is therefore my finding that the Contractor did NOT notify the Engineer of his intention to claim additional payment for disruption. The first two paragraphs of Sub Clause 20.1 provided that:

> *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or <u>any additional payment</u>, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the*

Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim."

4.4.29 The first paragraph of Sub Clause 20.1 sets out a precondition for a Contractor who intends to claim for additional payment. He must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance. The second paragraph sets the consequences of failing to give a Notice. That is, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

4.4.30 It is accordingly my FINDING and DECISION that the Claim for disruption costs arising from variation to the road shoulders wearing course is time-barred.

c. <u>31 days disruption costs arising from variation to wet areas treatment with rock fill.</u>

4.4.31 On 22nd September 2015 the Contractor proposed a 50cm thick rock fill plus 20cm thick CRR capping layer in some wet areas which exhibited excessive movements under normal compaction. On 24th September 2015, the Contractor issued a Notice to claim under sub-clause 20.1 for extension of time and additional payments. This was well within 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim.

4.4.32 In January 2017, the parties proceeded to agree on an amount of UGX 3,381,251,687 as compensation for this variation.

4.4.33 I perused the submissions and FIND as fact that on 9th February 2017, the Contractor submitted a claim where he was only requesting for extension of time for completion. In this letter, there was no indication from the Contractor that he was going to make a further claim for prolongation costs. I am alive to the fact that, following this application for extension of time, the Engineer proceeded in accordance with Sub Clause 3.5 and made a determination on 17th May 2017 awarding 31 days Extension of Time for Completion to the Contractor. There is no evidence before me suggesting that the Contractor raised

any issue with regard to the Engineer's determination which extended the time for completion by 31 days due to this variation. However, a claim for UGX 11,350,260,766 prolongation costs was only submitted on 6th December 2017. That was 438 days from the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim. The DAB is of the view that if the Contractor intended to make further loss and expense claims due to this variation, it should have notified the Engineer at the time an application for extension of time was being made.

4.4.34 The provisions of Sub Clause 20.1 require the Contractor to submit a fully particularised claim within 42 days after he became aware (or should have become aware) of the event or circumstance giving rise to the claim. This was not done. I already decided in issue 1 above that in accordance with the last paragraph of Sub Clause 20.1, failure to submit a fully particularized claim within 42 days where a notice has been served, would only be "TIME BARRED", to the extent to which *"…any such failure has prevented or prejudiced proper investigation of the claim*". Therefore, for a claim of this nature to be properly investigated, the Contractor is required to maintain contemporary records and submit the same to the Engineer. The fourth paragraph of Sub Clause 20.1 provided that:

> *"The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records and shall (if instructed) submit copies to the Engineer."*

4.4.35 In its reply to the Employer's Response, the Contractor argues that the claim for costs did not arise until the works were executed within the period of extension and completed on 22 October 2017. I do not think that the Contractor needed to wait until the works were executed in order for him to realise that he was going to incur additional disruption costs. The last part of paragraph 4 under Sub Clause 20.1 provided that:

> *"..If the event or circumstance giving rise to the claim has a continuing effect:*
>
> *a. this fully detailed claim shall be considered as interim;*
>
> *b. the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and*

c. the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

4.4.36 I perused the submissions and FIND that the disruption claim was first submitted by the Contractor to the Engineer on 6th December 2017. That is 438 days from the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance giving rise to the claim.

4.4.37 Therefore, in the absence of any contemporary records to substantiate the claim I FIND that the Engineer was prejudiced from properly investigating the claim.

4.4.38 It is accordingly my FINDING and DECISION that the Claim for disruption costs arising from wet areas treatment with rock fill is time-barred.

4.4.39 I am alive to the fact that other than the 14 days extension of time relating to the reduced rate of work due to delayed payments, the other two extensions of time relate to variations. The implication is that where delay is attributable to extra work, the Contractor may have already received labour, equipment, and Site and Head Office Overhead (HOOH) compensation from the mark-up on a change order. The Contractor has not demonstrated that he did NOT recover costs of labour, equipment and head office overheads from the variation amounts.

4.4.40 During the hearing, the argument as regards ISSUE 3 turned to whether the Contractor was claiming prolongation rather than disruption costs? The Employer argued that under the category of disruption costs, as claimed by the Contractor, it meant that the CLAIM lacked the support details, adding that the Contractor had the burden of proof of certainty as the claim was not substantiated.

4.4.41 I am alive to the requirements for the heads of claim for prolongation. These categories include indirect staff, bonds and insurances, site accommodation, bank finance charges, utilities, unabsorbed head office overheads and loss of profit. I have already dealt with the Contractor's failure to notify under SC 20.1 for any additional overheads under paragraph 4.4.3 above, and the related claims as being TIME BARRED.

4.4.42 I am alive to the fact that the Contractor raised the issue that the Contract was a Lump Sum, therefore, the Parties agreed to rely on breakdown rates of related items to cost the variations instructed. As such, the rates were applied as is without any addition for its overhead Costs. The Employer confirmed that the representatives on site generated Interim Certificates for Variations based on the rates of the nearby project, namely the the Mukono-Kyetume-Katosi Kisoga-Nyenga Road Project and although he promised to

submit details of some of the certificates (post hearing) to show how this was calculated, the documents were not submitted.

4.4.43 I also perused Clause 13 [**Variations and Adjustments]**. I am also aware of the provisions under SC 13.5 that:

…….For each Provisional Sum, the Engineer may instruct:

(a) work to be executed (including Plant, Materials or services to be supplied) by the Contractor and valued under Sub-Clause 13.3 [Variation Procedure]; and/or

(b) Plant, Materials or services to be purchased by the Contractor, for which there shall be included to the Contract Price:

(i) the actual amounts paid (or due to be paid) by the Contractor, and

(ii) a sum for overhead charges and profit, calculated as a percentage of these actual amounts by applying the relevant percentage rate (if any) stated in the appropriate Schedule. If there is no such rate, the percentage rate stated in the Appendix to Tender shall be applied.

4.4.44 I perused the various determinations of the Engineer as regards the Cost of Variations instructed under ISSUE 3, based on the agreed rates of the other project. It is clear that the Costs determined did not include any adjustments for the Contractor's Overheads as provided for under SC 13.5 for which a mark-up of 15% was provided in the PCC [Item 4 of Addendum No.3]. The Employer submitted that the Costs agreed included the Contractor's overheads but no details were provided by either Party.

4.4.45 I noted that there was a requirement for the Contractor to claim for the adjustment without the need to proceed under SC 20.1 but he did not. If the Contractor had notified the Engineer, he was obliged to include the adjustment of 15% on all variations. However, the Contractor was required to initiate the request. The Contractor has not demonstrated that he made such a request to the Engineer. Neither has it sought any such head of Claim in this referral. Had the Respondent done so, I would have reviewed any such claim. However, in the absence of any application, my hands are tied to dealing with the Claimant's sought relief.

4.4.46 The Contractor, instead claimed for disruption Costs. For reasons explained in the preceding paragraphs, it means that the Claim cannot possibly be entertained. Accordingly, I DETRMINE that the Contractor is NOT entitled to payment of UGX 11,350,260,766 arising from the extension of time for completion by 86 calendar days.

4.5. Issue 4: Payment towards Resident Engineer's Maintenance

To determine whether or not the Contractor is entitled to payment of UGX 339,582,738 for the Resident Engineer's maintenance for 246 days (Claim No.4).

4.5.1 On this ISSUE, the Contractor asked me to FIND in its favour that it is entitled to the above amount as compensation for the Engineer's maintenance (246 days or 8 months) beyond the duration of the Contract.

4.5.2 The Employer rejects the claim in its entirety arguing that the Contractor was required to provide the facilities for the duration of the Contract, that is for the period for the Works and the Defects Notification Period (DNP) up to the issuance of the Performance Certificate for as long as the Engineer was required to be on site.

4.5.3 The Employer further argued that the Contractor was paid a lump sum amount which included the Engineer's maintenance costs for the 6 months period when the Engineer had not commenced the services on site.

DAB's findings and decision

4.5.4 During the Hearing, the Employer submitted that under Annex 1[Revised Appendix C] of the Addendum No.3, Schedule "C" [Office, Accommodation and Laboratory Requirements – Facilities for the Engineer], stated that the facilities shall be provided for the **duration of the Contract**. The Employer further argued that while "Time for Completion" was a defined term under the contract, the "duration of contract" was not defined under the Contract, and referred to entire period for the Works and DNP of the contract. For this reason, the Contractor was required to provide and maintain the facilities for the entire contract duration, the Employer submitted.

4.5.5 The Employer further submitted that the Resident Engineer was not on site until 6 months after the Contract was signed, therefore, the Contractor already received payment for an additional 6 months as part of the lumpsum payment for expenses incurred during the contract duration.

4.5.6 The Contractor's argument was that the Employer notified the Resident Engineer in a letter dated 20 December 2017, that although the contract date for completion was 22 October 2017, the Engineer was required to stay on site for inspections and supervision of rectification of defects by the Contractor. Consequently, the Contractor notified the Resident Engineer, on 12 January 2018, of his intention to claim for the Engineer's maintenance Costs and submitted his detailed claim on 05 July 2018 for UGX 339,582,738, pursuant to SC 20.1.

4.5.7 The Contractor's submission was that the Resident Engineer's facilities were maintained on site for 246 days beyond the time for completion and having submitted its claim in accordance with SC 20.1, the Engineer and the Employer breached provisions of SC 3.5 by not making a determination of its claim, and therefore, considers himself entitled to the Cost of UGX 339,582,738.

4.5.8 I find as fact from the parties' submissions that the Resident Engineer's facilities were maintained on site beyond the time for "Taking - Over" on 22 October 2017. This is evidenced by the Employer's letter to the Contractor dated 20th December 2017[48]. According to the Employer, the continued presence of the Resident Engineer was necessitated by the following:

I. Guiding the terms of developing Technical Specifications.

II. Inspection of the completion of all outstanding works including snags, during the Defects Notification Period.

III. Conduct quarterly inspections or as may be required to ensure proper performance of the road and supervise rectification or any defects.

IV. Carryout final inspection before the end of the Defects Notification Period and prepare the necessary reports to enable the Employer conduct final inspection prior to issuance of the Performance Certificate

4.5.9 The Employer's argument, as regards the contract duration, was that the Contract for Design Review and Supervision signed between UNRA and the Consulting Engineers commenced on 14th July 2015 for a duration of 54 months - that is 30 months of Construction Supervision plus 24 months of Defects Liability Period (DLP). Completion was scheduled for 14th January 2020. The Employer's argument was that the provision of facilities for the Engineer were intended to cover the period that the Engineer was expected to be on the project, for both supervision and overseeing the Defects rectification. The Employer's argument was that the Engineer was under an obligation to oversee completion of all outstanding works including snags, during the Defects Notification Period in order for him to prepare necessary reports.

4.5.10 The Contractor argued against the Employer's assertion and rejected the reliance on the duration of the consultancy agreement, which was not provided as part of the Employer's bundle of documents, and I accept it.

4.5.11 On this submission, firstly it's not in dispute that the Contractor was to provide the Engineer's facilities for the duration of the contract. What is in issue is, "what period constitutes the contract duration"?

[48] Employer's letter ref UNRA/PR125/200 dated 20 December 2017 in Appendix 8 of the Referral.

4.5.12 I reviewed the provision of paragraph H of the Employer's requirements, in addition to Annex 1 and the Revised Appendix C of the Addendum No.3, and the both of which were relied upon by both parties which provided that:

> *"36. The contractor shall provide and maintain for the exclusive use of the Engineer the following for the entire duration of the contract:*
>
> *a. Fully equipped and operational site office facilities, housing accommodation (for eight persons) and laboratory facilities as specified in Appendix C of this Statement of Requirements.*
> *b. Transport one (1) 4WD Station Wagon Diesel engine capacity not exceeding 4000cc; and Five (5) Double Cabin pickups diesel engine capacity not exceeding 3500cc, Under the same arrangement, One (1) station Wagon and Two (2) Double Cabin pickups shall be provided to the Employer."* ***Emphasis added***
>
> *And*
>
> *Annex 1[Revised Appendix C] of the Addendum No.3, Schedule "C" [Office, Accommodation and Laboratory Requirements – Facilities for the Engineer], stated that the facilities shall be provided for the duration of the Contract.* ***Emphasis added***

4.5.13 During the hearing, the Contractor submitted that the "duration of contract" referred to the 'Time for Completion" which in turn referred to the Taking Over of Works or 22 October 2017, whilst the Employer's argument was that the "duration of contract" referred to the entire duration of the contract, that is the period from Commencement up to the release of the Performance Certificate or Guarantee.

4.5.14 I am alive to the other clauses in both the General and Particular Conditions of the Contract which point to the Engineer's availability beyond the Taking Over to deal with the Statements at Completion (Sub-Clause 14.11 [Application for Final Payment Certificate] and Sub-Clause 14.12 [Discharge]). However, the provision of the contract referred to the "**Time for Completion**" NOT "**contract duration**".

4.5.15 **The DAB sought to resolve the difference (if any) in the definition of "Time for Completion" and "duration of the contract".**

4.5.16 I perused the Contract agreement to establish the relevant provisions relating to the duration of the contract. Firstly, it is important to state that the Contract agreement does not have a defined term "contract duration" but provided a definition and references to the "Time for completion" of Works. There were three provisions:

4.5.16.1 Firstly, the definition for "Time for Completion" [Sub-sub-Clause 1.1.3.3] stated as follows:

"Time for Completion" means the time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4 [Extension of Time for Completion)), calculated from the Commencement Date.

4.5.16.2 Secondly, under SC 14.10 [Statement at Completion] provided as follows:

"Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of Statement at completion with supporting documents, in accordance with Sub-Clause 14.3..."

4.5.16.3 In addition, under SC 8.2, provided as follows:

"Time for completing all work which is stated in the Contract as being required for the Works or Section to be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [Taking Over of the Works and Sections]."

4.5.17 The DAB notes that the "Duration of Contract" has a different meaning and refers to[49]

"…the period stipulated in the Contract or work order or such extended period if any by written communication after which the contract shall come to an end."

"…Contract Completion by written communication after which the contract shall come to an end."

"…the period stipulated in the Contract or work order or such extended period if any by written communication after which the contract shall come to an end…"

"…Contract Duration – e.g. …this Contract shall be in effect for a period of 10 years from the Award Date or until all of Business's obligations and liabilities under this Contract have been satisfied, whichever occurs later.."

Or,

"…the term of a contract is its duration: the amount of time that the contract will remain in force."

[49] https://www.lawinsider.com/clause/contract-duration - accessed 25 May 2022

4.5.18 **Comparison between "Time for Completion" and "Duration of the Contract"**

Time for Completion is a defined term under Sub-Clause 1.1.3.4. That is;

> *"**Time for Completion**" means the time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as stated in the Contract Data as may be extended under Sub-Clause 8.5 [Extension of Time for Completion], calculated from the Commencement Date.*

4.5.18.1 In accordance with Sub-Clause 8.2, the completion of the Works in this case is for the purposes of taking over under Sub-Clause 10.1 and it includes the Extended Time.

4.5.18.2 **Duration of the Contract** on the other hand is not a defined term in the FIDIC 1999 (Yellow Book) Contract Agreement between the Parties. However, what is clear from the various definitions above, is that the contract duration refers to date on which all the contractual obligations (including completion of Works for the purpose of taking over and maintenance period) will be completed by the Contractor. This is reinforced by the provisions of the GCC Sub-Clause 11.9 which stated as follows.

> *"Performance of the Contractor's obligations under the Contract shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor fulfilled the Contractor's obligations under the Contract*.
>
> *The Engineer shall issue the Performance Certificate to the Contractor (with a copy to the Employer and to the DAAB) within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon thereafter as the Contractor has*:"

4.5.18.3 Therefore, it seems to me that **duration of the contract** includes the Defects Notification Period up to the time when the Performance Certificate is issued. This can also be understood as the period between the Contract Commencement date and the Contract end date - the period through which a contract is effective.

4.5.18.4 It follows, therefore, that duration of the contract and Time for Completion does NOT mean the same thing. Contract duration is a broad term which covers an entire period through which a contract is effective.

4.5.18.5 In accordance with Item H (*Facilities to be provided to UNRA's nominated Representative /Engineer*) paragraph 36 of the Employers Requirements, the

Contractor was required to provide and maintain facilities for the exclusive use of the Engineer for the **entire duration of the Contract.**

4.5.19 I am therefore persuaded by the Employer's submission that "contract duration" referred to the period from Commencement until the Contractor's obligations came to an end - when the Performance Security was released.

4.5.20 I already referred to the Employer's submission during the Hearing, and reference to Annex 1[Revised Appendix C] of the Addendum No.3, Schedule "C" [Office, Accommodation and Laboratory Requirements, Housing Requirements – Facilities for the Engineer], which I further reviewed. Under paragraph (a) General, stated (in part) as follows:

> *"…the facilities shall be provided for the duration of the Contract for the exclusive use of the Engineer. The provision further stated that the facilities shall be provided from 60 days after the Engineer's Order to Commence Work…,*
>
> *Upon completion of the Contract, the office, houses and laboratory if not rented and all furniture, fixtures and equipment shall revert to the Employer and the Contractor shall clear the site to the satisfaction of the Engineer..."*

4.5.21 Therefore, in the absence of any contrary submissions, and on the balance of probability, I am persuaded by the Employer's submission that the Contractor was required to continue providing the facilities beyond the Taking Over – Works period up to the end of the DNP. The reference to the time of site clearance was another indication that the reference was beyond the "Time for Completion" and DNP.

4.5.22 **It is accordingly the DB's FINDING and DECISION that the** correct interpretation of "*contract duration*" is that it is the period from the Commencement, extending beyond the Taking Over – Works on 22 October 2017, inclusive of the DNP up to the Release of Performance Security.

4.5.23 As to the question, whether the Contractor is entitled to receive additional payment for maintaining the Engineer's facilities for a further 246 days or 8 months beyond the Taking Over – for period 23 October 2017 to 26 June 2018?

4.5.24 As regards the Costs for the provision of facilities to the Engineer beyond the Time for Completion of Works, the Contractor submitted that:

4.5.24.1 Following the issuance of the Notice Claim, the Contractor submitted a detailed claim for **UGX 339,582,738** pursuant to S.C 20.1 of the GCC.[50] The Contractor's position was that this was a variation of the contract which was executed by instruction from the Engineer and Employer in accordance with S.C 13.1 of the GCC.

4.5.24.2 The Contractor's contention is that the Engineer was required to determine this claim within 42 days from 5 July 2018 in accordance with S.C 20.1 of the GCC but the Engineer never issued a determination, therefore, was in breach of both S.C 3.5 and S.C 20.1 of the GCC.

4.5.24.3 The Contractor cited paragraph 6 of S.C 20.1 of the GCC which provided that:

> *"Within 42 days after receiving the claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars but shall nevertheless give his response on the principles of the claim within such time."*

4.5.24.4 The Contractor contended that his cost claim for **UGX 339,582,738** was based on the Contract documents, including Volume 1- Addendum 3, Appendix C, Employer's Requirements, Price Breakdown and Schedules and on Bill No. 1 for a similar project in the same area, that is, the Mukono-Kyetume-Katosi Kisoga-Nyenga Road Project which method had previously been approved as a basis for the rock fill variation.

4.5.25 It is not in dispute that the Employer in a letter dated 20th December 2017 notified the Resident Engineer of his Contract obligations which included among others, obligations under the Defects Notification Period where the Consultant was required to "oversee inspection of the completion of all outstanding works to ensure that they are satisfactorily completed and within the agreed timelines conduct quarterly inspections or as may be required to ensure proper performance of the road, and supervise rectification of any defects, carry out final inspection before the end of DNP and prepare the necessary reports", (Refer to Appendix 21).

4.5.26 As a result of this extension of stay of the Engineer on site, the Contractor extended the provision of the facilities by 246 days, up to 26th June 2018. Consequently, the Contractor

[50] Contractor's letter ref SBI/RE/0718/629 dated 5 July 2018 in Appendix 8 of the Referral.

notified to claim under SC 20.1 and submitted a detailed claim for the related Costs amounting to UGX 339,582,738 being the Resident Engineer's maintenance costs.

4.5.27 The Employer referred to a meeting held with the Contractor in which the the parties discussed the issue of the Engineer's maintenance costs. In a meeting held between the Employer and the Contractor on 2nd July 2020, the Contract Manager noted that the Resident Engineer only commenced services after a period of 6 months from the date of signing the Civil Works Contract. The point being that the Contractor commenced works on 29th January 2015 whereas the Resident Engineer commenced services on 14th July 2015 but the Contractor was nonetheless paid a lump sum which included the Engineer's maintenance costs for the 6 months' period (when the Engineer had not yet reported) (Refer to Appendix 22). Furthermore, that during the 6 months' period for which the Engineer had not yet been appointed, the works were being supervised by the Employer (Refer to Appendix 22). In view of the above, the Employer submitted that the Contractor was not entitled to any further claim in respect to the Engineer's maintenance.

4.5.28 The Employer asked me to find in its favour, that the Contractor was paid a lumpsum amount for the Engineer's facilities, as such, his late mobilization by 6 months, meant that the Contractor was already paid in excess which should offset the additional cost claimed by the Contractor.

4.5.29 The Employer in his reply to the Contractor's rejoinder submitted that the contract amount included a lump sum amount of UGX 159,987,121,712 and contended that the Contractor received payment for maintenance of the Engineer's facilities which was part of the Employer's requirements. The Employer added that the Contractor cannot be entitled to additional payment as he was required to include this cost item in his bid to allow for the Engineer's presence during the Defects Notification Period (DNP).

4.5.30 The Contractor submitted that at the time the meeting of 22nd July 2020 took place, it's detailed Claim for the maintenance costs was already submitted to the Engineer for Determination (05th July 2018) which was not determined under SC 3.5 and rejects the Employer's submission as regards any request to waive the Costs.

4.5.31 The Contractor has not made any submission on the matter except argue that its Claim was not determined by the Engineer as required under SC 3.5.

4.5.32 I also reviewed the GCC and PCC SC 20.1 which stated that if the Engineer does not respond within the timeframe defined in this subclause, either Party may consider that the claim is rejected by the Engineer and either Part may refer such claim to the DAB. This was the option available to the Contractor under the Contract. I am alive to the fact

that the Contract Agreement was based on the FIDIC 1999 Yellow Book, therefore, there was no standing DAB in place at the time. The Contractor was required to notify a dispute and request for the appointment of the DAB. Thereafter, the Contractor would refer the dispute to the DAB.

4.5.33 It is not in dispute that the parties agreed to a Lump Sum Contract. No cost breakdown was provided to indicate how much of the Accepted Contract Amount (UGX 159,987,121,712) was the cost for the provision of the Engineer's facilities. There is nothing from the parties' submissions to suggest that they had agreed that payment for the Engineer's facilities was to be treated as though this was a re-measurable contract, notwithstanding their agreement to rely on the Price Breakdown and Schedules of Bill Items for a similar project in the same area, the Mukono-Kyetume-Katosi Kisoga-Nyenga Road Project for any agreed variations of Works.

4.5.34 It is already my FINDING that the Contractor was required to continue providing the facilities beyond the Taking Over – Works period up to the end of the DNP. I FIND no reason to allow entitlement to payment for provision of the Engineer's maintenance cost for an additional 246 days or 8 months.

4.5.35 **It is accordingly the DAB's FINDING and DECISION that the Contractor is NOT entitled to payment of UGX 339,582,738 for the Resident Engineer's maintenance costs.**

4.6. Issue 5: non-implementation of the Resettlement Action Plan (RAP)

To determine whether or not the Contractor is entitled to the sum of **UGX 11,346,339,502** arising from the non-implementation of the Resettlement Action Plan (RAP) on the Project.

4.6.1 In this referral, the Contractor asked me to FIND in its favour that it is entitled to the above amount as compensation for idle charges for non-implementation of the Resettlement Action Plan (RAP). The Contractor's basis of claim is that between 22nd October 2017 and 31st August 2019, he incurred the above costs in keeping the project office for the implementation of the Resettlement Action Plan.

4.6.2 The Employer rejects the claim in its entirety arguing that the Contractor did not incur any costs with regard to the implementation of the RAP as the exercise was halted. He adds that the Contractor already received UGX 799,935,609 for undertaking the RAP study which was part of the project design.

4.6.3 During the hearing, the Employer submitted that SC 13.5 [provisional Sums] provided that:

> *"Each Provisional Sum shall only be used, in whole or in part, in accordance with the Engineer's instructions, and the Contract Price shall be adjusted accordingly."*

Therefore, having not received any such Engineer's instruction to spend the claimed amount, the Contractor was not entitled to any compensation under the Sub-Clause.

DAB's findings and decision

4.6.4 I find as fact that the Contract Price for the project which amounted to UGX 233,126,164,344 contained a Provisional Sum of UGX 3,000,000,000 for Land Cost.

4.6.5 I also find that it was a term of the contract at Sub Clause 4.1 of the particular conditions of contract (PCC) which stated that:

"The Contractor shall facilitate acquisition of land from Project Affected Persons"

4.6.6 Furthermore, the amended sub-clause 14.2 (A) of the PCC provided that:

> "*The Employer shall make an interest free loan for disbursement of funds to Project Affected People and the Land Agency in relation to the permanent works only, when the Contractor submits a guarantee in accordance to this sub clause. The total amount of the Advance Payment shall be 50% of the provisional Sum Land Costs.*
>
> *The Contractor shall within 28 days of the Letter of Acceptance set up a separate independent imprest bank account, solely for disbursement of funds to the Project Affected People and the Land Agency. The Bank account should be with a reputable bank in Uganda.*
>
> *The Guarantee shall be in place within 14 days of the approval of the land value to the sum of 50% of the Provisional sum allocated to Land costs, issued by any recognized commercial bank located in Uganda or a foreign bank endorsed by a correspondent Bank located in Uganda*
>
> *The Contractor shall only disburse payments on written instruction from the Employer and shall with the instruction from the Employer and receipt from the recipient include in the submission under Sub Clause 14.3 [Application for interim Payment Certificate]*
>
> *The Engineer shall deliver to the Employer and to the Contractor an interim Payment Certificate for the advance after having confirmation of the setting*

up of the Bank account and after having satisfied that the Bank Guarantee is in place. This guarantee shall be issued by a reputable bank or financial institution selected by the Contractor and shall be in the form annexed to the particular Conditions or in a form approved by the Employer.

Through the interim payment certificates the account shall be reimbursed based on confirmed payment documentation until the funds are exhausted. Any surplus, including any interest shall be refunded through the payment certificates at which to me the guarantee can cease.

The Contractor shall ensure that the guarantee is valid and enforceable until the advance payment has been accounted for or repaid by the Contractor as evidenced by in the Payment Certificates showing zero advance outstanding."

4.6.7 The Contractor claims that between 22nd October 2017 and 31st August 2019 it incurred costs amounting to **UGX 11,346,339,502,** arising from expenses associated with the implementation of the RAP study and preparing for the implementation of the same. I must state that this was a period after the works were completed on 22nd October 2017. The Contractor alleges the costs incurred arose from keeping the Project Offices awaiting the execution and accomplishment of the RAP exercise.

4.6.8 However, I find as fact that on 10th November 2017, the Engineer wrote to the Contractor and enclosed UNRA's letter dated 18th October 2017 indicating that the Employer will be undertaking the RAP implementation for the entire project.

4.6.9 The Contractor submitted that in a letter dated 01 October 2018 he notified the Employer of his readiness to implement the RAP and effect payments to the affected persons. The DAB noted that this was one year after the Employer's Notice of 18 October 2017. In a follow up letter dated 28 November 2018, the Employer re-iterated its position that the implementation would be done by UNRA.

4.6.10 From the parties' submissions, a meeting was held in March 2019, at which time the Employer asked the Contractor to submit its detailed claim of Costs incurred in relation to the RAP Implementation. On 1st October 2019, the Contractor submitted a claim of **UGX 4,055,954,145** as compensation costs, for allegedly keeping the project office awaiting the implementation of the RAP. On 29th November 2019, the Employer rejected the claim citing lack of merit.

4.6.11 The Contractor then submitted a revised claim based on the various provisions in the contract, namely SC 4.1, SC 14.2, SC 13.5 of the GCC an Addendum No.3 which

included overheads, general obligations and expenses incurred for maintaining the RAP project office between 22nd October to 31st August 2019, amounting to UGX 11.346,339,510.

4.6.12 During the hearing, the Employer submitted that the Contractor failed to comply with a request to substantiate his claim for idle labour for the RAP implementation and was therefore, not entitled to any payment. According to the Employer, the only component of RAP carried out by the Contractor related to preparation of the report for RAP study as part of the civil works and a payment of UGX 799,935,609 was paid as part of the design activity.

4.6.13 No further evidence has been adduced by the Contractor to prove that he indeed kept the project office running for the sole purpose and in anticipation of the implementation of the RAP. Neither has he substantiated the alleged costs which is said to include costs of labour and site offices. I am therefore, persuaded by the Employer's argument that the Contractor failed to substantiate its claim for labour and site office maintenance for a period of 648 days.

4.6.14 The Employer argued that the Contractor never submitted any other claim apart from the one rejected on 29 November 2019, and therefore rejected the claim of **UGX 11,346,339,502** that it was unsubstantiated and was not incurred under any instruction of the Engineer as required under SC 13.5. During the hearing, the Employer further submitted that the Contractor's initial claim of **UGX 4,055,954,145** did not comply with the requirements of SC 20.1 and ought to have been made not later than 28 days after the Employer's letter dated 10 November 2017, instead the Contractor only notified its claim on 1st October 2019 – more or less 24 months later. For this reason, the Employer rejected the claim.

4.6.15 The Employer further argued that the amount claimed by the Contractor was for Works which were not carried out as the funds could only be accessed subject to submitting a valid advance guarantee – which the Contractor did not provide. I have already stated that it was not in dispute that the RAP was not implemented by the Contractor. According to the Contractor the claim is for maintaining staff and related office costs in anticipation of implementing the RAP.

4.6.16 The Employer questioned the basis of the Contractor's amounts of 1st UGX 4,055,954,145 and later the amount UGX 11,346,339,502? The Contractor submitted that the Employer's cost for RAP compensation was estimated at UGX 75.6 billion. Therefore, its 15% mark-up amounted to UGX 11,346,339,502. The Contractor considered the amount of UGX 4,055,954,145 to be an offer for any amicable settlement.

4.6.17 The Contractor's submission was that the amounts for the RAP were covered under SC 13.5 (Provisional Sums), therefore, there was no requirement to follow the SC 20.1 before making any claim, and I accept it. I am alive to provisions under SC 13.5. For any claim under SC 13.5, the only requirement was to submit proformas or quotations to the Engineer. However, once the cost estimate was rejected by the Engineer or the Employer, then there's a requirement to notify under SC 20.1(PCC).

4.6.18 I also noted that the Parties continued to have meetings in March 2019 to discuss the claim. Furthermore, the Employer rejected the Contractor's Claim on 29 November 2019. I am of the view that the Parties had waived the requirements of SC 20.1 by their conduct.

4.6.19 In its rejoinder, the Contractor submitted that the Employer never amended or varied the contract to exclude the works for the RAP implementation as required under SC 13.1 [Variations] and rejected the Employer's argument that the works were never instructed as required under SC 13.5. The point being that the PCC SC 4.1 provided that, "the Contractor shall facilitate acquisition of land from Project Affected Persons".

4.6.20 I reviewed the GCC and PCC SC 20.1 which stated that if the Engineer does not respond within the timeframe defined in this subclause, either Party may consider that the claim is rejected by the Engineer and either Part may refer such claim to the DAB. However, I am alive to the fact that there was no DAB in place at the time, therefore, the Contractor was entitled to make the revised submission.

4.6.21 I perused the Contractor claim amounting to **UGX 11,346,339,502 allegedly** for the incurred costs for keeping the Project Offices awaiting the execution and accomplishment of the RAP exercise. The Contractor submitted that he availed proof of the employees retained and the site office retained for the implementation of the RAP on the project. The Contractor has not provided such evidence in its submitted documents. In addition, the period claimed refers to the post Taking – Over of Works, period from 22nd October 2017 to 31 August 2018. Having been notified by the Employer about the decision to undertake the RAP Implementation itself, this constituted a variation under SC 13.1, and I see no reason why the Contractor retained staff for 648 days. I am not persuaded by the Contractor's argument.

4.6.22 **I, therefore, dismiss the Contractor's submission that it incurred costs amounting to UGX 11,346,339,502 arising from keeping the Project Offices awaiting the execution and accomplishment of the RAP exercise.**

4.6.23 **The question I should turn to is whether the omission of the RAP implementation constitutes a breach of contract giving the Contractor entitlement to overhead charges and profit?**

4.6.24 The Contractor has argued that the omission of this portion of work was in breach of Sub Clause 13.1 which provided that the works cannot be omitted. He contends that in accordance with the provisions of Sub Clause 13.5 and form D 4.2.5 of the bidding documents, the contractor is entitlement to overhead charges and profit.

4.6.25 The Employer argues that the UGX 3,000,000,000 for Land Cost was a Provisional Sum and that as such the Contractor could not claim entitlement.

4.6.26 To fortify its case, the Employer also cited a number of cases, namely:

4.6.26.1 Case (i) *Multiplex v Cleveland Bridge* where a provisional sum was defined as being in the form of a contingency.

4.6.26.2 Case (ii) *Amec v Cadmus* where a provisional sum is defined as an amount that is an estimate of the cost of providing particular contracted services.

4.6.26.3 Case (iii) *Hampton v Glamorgan* where Earl Loreburn stated that:

"It may be permissible (subject to the terms of the applicable contract) for an owner to instruct the Contractor to perform the provisional sum work, not to instruct the work at all, to perform the work itself or to arrange for it to be performed by another Contractor".

4.6.27 **I reviewed the cases and submissions in view of the Employer's contention. All I can say is that the cited cases do not in any way aid the Employer's case that omission of provisional sums from the scope does not constitute a breach.**

4.6.28 The definition given in **Multiplex v Cleveland Bridge** where a provisional sum was defined as being in the form of a contingency cannot be said to be conclusive as the courts have given different definitions depending on the facts of the case.

4.6.29 In **Amec v Cadmus,** a provisional sum item was found to be part of the scope of works and, as a result, the employer could not omit it simply in order to instruct a different contractor to undertake the same package. The court found that the omission amounted to a breach of contract. In particular it was held that:

"In those circumstances, and, in particular, in view of the express finding of the arbitrator at paragraph 12.04 that the statement in Hudson reflects the 'generally accepted position in the industry', it seems to me that the arbitrator

> *was perfectly correct in deciding that such an arbitrary withdrawal of work from the provisional sums and the giving of it to the third party was something for which Amec were entitled to be compensated and the compensation that he arrived at, namely the loss of the profit having accepted figures put forward to him in evidence, is one which is not open to be impugned on appeal as a matter of law. In those circumstances, therefore, albeit with some reluctance, it seems to me that I should dismiss the appeal as well."*

4.6.30 In **Hampton v Glamorgan***,* Earl Loreburn qualified his statement by stating that it may be permissible for an owner to perform the provisional work itself or to arrange for it to be performed by another Contractor **"subject to the terms of the applicable contract".**

4.6.31 My finding from the wording of the contract is that the parties intended for the contractor to facilitate acquisition of land from Project Affected Persons. This was express under the amended Sub Clause 4.1 of the PCC and made this particular item to be part of the scope of work. Crucially, while Sub-Clause 13.1 provided for the varying of the scope of work, there was a limitation in that any Variation was not to comprise the omission of any work which is to be carried out by others. I am alive to the fact that the Employer did not omit the work in order to have it carried out by others. However, the fact that the Employer omitted the work in order to have it done by himself does not change the situation. The principle is that the Employer cannot omit work **where he still intended** to have it done. He can only do so where the work is not to be done at all. I, therefore, reject the Employer's submission that a Contractor will not be entitled to be compensated by the owner for loss of profit on the provisional sum work in the event that no instruction is given to perform work. (***Emphasis added***).

4.6.32 Furthermore, SC 13.1 stated that, "*Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works*". I noted that the Engineer's Instruction was dated 10th November 2017 (attaching a letter from the Employer dated 18 October 2017). Therefore, the Engineer's Instruction was issued outside the implementation period.

4.6.33 During the hearing, the Employer submitted that the omission of the RAP component was in compliance with guidelines issued by the Ugandan Parliament. The Contractor rejected the suggestion that the alleged Parliamentary guidelines was good reasons for letting the RAP Implementation to be carried out by UNRA disregarding the contractual provisions whereby the Employer should have issued a variation to omit the Works. The Contractor argued that Parliamentary guidelines could not replace the terms of a written contract, and therefore, rejected the Employer's submission.

4.6.34 I am, therefore, not persuaded by the Employer's submission that the alleged Parliamentary guidelines was the reasons for the omission of the RAP Works, for lack of evidence. The only conclusion I can make from the late notification and the omission of the Works was it was arbitrary and ignored the provisions of the Contract.

4.6.35 **It is accordingly my FINDING that the omission of this provision was in breach of Sub Clause 13.1 and that the same entitles the Contractor to compensation for loss of profit.**

4.6.36 I reviewed Sub-Clause 13.5 of the GCC which in its general form provided that:

> *"Each Provisional Sum shall only be used, in whole or in part, in accordance with the Engineer's instructions, and the Contract Price shall be adjusted accordingly. The total sum paid to the Contractor shall include only such amounts, for the work, supplies or services to which the Provisional Sum relates, as the Engineer shall have instructed. For each Provisional Sum, the Engineer may instruct:*
>
> *(a) work to be executed (including Plant, Materials or services to be supplied) by the Contractor and valued under Sub-Clause 13.3 [Variation Procedure]; and/or*
>
> *(b) Plant, Materials or services to be purchased by the Contractor, for which there shall be included in the Contract Price:*
>
> *(i) the actual amounts paid (or due to be paid) by the Contractor, and*
>
> *(ii) a sum for overhead charges and profit, calculated as a percentage of these actual amounts by applying the relevant percentage rate (if any) stated in the appropriate Schedule. If there is no such rate, the percentage rate stated in the Appendix to Tender shall be applied.*
>
> *The Contractor shall, when required by the Engineer, produce quotations, invoices, vouchers and accounts or receipts in substantiation."*

4.6.37 By Addendum No.3 Section IV-Bidding forms - Form D.4.2.5 (a) the percentage for Adjustment of Provisional Sums was amended to 15%.

4.6.38 I FIND no reason to depart from this provision. In this circumstance, I allow 15% mark up for profit in respect of the UGX 3,000,000,000 provisional sum for Land Cost. The following parameters apply:

4.6.38.1 Land Cost provisional sum: UGX 3,000,000,000

4.6.38.2 Profit mark-up: 15%

4.6.39 Therefore, the lost profit from the omitted work is calculated as follows:

$$\text{Recoverable Lost Profit} = \frac{\text{Profit mark-up}}{100} \times \text{Land Cost provisional sum}$$

$$\text{Recoverable Lost Profit} = \frac{15}{100} \times \text{UGX } 3{,}000{,}000{,}000 = \textbf{UGX 450,000,000}$$

4.6.40 **It is accordingly the DB's FINDING and DECISION that the Contractor is entitled to payment of UGX 450,000,000 (exclusive of VAT) being loss of profit for the omission of Works related to the implementation of the Resettlement Action Plan on the project.**

Table 2: Summary of Monetary Decisions before Financing Charges (all exclusive VAT)

No.	Contractor's Head of Claim	Amount Claimed	Amount allowed by the DB
		(UGX)	(UGX)
1	**Issue 1:** Idle charges of equipment in 2016	385,374,840	385,374,840.00
2	**Issue 2:** Idle charges of equipment in 2017	443,157,791	443,157,791.00
3	**Issue 3:** Prolongation Cost for 86 days Extension of Time	11,350,260,766	0.00
4	**Issue 4:** Engineer's maintenance beyond the completion date	339,582,738	0.00
5	**Issue 5:** Non-implementation of the Resettlement Action Plan (RAP)	11,346,339,502	450,000,000.00
	Total Contractor's CLAIM	**23,864,715,637.00**	**1,278,532,631.00**

4.7. ISSUE 6: Financing Charges and/or interest

4.7.1. The Contractor asked me to determine that JV SBI & RCC was entitled to payment of financing charges and/or interest, on any amounts due, at the rate in the contract in accordance with Sub Clause 14.8 compounded monthly in relation to the above.

4.7.2. With regard to the claim whether or not Financing Charges and/or interest should be given effect to, the Employer asked the DAB to reject the entire claim.

4.7.3. On my part, the Parties are bound by the Engineer's Determination as provided for under SC 3.5 to give effect to the Engineer's determination. The last paragraph of Sub-Clause 3.5 is instructive:

> *"The Engineer shall give notice to both parties of each agreement or determination, with supporting particulars, within 28 days from the receipt of the corresponding claim request except when otherwise specified. Each party shall give effect to each agreement or determination unless and until revised under clause 20 [claims disputes and arbitration]" [DAB emphasis added]*

4.7.4. The Determinations by RE *"P. Jagadeesh"* where on 17th May 2017 and 8th July 2019 for amounts of UGX 385,374,840 and UGX 443,157,791 respectively.

4.7.5. It is already my FINDING and DECISION that the above amounts where due to the Contractor. Accordingly, these amounts should have been effected as required under SC 3.5. Consequently, these amounts attract Financing Charges from the dates when each was due (that is effective from a date of 17th May 2017 + 56 days = **12th July 2017** and 8th July 2017 + 56 days= **2nd September 2017**), up and until 2nd May 2022. The Financing Charges are due and to be paid in accordance with the Sub Clauses 14.7 and 14.8 of the Particular Conditions of the Contract.

4.7.6. I perused the Contract. Particular Conditions SC 14.8 provided for **Simple Interest at the rate of 1% above the central bank discount rate**. Accordingly, the Contractor is entitled to Financing Charges. As at the time of entering this decision, the prevailing discount rate as determined by the Bank of Uganda was 6.5%. I therefore, adopt this rate and calculate simple interest as follows:

Interest calculation:

4.7.7. I have decided that the Contractor is entitled to UGX 1,278,532,631. Of this amount, UGX 385,374,840 and UGX 443,157,791 where due on 12th July 2017 and 2nd September 2017. Therefore, only this amount is eligible for Financing Charges. Financing Charges or Interest on the other UGX 450,000,000 will only be applicable if the same is not paid, 56 days after the date of this decision.

Interest on delayed payment of UGX 385,374,840 as determined by the Engineer arising from costs of idle equipment in 2016:

Amount Awarded: UGX 385,374,840
Interest rate: 6.5%+1% =7.5%
Duration of Delay: 12.07.2017 to 30.05.2022 = 1783 days
Interest Due: $\frac{7.5\% \times \text{UGX } 385,374,840 \times 1783}{365 \text{ days}}$ = **UGX 141,189,727.34**

Interest on delayed payment of UGX 443,157,791 as determined by the Engineer arising from costs of idle equipment in 2017:

Amount Awarded: UGX 443,157,791
Interest rate: 6.5%+1%=7.5%
Duration of Delay: 02.07.2017 to 30.05.2022 = 1793 days
Interest Due: $\frac{7.5\% \times \text{UGX } 443,157,791 \times 1793}{365 \text{ days}}$ = **UGX 163,270,257.38**

Total Interest due: 141,189,727.34 + UGX 163,270,257.38 **= UGX 304,459,984.72**

4.7.8. **It is accordingly the DAB's FINDING and DECISION that the Employer must pay to the Contractor Financing Charges amounting to UGX 304,459,984.72 exclusive of VAT.**

4.8. Adjudication Costs

4.8.1. In this referral, the Contractor's claim was **UGX 23,864,715,637.00** (Uganda Shillings Twenty-Three Billion Eight Hundred Sixty-Four million, Seven Hundred Fifteen Thousand Six Hundred Thirty-Seven) exclusive of VAT.

4.8.2. It is already my FINDING and DECISION that **UGX 1,582,992,615.72** (Uganda Shillings One Billion Five Hundred Eighty-Two million, Nine Hundred Ninety-Two Thousand, Six Hundred Fifteen, and Seventy Two cents) exclusive of VAT, is due to the Contractor.

4.8.3. However, I know of no-good reason not to follow the applicable provision under Sub Clause 20.2 of the conditions of contract. I therefore, decide that in accordance with the Contract Agreement, each party shall be responsible for their own adjudication and other expenses and for an equal share of the fees and expenses of the Dispute Board.

5. Summary of the DAB Decisions

5.1. The DAB wishes to give the Parties its professional assurances that it has approached this adjudication in a fair, independent and impartial manner and has done its best to give a Decision that complies with the Contract and is based on the facts as the DAB sees them and reflects what the DAB perceives to have been the mutual intent of the Parties at the time the Contract was executed. The DAB trusts that both Parties will respect this decision and give effect to it.

5.2. **Decisions**

5.2.1 Having been properly and lawfully appointed to determine and give decisions in accordance with the Particular and General Conditions + Specifications on any dispute arising between the Parties to the Contract and having given full consideration to all documents and submissions put before the DAB in this referral and for the reasons stated in the narrative in the foregoing sections **the DAB DECIDES in terms of Sub-Clause 20.4 as follows:**

5.2.2 **First Decision Sought by the Contractor:** Whether or not the Contractor is entitled to payment of **UGX 385,374,840** in respect to idle charges for equipment due to reduction in the rate of works in 2016?

5.2.2.1 **DAB Decision:**

The Contractor is entitled to payment of UGX 385,374,840 exclusive of VAT, being idle charges for equipment manpower. **The Claim succeeds.**

5.2.3 **Second Decision Sought by the Contractor:** Whether or not the Contractor is entitled to payment of **UGX 443,157,971** in respect to idle charges for equipment due to reduction in the rate of works in 2017?

5.2.3.1 **DAB Decision:**

The Contractor is entitled to payment of UGX 443,157,791 exclusive of VAT, being idle charges for equipment manpower. **The Claim succeeds**.

5.3.3 **Third Decision Sought by the Contractor:** Whether or not the Contractor is entitled to payment of **UGX 11,350,260,766** arising from the extension of time for completion by 86 calendar days?

5.3.3.1 **DAB Decision:**

The Contractor is NOT entitled to payment of UGX 11,350,260,766 arising from the extension of time for completion by 86 calendar days. **The Claim FAILS**.

5.3.4 **Fourth Decision Sought by the Contractor:** Whether or not the Contractor is entitled to payment of **UGX 339,582,738** for the Resident Engineer's maintenance for 246 days?

5.3.4.1 **DAB Decision:**

The Contractor is NOT entitled to payment of UGX 339,582,738 being the Resident Engineer's additional maintenance cost. **The Claim FAILS.**

5.3.5 **Fifth Decision Sought by the Contractor:** Whether or not the Contractor is not entitled to the sum of **UGX 11,346,339,502** due to the non-implementation of the Resettlement Action Plan (RAP) on the Project

5.3.5.1 **DAB Decision:**

In principle, the Contractor's claim for costs of maintaining project office in anticipation of the RAP implementation **partially SUCCEEDS**. The DAB finds that the Contractor is entitled to recover **UGX 450,000,000** exclusive of VAT being loss of profit for non –implementation of the Resettlement Action Plan on the project.

5.3.6 **Sixth Decision Sought by the Contractor:** Whether or not the Contractor is entitled to payment of financing charges and/or interest on any monies due pursuant to sub-clause 14.8 of the conditions of contract?

5.3.6.1 **DAB Decision:**

The DAB finds that the Contractor is entitled to Financing Charges in respect of unpaid amounts for entitlements for idle equipment due to reduction in the rate of works in 2016 and 2017, amounting to UGX 304,459,984.72 exclusive of VAT. The Contractor's claim, therefore, succeeds. **The Claim, therefore, succeeds.**

5.4 Table 2: Summary of the DAB Decisions

Summary of Monetary Decisions

No.	Contractor's Head of Claim	Amount Claimed (UGX)	Amount allowed by the DAB (UGX)
1	**Issue 1:** Idle charges of equipment in 2016	385,374,840	385,374,840.00
2	**Issue 2:** Idle charges of equipment in 2017	443,157,791	443,157,791.00
3	**Issue 3:** Prolongation Cost for 86 days Extension of Time	11,350,260,766	0.00
4	**Issue 4:** Engineer's maintenance beyond the completion date	339,582,738	0.00
5	**Issue 5:** Non-implementation of the Resettlement Action Plan (RAP)	11,346,339,502	450,000,000.00
6	Financing Charges		304,459,984.72
	Total	**23,864,715,637.00**	**1,582,992,615.72**

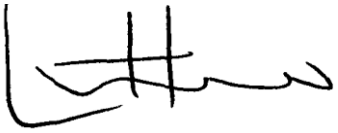
5.5 **This is the Decision of the DAB** – A total amount of **UGX 1,582,992,615.72 (Uganda Shillings One Billion Five Hundred Eighty-Two million, Nine Hundred Ninety-Two Thousand, Six Hundred Fifteen, and Seventy Two cents)** exclusive of VAT, is due to the Contractor.

5.6 The DAB thanks the Parties for their submissions and for their courtesy.

6. DAB CONCLUDING COMMENT

6.1. As provided for in GCC Clause 20.4, the above DAB Decision is binding on both Parties, who shall promptly give effect to it, unless and until it is revised in an amicable settlement or arbitral award. If neither Party gives a notice of dissatisfaction within 28 days hereof, then the above Decision becomes final and binding.

Signed:



Henry M Musonda FCIArb

Sole DAB for the Civil Works for Design and Build Project for Rehabilitation of Mukono - Kayunga and Bukoloto - Njeru (95Km) Road Project, Uganda.

Issued at: Ndola, Zambia.

Date: 30th May 2022