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

Upgrading from Gravel to Bituminous Standard of Mukono-Kyetume-Katosi/Kisoga-Nyenga Road
Contract No 2014-15/00009-0085

DECISION OF DISPUTE BOARD IN FIRST DISPUTE REFERRAL

in respect of

FINANCIAL CLAIM FOR HEAD OFFICE OVERHEADS

Dispute Board

Henry M Musonda FCIArb

Decision Date: 10 December 2021

PURSUANT TO CLAUSE 20.4 OF THE CONDITIONS OF CONTRACT

DB DECISION - REFERRAL No 1

In respect of

FINANCIAL CLAIM FOR HEAD OFFICE OVERHEADS

1. INTRODUCTION

Preamble

1.1. The Employer and the Contractor (collectively "the Parties") entered into a Contract for Works comprising the upgrading of the the Mukono - Kyetume-Katosi/Kisoga-Nyenga/ Nyenga-Njeru from gravel to Paved (Bituminous) Standard of approximately 84 km, which is referred to as 'the Contract', on or about 12 January 2015.

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 Claimant, 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 Respondent, and the Employer.

1.3. The Commencement Date was 27th January 2015, and the original Time for Completion was 911 days. The Accepted Contract Amount was 253,940,121,150 (Uganda Shillings Two Hundred Fifty-Three Billion, Nine Hundred Forty Million, One Hundred Twenty-One, One Hundred Fifty Only), Inclusive of Applicable taxes. The Contract Price was payable in two currencies – 24% in Uganda Shillings (UGX) and 76% in United States Dollars (USD). – Uganda Shillings.

1.4. The Conditions of Contract comprise the FIDIC "Conditions of Contract for Construction, MDB Harmonised Edition June 2010" ("FIDIC" or "the FIDIC Pink Book") 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).

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

1.6. The Engineer was M/s Arab Consulting Engineers (MOHARRAM- BAKHOUM) up to 13th April 2018. The UNRA Construction Supervision Unit replaced the Arab Consulting Engineer and took over as the SC 3.1 "Engineer" from 14th April to date.

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

Date of Contract Agreement	:	12th January 2015
Commencement Date	:	27th January 2015
Time for Completion	:	911 days
Contractual Completion Date	:	27th July 2017
Extension of Time for Completion (Addendum No 1 + EoT)	:	899 days
Revised Time for Completion (Original + Addendum No 1 + EoT)	:	1810 days
Revised Completion Date (Addendum No 1 & 2 + EoT)	:	10th January 2020
Defects Notification Period	:	365 days

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

1.8. Amendments to the Contract

1.8.1. The Contract was subjected to the following amendments:

Addendum No 1 dated 26 June 2019*: Extended the physical works by 10km from Nyenga to Njeru and extended the time by six months from 9th January to 9th July 2019. The cost of the additional quantities was UGX 29,546,729,785 inclusive of VAT resulting into a revised Contract Price of UGX 283,486,850,935 inclusive of 18% VAT, representing an 11.6% increase.*

1.9. Extension of time.

a) Both Parties submitted and confirmed that the time for completion was extended several times in accordance with sub-clauses 3.5, 8.4, 10.1, 13.1 and 20.1 as shown in the EOT Summary Table below. Both Parties confirmed that although 937 days was the total extension of time granted, effectively the Time for Completion was extended by 899 days, as the 38 days were concurrent with the period extended for Addendum No.1.

Table 1: Summary of Extensions of Time for Completion

No.	Description	EoT in days
1	VO1 for Additional asphalt work	60
2	Activities in new swamp locations	51
3	Activities in new swamp locations	91
4	VO.2 for additional drainage design for storm water disposal to the swamps	83
5	Reduced Rate of Work due to Delayed Payment IPC 7-20	93
6	Reduced Rate of Work due to Delayed Payment IPC 7-20	62
7	Delayed access to the Re-alignment Km 5+200 to 6+500	92
8	Addendum No. 1 for 10Km Section from Njenga to Njeru	181
9	50mm Asphalt Overlay from Km 0+00-4+00 **(Employer submitted that the 38 days EoT was not approved due to concurrency of activity Item 8 above)**	0
10	Increase in Work Quantities.	96
11	Delayed relocation of UMEME High Voltage Power Lines	55
12	Abnormal Rainfall	25
13	Abnormal Rainfall	10
	Grand Total – Extension of Time	**899**

1.10. The Parties chose to appoint a one - person Dispute Board (DB) 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 DB. The following person was duly appointed as the DB member with effect from 27th January 2021:

Henry M Musonda (Sole DB member)

DB's Terms of Reference & Jurisdiction

1.11. 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 DB 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 DB and approved by both Parties, the DB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause…"

1.12. 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".

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

1.14. In terms of the Procedural Rules, the DB 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 DB 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.

1.15. 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 DB is not acting as an Arbitrator.

1.16. The DB's Decision is binding upon the Parties as a matter of contractual agreement. Should either Party be dissatisfied with the DB's Decision, after giving notice of such to the other Party within 28 days of the DB 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 DB's Decision, the DB's Decision becomes final and binding.

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

DB Dispute Resolution Process and Timetable

1.18. The Dispute arises from the Employer's rejection of the Engineer's determination of the Contractor's claim for payments for Head Office Overheads for various extensions of time garnted by the Employer for completion of the project. The Contractor has previously submitted the Claims to the Engineer in respect of prolongation and Head Office Costs and a number of Determinations were issued which after review, were all rejected by the Employer, in line with the Contract provisions, on the basis that the Head Office Overheads claimed by the Contractor were, all paid and covered under "Bill Item 13.01 (b) – Time Related Obligations." The Employer rejected the claim in its entirety.

1.18.1. The Contractor's Claim for Head Office Overhead Cost of UGX 36,197,059,717 was submitted to the Employer on 12 February 2020.[1] On 5th March 2020, the Employer through its Resident Engineer wrote to the Contractor rejecting the entire claim on the basis that it had already paid the overheads for the extended period.[2]

1.18.2. The Contractor did not accept the determination and on 13th March 2020 declared a dispute and requested the Employer to appoint an adjudicator[3] pursuant to Sub-Clause 20.2 of the particular Conditions of Contract. This was followed by similar letters on 7th May 2020, 7th July 2020, 7th October 2020, and 28th October 2020.

1.18.3. Consequently, on 21st January 2021[4] the Employer notified the Contractor of my appointment as sole member of the Dispute Board.

1.18.4. On Friday 16th July, 2021 the DB held a virtual Preliminary meeting and the Parties agreed to the following timetable:[5]

	Description	Time (days)	Due Date
•	Contractor's Referral	+28 days	16 Aug 21
•	Employer's Response	+28 days	13 Sep 21
•	Contractor's Reply	+7 days	20 Sep 21
•	Employer's Rejoinder	+14 days	04 Oct 21
•	Close of pleadings	+7 days	11 Oct 21
•	Hearing	+21 days	01-05 Nov 21
•	DB Decision	+35 days	10 Dec 2021

[1] Contractor's letter JV SBI&RCC/516/KM/2020/0362
[2] Employer's letter UNRA/WORKS/2014-15/00009-0470
[3] Contractor's Letter JV SBI&RCC/516/KM/2020/0365
[4] Employer's letter UNRA/PR124/200
[5] DB Procedural Order No.1 dated 17 July 2021

1.19. In accordance with the Procedural Timetable, the Contractor submitted its Referral to the DB on 16 August 2021. The Contractor referred the matter to the DB pursuant to GCC Clause 20.4. A "soft copy" of the Contractor's Referral Submission was e-mailed to the DB on 13 August 2021 and a hard copy couriered and received by the DB.[6]

1.20. The Employer submitted his Response on 13 September 2021.

1.21. The Contractor duly submitted his Reply on 20 September 2021. The submission was still in compliance with the above timetable.

1.22. The Employer submitted his Rejoinder on 30 September 2021.

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

1.24. The Parties agreed to a hearing. The dates, 1st to 5th November 2021, were set aside for the hearing, in Kampala.

1.25. The Contractor was allowed 28 days to submit a Referral after the date of Notification. Parties also confirmed that the DB would be afforded at least 30 days from the 5th of November 2021 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 DB Decision on Referral No. 1 was extended by 32 days to:

	Time	Due Date
DB Decision	116 days	10 December 2021

1.26. In summary, the submissions received by the DB comprised letters, attachments (overview and Appendices, Tables, and Works Contract Agreement"[7].

1.27. The DB has carefully studied and considered all the submissions made to it and now makes its Decision based on these submissions, documents and communications. The DB shall provide a basic reasoning in order to give the Parties a general understanding of how it arrived at its Decision. The DB 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.

[6] Contractor letter dated 13 August 2021 VJ/SBI-UNRA/1521/19.
[7] "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)

1.28. Conduct of the virtual Hearing

1.28.1. On the request of the Parties via email dated 29 October 2021, a virtual hearing was held on 3rd November 2021, between 09.30hrs to 1430hrs, and followed the Agenda issued by the DB, and the "Notes on the Conduct of Hearings" previously issued by the DB.

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

1.28.2.1. The Contractor's team:

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

1.28.2.2. The Employer's team:

Eng. Stephen Kizza, Resident Engineer
Eng. Harriet Namuwonge, Contract Manager
Eng. Joseph Mbaziira, Project Engineer
Ms. Esther Kusiima- Legal Representative
Ms. Barbara Rwobusheru-Legal Representative
Ms. Philo Nyadoi - Legal Representative

1.28.3. 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. The Dispute arises from a claim for Head Office Overheads, following various extensions of time granted to the Contractor during the course of the contract.

2.2. During the course of the contract and on various occasions, the Engineer granted to the Referring Party, extensions of time due a number of delay causes. The Claimant argues that it is entitled to the payment of UGX 36,197,059,717 due to the delay.

2.3. On 25 January 2018, the Claimant submitted a financial claim for prolongation costs for 202 days including a claim for UGX 10,473,148,443 for Home Office Overheads (HOOH). This claim was rejected by the Engineer for lack of substantiation.

2.4. Following the Contractor's response on 15th February 2018, on 5 April 2018, the the Engineer made a determination and recommended to the Employer that the Contractor was only entitled to UGX 7,362,312,272 as Head Office Overheads for the then, 142 days extension of time. The Head Office Overheads where calculated using the Hudson formula.

2.5. On 10 April 2018, the Responding Party informed the Contractor that the "Engineer", ACE would end their services on 13 April 2018 and that its employee, Eng. Samuel Muhozi would perform the duties of the SC 3.1, the "Engineer" effective 14 April 2018.

2.6. The Employer reviewed the Engineer's determination and on 2nd Mav 2018 notified the Engineer of its observations as listed below:

2.6.1. *The inputs used for Hudson's Formula for Head Office Overheads was 18.6% contrary to the 3.3% as provided in Table F, Supplementary Breakdown of Prices.*

2.6.2. *The Contract sum considered included Contingencies and VAT. This was not consistent with Table F. Supplementary Breakdown of Prices.*

2.6.3. *There was no evidence presented for the actual expenses incurred by the Contractor over the extended period.*

2.7. Based on the above observations, the Employer rejected the Engineer's determination (Refer to Statement of Defence (SoD) Appendix 15).

2.8. On 28th May 2018, the newly appointed "Engineer" issued a letter recommending the use of the Eichleay formula rather than the Hudson formula for the calculation of the Head Office Over Heads and recommended, in accordance with Sub Clause 3.5, a sum of UGX 922,469,416 as opposed to UGX 10,473,148,443 claimed by the Claimant.

2.9. On 30 May 2018, Contractor under cover of its letter JV SBI&RCC/516/KM2018/0026 reduced its claim for Head Office Over Heads to UGX 5,906,630,493. The Contractor alleges that this was done in an effort to resolve the matter amicably.

2.10. On 17 July 2018, UNRA responded by alleging that Head Office Over Heads were in fact already paid for under Payment item 13.01(b) of the Bills of Quantities and General Specifications.

2.11. Further extensions of time were awarded to the Contractor between 2018 and 2019 and on 12 February 2020, the Contractor submitted a revised claim in the total sum of UGX 36,197,059,717 for Head Office Over Heads for a combined 763 days extension of time.

2.12. On 5 March 2020, the Employer notified the Contractor of its final decision rejecting the entire claim.

2.13. On 13 March 2020, the Contractor declared a dispute and requested for the appointment of an Adjudicator. The Contractor alleges that the Employer unreasonably delayed the appointment of the Dispute Board (DB), instead of 21 days after the notice to refer the dispute to the DB, until 27th January 2021.

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

3. The Parties Pleadings

3.1. The Contractor's Case

3.1.1 The Contractor claims head office overheads costs for the various extensions of time of completion for the project. (see summary in Table 1 above). It is not in dispute that the extensions were granted by the Employer for various delays related to variations, instructions or changes and in accordance with the provisions of Sub Clause 13.1, 14.8, 8.4, 3.5, 20.1 of the Conditions of the Contract.

3.1.2 The Contractor further submitted that the Claim was made in accordance with SC 20.1 and complied with all relevant procedures under the Contract. On this point, the Employer did not raise any issue at all.

3.1.3 The Contractor further submitted that its claim is based on the various provisions of the Contract including:

i) SC 1.1.4.3 which stated:

> *"Cost" means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.*

ii) Bill No.1 General: Item 13.01(b) for Time Related Obligations

iii) Extension of Time for Completion granted by the Employer of 937 days (adjusted to 899 days for concurrency delays)

iv) Table F – Contractor's Tender Price Breakdown which provided for 18.6% of the original Contract Sum as mark up for office overhead costs

v) Original Contract Sum of UGX 253,940,121,150 (Uganda Shillings Two Hundred Fifty-Three Billion, Nine Hundred Forty Million, One Hundred Twenty-One, One Hundred Fifty Only), inclusive of Applicable taxes as per notification of award of tender dated 12 January 2015, and based on the provision under SC 1.1.4.2 which defined Contract Price as:

> *"Contract Price" means the price defined in Sub-Clause 14.1 [The Contract Price], and includes adjustments in accordance with the Contract.*

vi) The Contractor further submitted that the Claim was made in accordance with SC 20.1 and complied with all relevant procedures under the Contract. On this point, the Employer did not raise any issue at all.

vii) On the use of the Hudson Formula to determine Home Office Over Heads set out in Hudson's Building Contracts, at page 599 of the 10th Edition, which was also used by the Resident Engineer.

3.1.4 The Contractor, therefore, claims the sum of UGX 48,659,247,818.13 (Uganda Shillings Forty Eight Billion Six Hundred Fifty Nine million, Two Hundred Forty Seven Thousand Eight Hundred Eighteen and Thirteen cents) as additional payment calculated using the Hudson Formula as Costs of Head Office Over Heads (HOOH) for the delayed completion of 937 days.

3.2. The Contractor contended that:

3.2.1. As a result of the various extensions of time granted by the Employer, which delayed the completion of the Works, the Contractor incurred offsite costs for executive and administrative salaries, head office rent and expenses, legal and accounting expenses, utilities, telephone, computers for the home office, travel, for head office staff, professional fees, among other expenses as elaborated under its Claims submitted to the Engineer in Exhibits C6 and C21 of the Contractor's Statement of Claim (SoC).

3.2.2. The Employer admitted and confirmed the extension of time for completion of the project by 937 days. On this issue, the Employer submitted that the 38 days granted on 18 December 2018 for change of scope for asphalt overlay were concurrent with the EoT granted for Addendum No.1, thus reducing the total to **899 days**. The Contractor argued that the 38 days EoT was granted before the Addendum No.1 was signed, on 18th and 24th December 2018 respectively – 6 days apart. During the hearing, however, the counsel for the Contractor stated that the Claimant was willing to accept the 899 days as the total extension for the Time for Completion. Effectively this meant that the sum claimed is to be adjusted based on the 899 days.

3.2.3. The Contractor avers that during the extended period of time for completion of the Works in May 2017, he was awarded the Contract for the Development of Kabaale International Airport in Hoima Uganda by the Ministry of Works and Transport which Contract Commenced in April 2018 and, therefore, couldn't fully mobilize all the required resources for the new project due to the numerous extensions of time on the Mukono - Kyetume-Katosi/Kisoga-Nyenga/Nyenga-Njeru project which should have been completed by 27 July 2017. [An extract of the Contract was enclosed in Contractor's Bundle of Documents (CBoD) and marked Exhibit C25].

3.2.4. The Employer submitted that the Contractor received payment for HOOH under Bill item 13.01 (b) (time related obligations) amounting to UGX 37,578,888,576 in the Final Account. According to the Employer, the sum of UGX 37,578,888,576 represented the Contractor's 10.49% for Overheads Head Office incorporated in Table F of its tender, which amount was already incorporated in its Contract Price and Addendum No.1. The Employer made reference to Item 13.01 (b/c) for Time Related Obligations of the Bill 1 – General where the amount of UGX 37,578,888,576 was paid.

3.2.5. The Contractor rejected the Employers submission and contended that he had never received any such payment, over and above the entitlement under Item 13.01(b). The Contractor's argument was that the overheads covered in the Bill Item 13.01(b) only related to general site and site office overheads and did not include Head Office and Home Office Overheads (HOOH).

3.2.6. In response to the Employer's submission of the details of extension of time of 937 days, the Contractor amended its claim from UGX 36,197,059,717 (Uganda Shillings Thirty Six Billion One Hundred Ninety Seven Million Fifty Nine Thousand Seven Hundred Seventeen) based on 763 days of extension time, to the sum of **UGX 48,659,247,818.13** calculated using the 937 days of Time Extension, and using the Hudson Formula and Contract parameters as follows:

(HO OH Percentage in the Contract) 100 x (Contract Sum)/ (Contract Period) x Period of Delay

HOOH Percentage in the Contract:	18.63%
Accepted Contract Sum:	UGX 253,940,121,150
Original Contract Period:	911 days
Period of Delay for HO OH:	937 days

Therefore, HOOH Claim:

= 18.63% x (253,940,121,150)/911 x 937: **UGX 48,659,247,818.13.**

3.2.7. The Contractor's submission was that all previous claims e.g. for UGX 36, 197,059,717 based on 763 days of EoT including the current updated one for 937 days (as shown above) was correctly calculated based on the aggregate percentage of 18.6% as HOOH Percentage in the Contract provided for in Table F. The argument was that:

3.2.7.1. Table F provides for an aggregate rate of 10.49% for overhead fees including (a) overheads head office of 3.3%, (b) fees, profit of 3.0%, finance charges of 1.76%, freight of 0.34%, insurance and bonds of 1.19% and taxation of 0.90%.

3.2.7.2. Table F also provides for an aggregate rate for middle management costs of 1.95% including (a) salaries of 0.82%, social charges of 0.60% and others at 0.52%.

3.2.7.3. Table F further provides for an aggregate rate of management costs of 6.19% including salaries and wages of 5.24%, social charges of 0.61% and others at 0.34%.

3.2.7.4. The total percentage is therefore the total sum of overhead fees at 10.49%, middle management costs at 1.95% and management costs of 6.19% which aggregates to the percentage of 18.63%.

3.2.8. Regarding the use of the Hudson formula to calculate entitlement of Head Office Over Heads (HOOH) costs, the Contractor argued that the use of the formula was based on its experience as a seasoned Contractor in Uganda who has constructed over 1,000 Km of roads and as an international contractor consistently ranked in the ENR Top 250 International Contractor list. The Contractor added that despite criticizing the Hudson Formula in their response, the Employer did propose an alternative formula that the Adjudicator could use to resolve the dispute.

3.2.9. The Contractor further contended that, in determining the overheads, the Engineer applied the Hudson formula which has been approved in the cases of *Ellis Don Limited v. The Parking Authority* as well as *JF Finnegan v. Sheffield City Council* where the Judge observed 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 contract which would have had the effect of funding the overheads during the overrun period."*

According to the Contractor, this principle was also approved in the Canadian case of *Shore & Horwitz v Franki* of Canada, and that it was also applied by the Mr. Recorder Percival QC, in the unreported case of *Whittal Builders Company Ltd v Chester Le Street District Council (1984).*

3.2.10. The Claimant denied the assertion from the Employer that there was uncertainty on the Contractor's part and an attempt to make an unjust and unsubstantiated claim. The Contractor argued that the Head Office Overheads claim was justified since he was delayed in completing the original scope and the addendum No.1 works due to the Employer's default of delayed instructions, changes to the design, numerous changes in the scope of the works and delayed payments as aforementioned. The Contractor further argued that, as a result of the delays, its resources which would have been used on another contract but couldn't since he was kept on site for an additional extended period, hence its entitlement to payment of unrecovered head office overheads (HOOH) for the works delayed by 937 days.

3.2.11. Regarding the Employer's argument that the head office over heads were paid as part of the time related obligations in item 13.01 of the Bill of Quantities during the extended period, the Contractor contended that the same only covered the site office overheads at Mukono Katosi and did not cover the offsite overhead costs for the Contractor's Head Office in Kampala, Uganda, (SBI-Uganda) Nigeria (RCC), Switzerland and Israel (SBI).

3.3. **Remedies Sought by Contractor**

The Contractor seeks the following decision(s) from the DB in its favour:

3.3.1. **Payment for amount as claimed**: A declaration that JV SBI&RCC is entitled to payment of UGX 48,659,247,818.13 (Uganda Shillings Forty Eight Billion Six Hundred Fifty Nine million, Two Hundred Forty Seven Thousand Eight Hundred Eighteen and Thirteen cents) in accordance with sub clauses 20.1, 13.1, 8.4, and 3.5.

Following the acceptance by both Parties, of the 899 days as the total days extended, the amount stated at paragraph 3.2.5 above, was therefore, adjusted to: UGX 46,685,873,840.45

3.3.2. **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.

3.3.3. **Costs:** A declaration that JV SBI&RCC is entitled to payment of costs incurred in relation to this Adjudication in accordance with **Sub Clause 20.2.**

3.4. **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 of HOOH or any financing charges nor interest applicable to the claim:

3.4.1. The Employer rejects the Contractor's claim for HOOH and argues that the cost being claimed was already reimbursed by the Engineer under payment item 13.01(b) which took into consideration all general site and office overheads for the extended period as evidenced by Table F. Supplementary Breakdown of Prices.

3.4.2. According to the Employer, Bill No.1 General and Item 1300 (which comprise Bill Item 13.01 (b) -Time Related Obligations in the Bills of Quantities) were defined under the General Specifications to include all **general site and office overheads (Employer's emphasis),** profits, financing costs, risks, legal and contractual responsibilities and other costs of a preliminary or general nature which were not specifically measured for payment under any other items of payment. The Employer further submitted that the provision made no distinction between site office and head office. The Employer, therefore, contended that the Contractor's submission under Paragraph 5.2(c) of the Statement of Claim had no basis in law and fact.

3.4.3. The Employer rejected the Contractor's contention that the time related obligations were payments for the site office at the project in Mukono - Katosi and did not cover offsite overhead costs for the Contractor's head office in Kampala, Switzerland, and Israel, as lacking merit.

3.4.4. As regards the Contracator's application of the rate of **18.6%** of the Contract Sum (indicated under **Paragraph 5.4 Table F of the Contractor's Tender Price Breakdown)** as the agreed rate for Head Office Overheads under the Contract, the Employer argued that the rate was erroneous. According to the Employer, the applicable rate for Overheads Head Office under the same Table F-Supplementary Breakdown of Prices, was 3.3% **.** The Employer concluded that payment of all associated time related obligations under Bill item 13.01 (b) were included in the certified IPC amounts for the works executed and that these included the portion of the Head Office Overheads costs being claimed by the Contractor.

3.4.5. The Employer's contention was that the Original Contract Price comprised 3.3% Head Office Overheads amounting to UGX 5,918,096,044[8], and that following the execution of Addendum No. 1 the Contract Price was revised to UGX 234,085,948,066 (exclusive of Contingency of 20% and 18% VAT) which also included the 3.3% portion for Head Office Overheads amounting to UGX 7,724,836,286 which was duly certified and paid under Item 13.01(b). Accordingly, the Employer argued, this constituted full payment of all associated time related obligations for the works executed and covered the office overhead costs being claimed for by the Contractor.

[8] Table F. Supplementary Breakdown of Prices

3.4.6. As regards the Contractor's submission that the use of the Hudson formula was approved under case law, the Employer submitted that such submission was a misrepresentation as on several occasions it has been considered to cause double payment.[9] The Employer argued that other formulas were relied upon to determine such overheads adding that, the Hudson formular did not provide any assistance to the determination of the percentage rate for profit and overheads recovery for a particular case. The Employer avered that there was a preference for the other two formulas, which were considered as slightly more precise and referred to some publication in support of its view.[10]

3.4.7. The Employer's position was that , the above assertions notwithstanding, the Contractor had not presented the actual office overhead costs expended or incurred as a result of the awarded extension of time. It was also the Employer's contention that the Contractor had not demonstrated how the EOT of 763 (later amended to 937) days caused the Contractor delay and disruption that prevented the Contractor from taking on other projects and hence reduced turnover over the period, to support its claim for recovery of the overheads. The Employer's argument was that for the claim to stand, the Contractor needed to demonstrate that it had failed to recover its overheads and profit it could reasonably have expected during the period of prolongation and that it has been unable to recover such overheads and profit because its resources were tied up by Risk Events attributed to the Employer.

3.4.7.1. The Employer submitted that the Contractor's claim failed to meet the principles of substantiation (that he who asserts must prove), as the Contractor had not furnished any evidence to support its claim of loss for overhead costs including fees for management, middle management and for skilled personnel, 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. In addition, the Employer argued that there was no evidence of Contracts that the Contractor had undertaken or bid for works but were not executed as a result of the delay caused by the various extensions of time (EOT) issued by the Employer.

3.4.7.2. Secondly, the Employer's submission was that the general standard of substantiation applied which is based on a balance of probabilities to argue that,

[9] SCL Delay and Disruption Protocol, 2nd Edition 2017 para. 2.10
[10] The Sad Truth About Overheads and Profit Claims available at:
https://www.adjudication.org/resources/articles/sad-truth- about-overheads-profit-claims.

if the Contractor fails to discharge the burden of proof to prove their case, the claim should be dismissed or that the Employer will not have a case to answer.

3.4.8. In support of its submission, the Employer relied on writings of the learned authors *R Peter Davidson & John Mullen; Evaluating Contract Claims 2nd Edition pg. 3, to argue that the second principle of proof, while indicating a balance of probabilities does not imply that assertions need not be fully evidenced where it is reasonable to expect such evidence.*

3.4.9. *The Employer also cited a number of cases, namely:.*

3.4.9.1. Case (i) in *CJ Sims Ltd v Shaftesbury plc*[11] **where** Judge John Newey stated that:

'Its words are peremptory – "all must be substantiated in full" and the substantiation is to be "to the….satisfaction of (the defendants') quantity surveyor. The only qualification is that the quantity surveyor cannot require more than is "reasonable".'

3.4.9.2. As to the Cases relied on by the Contractor, namely, *Ellis Don*[12] and *JF Finnegan*[13], the Employer submitted that the cases clearly stipulated 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'.

The Employer's argued in this case, that the Contractor has not established the evidence needed to satisfy the costs incurred as a result of the delayed completion nor demonstrated financial losses at it's Head Offices to warrant payment of any Head Office Overheads.

3.4.10. By way of rejoinder, the Employer submitted that:

3.4.10.1. The Contractor had failed to substantiate the claim by way of evidence in form of number of employees that were employed at its Head Office, the rent payable and the period of time spent as a result of multiple extensions of time.

[11] CJ Sims Ltd v Shaftesbury PLC (1991) 60 BLR 94
[12] Ellis Don (n13)
[13] JF Finnegan (n14)

3.4.10.2. The Contractor had not provided evidence to support the assertion that he was unable to mobilize all resources nor demonstrated any negative implications of the time extension on the new project (the development of Kabaale International Airport in Hoima) during the period of extension of the project. The Employer's argument was that the implementation of various projects concurrently does not in itself amount to disruption unless it can be demonstrated that the resources, 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.

3.4.11. As regards the Contractor's claim of 38 days (50mm Asphalt overlay from Km 0+000-KM4+000) awarded by the Engineer as extension of time, the Employer submitted that the EoT was not approved by the Employer because this period was concurrent with the extension of time due to Addendum No.1, therefore, the total period of EoT amounted to 899 days as illustrated in the Employer's response. The Employer, also submitted that in accordance with item A16 of the scope of Works, the additional extension of time of 35 days due to abnormal rainfall does not comprise part of the prolongation claim days.

3.4.12. During the hearing, the Contractor accepted the 899 days as valid, but rejected the Employer's submission that the 35 days were not compensable for costs.

3.4.13. As a result of the foregoing, the Employer seeks the following decision(s) from the DB:

3.4.13.1. The Contractor is not entitled to the revised sum of **UGX 48,659,247,818.13** (Uganda Shillings Forty Eight Billion Six Hundred Fifty Nine million, Two Hundred Forty Seven Thousand Eight Hundred Eighteen and Thirteen cents) and any financing charges or interest applicable to the claim.

3.4.13.2. Any other relief deemed fit.

3.5. Undisputed Facts

The following facts are not in dispute:

3.5.1. The parties entered into a Contract dated 12th January 2015 which commenced on 27th January 2015. Original completion was 27th July 2017 but was, by various extensions granted by the Employer, extended to 10th January 2020.

3.5.2. The Original Contract Price was UGX 179,336,243,750 (exclusive of 20% Contingency and 18% VAT). Following the execution of Addendum No. 1, the Contract Price was revised to UGX 234,085,948,066 (exclusive of Contingency of 20% and 18% VAT).

3.5.3. Table F – Supplementary Breakdown of Prices provided the Contractor's Tender Price breakdown for labour, equipment, plant, materials as well as overhead costs and profit for all work was part of the Contractor's Appendix toTender and Contract Agreement.

3.5.4. Time for Completion was extended by 899 days as summarized in Table 1.

3.6. **The Issues to be Determined and format of decision**

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

3.6.1. **Issue 1:** To determine whether or not Head Office Overheads paid to the Contractor as part of the certified payments under item 13.01(b) of the bill of quantities covered all associated head office over heads for both executed works and the time delays, being claimed by the Contractor?

3.6.2. **Issue 2:** If the finding in issue 1 above is that Head Office Overheads for the extended period were NOT paid, then to determine whether or not the Contractor is entitled to payment of UGX 48,659,247,818.13 or other amount to be determined by the DB, arising from the same?

3.6.3. **Issue 3:** To determine 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?

3.6.4. **Issue 4:** To determine whether or not the Contractor is entitled to Costs of adjudication?

3.6.5. **Issue 5:** In the alternative, to determine whether or not the Employer is entitled to any remedy as a consequence?

4. Analysis and Findings

4.1. The DB's Deliberations & Findings

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

4.1.2. The DB 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 DB 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 DB 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 DB arrived at its decision.

4.2. **Issue 1: Payment under item 13.01(b) of the bill of quantities**

Whether or not Head Office Overheads paid to the Contractor as part of the certified payments under item 13.01(b) of the bill of quantities covered all associated head office over heads for both executed works and the time delays, being claimed by the Contractor?

4.2.1. The Contractor claims payment for Head Office Over Heads (HHOH) arising from various Extensions of Time for the delayed Completion of the Project. The Contractor claimed an amount of UGX 36,197,059,717 in Head Office Overheads for the 763 days extension of time. This amount was further revised to **UGX 48,659,247,818.13** in the Contractor's reply to the Employer's response on the basis that the Employer has admitted and confirmed the extension of time for completion of the project as being 937 days and not 763 days.

4.2.2. The Employer contends that the Contractor is not entitled to payment of any sums for HOOH.

4.2.3. In objecting to the Contractor's claim for Overheads, the Employer relied on the General Specifications to argue that item 13.01(b) of the bill of quantities covered in full the cost of time related obligations relating to all general site and office overheads, profits, financing costs, risks, legal and contractual responsibilities and other costs.

4.2.4. The Employer's submitted that the Contractor received payment for HOOH under Bill item 13.01 (b) (time related obligations) amounting to UGX 37,578,888,576 in the Final Account. According to the Employer, the sum of UGX 37,578,888,576 represented the

Contractor's 10.49% for Overheads Head Office incorporated in Table F of its tender, which amount was already incorporated in its Contract Price and Addendum No.1. The Employer made reference to Item 13.01 (b/c) for Time Related Obligations of the Bill 1 – General where the amount of UGX 37,578,888,576 was paid. The Employer further argued that, it was for this reason that the Engineer, disallowed the Contractor's for Head Office Overheads amounting to UGX 7,724,836,286 as it considered the amount already covered in its revised Contract Price (Addendum No.1) was, therefore, duly certified and paid under Item 13.01(b). Accordingly, the Employer argued that, the amount of UGX 37,578,888,576 constituted full payment of all associated time related obligations for the works executed and covered the office overhead costs being claimed by the Contractor.

4.2.5. The Contractor rejected the Employers submission and contended that he had never paid been paid any such payment, over and above the entitlement under Item 13.01(b). The Contractor's argument was the over heads covered in the Bill Item 13.01(b) only related to general site and site office overheads and did not include Head Office and Home Office Overheads (HOOH).

4.2.6. The starting point in determining this issue is a consideration of the provisions of the Contract with regard to entitlement to recovery of cost of increased office overheads. Both Parties discussed the provisions of Section 1300 [Contractor's Establishment on Site and General Obligations] and in particular, the payment provision laid down at Sub-section 1304 of the Special Specifications. Because of the importance of the clauses, which provided for payments regarding fixed and time related obligations, I shall quote the relevant part of **Sub-section 1304 – Payment Item 13.01** of the Special Specifications in full here:

"Payment of the sums tendered under Sub items (a), (b) and (c) shall, for the three sub items together, include full compensation for all the Contractor's charges in respect of the following items, collectively termed the "Contractor's General Obligations".

a) Setting up and maintaining his organization, camps, accommodation and construction plant on the site and their removal on completion of the Contract

b) Complying with the requirements of the General Conditions of Contract and Section 1200 of the Specifications, including the effecting of insurance and providing the sureties required.

c) <u>All</u> general site and <u>office overheads</u>, <u>profit</u>, <u>financing costs</u>, <u>risks,</u> legal and contractual responsibilities and <u>other costs</u> and obligations of a preliminary or

general nature which are not specifically measured for payment under any other items of payment. [Emphasis added]

4.2.7. From the written submissions, it was not in dispute that the bill of quantities showed that indeed there was a payment item 13.01 (b) *'Time Related obligations'* with a monthly rate of UGX 644,356,800. The Employer submitted that as of IPC No.48 the Contractor had invoiced for a total of 58.32 months (1773 days) in time related obligations. This was against the 36 months (1095 days) originally allowed for in the contract. I perused the Employer's Rejoinder to Contractor's Reply, and find that under Appendix 3, an amount of UGX 37,578,888,576 was certified in the Final Payment under Bill Item 13.01(b/c) [Time Related Obligations].

4.2.8. The Employer's contention was that the Claimant had already been paid Time related Costs for the work completed and measured, therefore, no outstanding payment was due. The argument by the Claimant was that the payment of of UGX 37,578,888,576 related to Site Overheads only, and the claim for UGX 48,659,247,818.13 was for Head Office Overheads Costs arising from the various extensions of Time for Completion. According to the Contractor, it was entitled to an additional payment based on the generally accepted principle that:

> *"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".*

4.2.9. According to the Claimant, Table F [the Supplementary Price Breakdown of Prices submitted as part of its Tender] formed part of the Contract Agreement where the Contractor allowed for home office overhead in his markup of direct costs in his rates which also covered work changes and variations. This is evidenced at "Item 9" of Table F where the sub-total for "*Overheads, Fees"* amounted to 10.49% of the measured items. The DB notes that the Claimant has claimed 18.6% as the total rate for HOOH, which the Employer rejected. The DB will decide on the issue of whether 10.49% or 18.6% or other is the applicable %, later.

4.2.10. As regards Payment Item 13.01(b) of the Special Specifications, the Employer correctly pointed out that; *"the provision makes no distinction between site office and head office*", adding that for this reason the Contractor's claim had no basis in law and fact. The Employer's argument was that the Contractor was already compensated for office

overheads in his Time related Costs under 13.01(b), and therefore, required no further compensation.

4.2.11. The detailed submissions are all on record and the question as I see it is whether the provision under Table F can be ignored, given the fact that the Bill Item 13.01(b) also provided for Office Overheads such that the payment made to the Contractor for certified amounts for the executed works, and based on the revised Contract Price, covers ALL OFFICE OVERHEADS associated with time related obligations for the extended time of 937 days?

4.2.12. I FIND from the wording of this Pay Item 13.01(b) that it does not render other pay items for Head Office Costs inapplicable. The consequence of the two provisions, namely Special Specifications Item 13.01(b) and Table F of the Contractor's Tender, is that in addition to the Time related obligations under Bill of Quantities Item 13.01(b) which included Office Over Heads and General Obligations, the Claimant included an additional percentage (%) for HOOH and Profit in all his rates for various activities e.g. labour, materials, equipment etc applicable to the measurable inputs for all the work. This mark-up (or payment) was already embedded in his rates for the various work items and was an entitlement to be recovered by the Contractor regardless of whether or not the change or variation causes a delay or not. I also do recall what the Employer had to say on this point during the hearing – he argued that both the pay Item 13.01(b) and the Bill Items in the Contract included an element of Profit and Office Overheads. For my part, I agree with the submission.

4.2.13. It is therefore, my FINDING that the contract had two stand-alone provisions for the recovery of office overheads, that is:

4.2.13.1. a mark-up on time related overheads under bill item 13.01(b). and another

4.2.13.2. mark-up on all work activities (on all rates for measured items) under Table F.

Was the Contractor entitled to recovery of office overheads under both Bill Item 13.01(b) and Item 9 of Table F?

4.2.14. I now turn to the issue of office overheads paid under Bill Item 13.01(b). It is not in dispute that the Contractor was reimbursed for the time-related obligations under bill item 13.01(b) which included office overheads. According to the Contractor, this particular claim before me relates to unabsorbed head office overheads **resulting from delays attributed to the Employer**. On this point, the Claimant's submission, in my view, is

supported by paragraph 1304(iii) which showed that it was possible to have other HOOH obligations which were measured under other items, as in this case.

4.2.15. The Employer asked me to disregard the Contractor's contention under Paragraph 5.2(c) that time obligations paid under Bill Item 13.01(b) were for the site office and did not cover Costs for the Contractor's Head Office. I have already noted that, in its tender, the Contractor priced for Over Heads – firstly, under Item 9 of Table F [the Supplementary Price Breakdown of Prices submitted as part of its Tender] and also under Payment Item 13.01(b) which covered the Contractor's General Obligations including those *not specifically measured for payment under any other items of payment.* This being the case, I must agree with the Claimant that the entitlements for recovery of HOOH was such that he may recover under Bill Item 13.01(b) and under Item 9 of Table F. The fact that the Contractor was paid time obligations under the Bill Item did not preclude him from claiming under Item 9 of Table F. In my view, and it is already my FINDING and DECISION that the two provisions are separate and apply independent of each other, as follows:

4.2.15.1. Pay Item 13.01(b) applies to time related obligations, and

4.2.15.2. Item 9 of Table F[Supplementary Price Breakdown of Prices submitted as part of its Tender] applies to all other Bill of Quantities rates for labour, equipment, plant, materials, overheads costs and profit for all work.

4.2.16. **Accordingly, it is my FINDING and Decision that Bill Item 13.01 (b) and the provisions under Table F apply independently not withstanding that they both relate to the reimbursement of Office Overhead Costs. I will therefore, proceed to consider the Contractor's claim.**

4.3. **Issue 2: Entitlement to UGX 48,659,247,818.13 in Head Office Overhead Costs.**

Whether or not the Contractor is entitled to payment of **UGX 48,659,247,818.13** in overhead costs arising from various Extensions of Time for the delayed Completion of the Project?

4.3.1. The Contractor's calculation of the office overheads was based on the Hudson Formula and the original accepted contract sum of UGX 253,940,121,150.

4.3.2. The Contractor asked me to FIND in its favour that it is entitled to the above amount as Head Office Over Head Costs calculated at 18.63% using the Hudson Formula.

4.3.3. In its Statement of Claim, the Contractor asked the DB to find that he was entitled to payment of UGX 36,197,059,717 in Head Office Overheads for the 763 days extension of time. This amount was later revised to UGX 48,659,247,818.13 in the Contractor's

Reply to the Employer's response. The Contractor's basis of revision of the amount claimed was that the Employer had admitted and confirmed the extension of time for completion of the project as being 937 days and not 763 days.

4.3.4. The Employer asked me to reject the claim in its entirety.

4.3.5. It is necessary to address a number of sub issues raised by the Employer. That is;

1) Whether proof of loss of Head Office Overheads is a perquisite to claimimg HOOH?

2) Whether the contractor can apply the hudson formula or not? If yes, whether the mark-up of 18.6% and period of delay of 899 days are valid parameters?

4.3.6. I now turn to discuss the above sub-issues.

Sub Issues 2.1 Whether proof of loss of Head Office Overheads is a perquisite to claimimg HOOH?

4.3.7. The Employer contended that the Contractor did not present actual office overhead costs expended and further submitted that the Contractor failed to explain how he covered his overheads without the extension of time. The Employer argued that on the basis of the Claimant's failure to furnish any evidence as regards the number of employees that were employed at its Head Office or the rent payable and which resources were ready to be employed elsewhere but for the multiple extensions of time issued, "there is no information to support the claim, therefore, the claim does not meet the standard of substantiation and should be rejected. According to the Employer, the Contractor's claim for additional payment had no merit nor basis and, therefore, was speculative.

4.3.8. The Employer's further contention was that the Contractor did not demonstrate that the delay prevented him from taking on other projects and reduced turnover over the period to substantiate recovery of overheads.

4.3.9. I reviewed the written submissions and the legal cases relied upon by both Parties, in view of the Respondent's contention. **All I can say is that the Employer's argument relating to legal principles of 'substantiation' does not obviate the need for me to consider factually the grounds for resisting payment of the HOOH Costs, as to whether it was borne out of the contract agreement and whether it was valid or not.**

4.3.10. My understanding of the Contractor's claim is that he considers himself entitled to recovery of office overheads occasioned by the delays to the Works.

4.3.11. I am alive to the Contractor's submission as regards the delayed completion of the Works on or around 12th January 2020 instead of 27th January 2017, during which time the Contractor was awarded a contract for the development of the Kabaale International Airport in Uganda. The Contractor contended that because of the delays on the project with the Responding party it could not fully mobilize all its resources to that new project which commenced on or around 18th April 2018.

4.3.12. It is not in dispute that the original contract was scheduled to be completed on 27th July 2017. It is also not in dispute that due to numerous extensions of time granted to the Contractor, completion was revised to 12th January 2020.

4.3.13. The Employer contended that the Contractor did not demonstrate loss of funding to warrant payment of any Head Office Overheads nor provided any evidence of Contracts that the Contractor had undertaken or bidded for but were not executed as a result of the delay caused by the various extensions of time (EOT) issued by the Employer on account of the Contract in issue but, I reject it.

Increased Site and Office Overheads

4.3.14. I am alive to the requirements for claims relating to loss of overheads – that normally consists of costs such as rent, utilities, furnishings, office equipment, executive staff salaries, support and clerical staff salaries, project related staff (engineers, estimators, schedulers), mortgage costs, outside legal and accounting expenses, depreciation, auto travel, professional trade licenses and fees, employee recruitment, relocation, training and education, photocopying, entertainment, contributions, donations, postage, cost of preparing bids, review of submittals, taxes, advertising, insurance premiums, interest costs, and data processing/computer costs. The contractor needs to pay or recover these costs by allocating these costs to the projects it performs.

4.3.15. I do also have to agree with the general proposition which is also supported by authorities like the "SOCIETY OF CONSTRUCTION LAW, DELAY AND DISRUPTION PROTOCOL" which provides guidelines for compensation of claims for "Head Office overheads and Profit" and provides as follows:

> "Where there is Employer Delay to Completion, a Contractor will often include a claim for the lost contribution to head office overheads and the lost opportunity to earn profit (either on the project the subject of the claim or on other projects). This is on the basis that its time-related resources have been prolonged on the project, rather than earning revenue (including, importantly, contribution to head

office overheads and profit) on other projects from the contract completion date."[14]

4.3.16. I received many submissions for and against there being an entitlement to recovery of unabsorbed overheads if a project delayed. The Contractor submitted that he considered himself entitled to Head Office Overheads and management costs for the extended period beyond the Competion date.

4.3.17. I am alive to the accepted practice in the construction industry that Overheads may be claimed as part of the Contractor's loss and expenses claim for the additional requirement to stay on site and/or head office for a longer period than the contract anticipated as a result of a delay to the completion date as follows:

1. **If the delay is attributable to extra work, the Contractor may receive Head Office Overhead (HOOH) compensation from the mark-up on a change order.**

2. **If there is no extra work and project is experiencing delay, then the Contractor face under recovery of HOOH from the particular project.**

4.3.18. However, since it is very difficult to determine extra resources used in the head office. Some authorities like the "SOCIETY OF CONSTRUCTION LAW, DELAY AND DISRUPTION PROTOCOL" and legal cases provide examples of how Contractor's claims for unrecovered HOOH, regardless of actual expenses, have been dealt with provided the contract allows for it.

4.3.19. This is also supported by the observation made by Sir William Stabb QC in the case of J.F Finnegan which case has been relied upon by both parties. He observed that, *…"a claim for overheads during the period of overrun is not related to actual loss but is assessed by allowing for funding overheads during the period of overrun, for which the contract sum had not made provision."*

4.3.20. For reasons stated above, it is my FINDING and DECISION that proof of loss of office overheads is not a preliquisite to claiming them.

Sub-Issue 2.2: Whether the Contractor can apply the Hudson Formula or not? If yes, whether the delay period of 899 days and mark-up of 18.63% are valid parameters?

4.3.21. I reviewed the parties' arguments and reliance on several cases in support and opposition to the use of the Hudson formula.

[14] SCL Delay and Disruption Protocol, 2nd Edition 2017 para. 2.2, page 55

4.3.22. In this referral, the Contractor asked me to find in his favour that he was entitled to payment of UGX 36,197,059,717 in Head Office Overheads for the 763 days extension of time. This amount was further revised to **UGX 48,659,247,818.13** in the Contractor's reply to the Employer's response. The Contractor's basis of revision was that the Employer admitted and confirmed the extension of time for completion of the project as being 937 days and not 763 days. During the hearing, however, the Parties agreed to 899 days as total granted extension of time. Accordingly, the amount claimed is to be adjusted downwards. I shall deal with the revision of the days and resultant amount later.

Calculation of Overheads

4.3.23. The Contractor's calculation of the office overheads was based on the Hudson Formula arguing that the same has received wide judicial approval. The Contractor's argument was that the use of the Hudson formula to calculate unabsorbed head office overheads has been approved by the courts in the cases of *Ellis Don*[15],*JF Finnegan*[16], Shore & Horwitz, and Whittal Builders.[17]

4.3.24. The Employer's position was that this formula has on several occasions been considered to cause double payment. He argued that there is preference for the other two formulas, which are considered as slightly more precise. It was not clear which formulas the Employer referred to. However, in its post hearing clarifications, the Employer confirmed reference to the Emden and Eichleay formulae.

4.3.25. In its rejoinder, the Employer submitted that the Hudson formula was a misrepresentation of the HOOH claimed by the Contractor as he had failed to substantiate the basis of the claim and asked me to review the case law relied upon to reject its application.

4.3.26. I am alive to the technique for calculation of home office overhead damages, a claim category on construction projects, using the three (03) formulae, namely, the Hudson, Emden and Eichleay. Although the Formulae have been used in the construction industry over a long time it is always difficult to reach agreement on the method to use because each formula yields different results.

4.3.27. I therefore reviewed the three formulae, namely, the Hudson, Emden and Eichleay, presented by the Parties:

4.3.28. **Hudson formula:** The basic approach is to divide the contract sum by the contract period to calculate a daily value. This figure is then multiplied by the HO

[15] Ellis Don (n13)
[16] JF Finnegan (n14)
[17] Shore & Horwitz Construction Co Ltd v. Franki of Canada (1964) SCR 589

overheads percentage, giving the proportion of overheads represented by the contract value. This is then multiplied by the period of delay, in days, to determine the recoverable HO overhead and profit as follows:

$$\text{Recoverable HOOH} = \frac{\text{Tender Off-site Overheads \& Profit}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of Delay}$$

4.3.29. The ***Emden formula*** is identical to the Hudson formula, save that the head office overheads percentage (and profit) used is the actual percentage based on the contractor's accounts and is arrived at as follows:

$$\text{Recoverable HOOH} = \frac{\text{Actual Off-site Overheads \& Profit}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of Delay}$$

4.3.30. The ***Eichleay* formula** uses the actual overheads in the similar manner to the Emden, but the total contract turnover including variations is inserted in lieu of the Contract Sum.

4.3.31. The Contractor's application, however, was based on the Hudson formula. During the hearing the Contractor testified that the use of the Hudson formula was supported by the Construction Management Association of America Journal, which was shared post hearing. According to the Contractor, the journal supported the use of the Hudson formula where the appropriate parameters had been provided in the contract, in an apparent refernce to the Table F [the Supplementary Price Breakdown of Prices submitted as part of its Appendix to Tender] in which the Contractor provided mark-ups for office overheads and for management fees for head office staff. The Contractor further argued that the Engineer had relied on the same formula, although this was later changed by the replacement (inhouse) Engineer to Eichleay formula.

4.3.32. The Contractor objected to the use of the Eichleay's formular because the parameters were not those stated in his tender or the contract agreement. The Contractor submitted that although the inhouse Engineer used the Eichleay's formular, the parameters used were wrong and made reference to exhibit C10, page 82 of its Statement of Claim.

4.3.33. I perused the Engineer's computation at C10, page 82 as referenced above and FIND that although the Resident Engineer indicated the use of the Eichleay formular, it is clear to me that the assumption made of only one project at the time, effectively converted the formula to the Hudson. It is already my Finding that the Contractor had more than one project at the time (Commencement Order for Works for the Development of the Kabaale International Airport in Hoima, Uganda was dated 23 April 2018 during and this was

during the period of delay namely, 27th January 2017 to 12th January 2020), therefore, the assumption was incorrect. Accordingly, I am persuaded by the Contractor's submission that the Employer relied on the same Hudson formular, save for its rejection of the amounts computed on the basis that the HOOH were already compensated to the Contractor under Bill Item 13.01(b).

4.3.34. The Contractor went on to argue that the use of the Hudson formular was correct as the parameters (Table F mark-ups) were provided in the Appendix to tender, which according to him was also confirmed by the Employer's reference to the same parameters/Table F in its Rejoinder. On this issue, it is not in dispute that Table F [the Supplementary Price Breakdown of Prices] was submitted as part of its Tender.

4.3.35. I now turn to the Contractor's reliance on legal cases to support it's use of the Hudson formular. The Employer relied on the same precedents to make its case.

4.3.36. The argument that the decisions of the courts in the cases of *Ellis Don*[18] and *JF Finnegan*[19] supported the Contractor's position, that the use of the Hudson formula to calculate unabsorbed head office overheads has been approved.

4.3.37. I reviewed the cases and authorities relied upon by both parties:

4.3.37.1. The Hudson formula found favour with the judge in *Ellis Don*[20] but it is worth noting that in that case neither counsel could think of a better approach.

4.3.37.2. In the JF Finnegan v Sheffield City Council (1988), the claimant contractor brought a claim for loss and expense as a result of its inability to adhere to the contractual timetable resulting from batches of houses being handed over out of sequence. The Court held that the contractor's loss in respect of lost overheads and profit was to be calculated by looking at the fair annual average of the contractor's overheads and profit as a percentage figure, multiplied by the contract sum and the period of weeks of delay, divided by the contract period (this is known as the 'Hudson formula'). However, recovery of such costs is only possible if the contractor can demonstrate that he could have been employed on another contract that would have the effect of funding the overheads during the period of delay.

4.3.37.3. In *JF Finnegan*[21] Sir William Stabb O.R. said:

[18] Ellis Don (n13)
[19] JF Finnegan (n14)
[20] Ellis Don (n13)
[21] JF Finnegan (n14)

> *"……I infinitely prefer the Hudson formula which, in my judgment, is the right one to apply in this case, that is to say, overhead and profit percentage based upon a fair annual average, multiplied by the contract sum and the period of delay in weeks, divided by the contract period" [Emphasis added]*

4.3.37.3.1. It is also important to mention here that even though Sir William Stabb appeared to prefer the use of the Hudson formula**,** it would appear that he did not fully understand the Hudson formula as the method he referred to points to the Emden's formula which utilises the overheads based upon the 'fair annual average' and not the percentage allowed for at tender. Additionally, the facts of the case where such that the contractor had calculated his overheads using his own invention and not any of the three formulas. It follows that the statement of QC Stabb was not made in comparison of the three formulas and as an endorsement of the Hudson formula over the other two formulas, namely: the *Emden* and the *Eichleay* formulae. Therefore, the preference for "Emden" was endorsed in the case of J.F. Finegan Ltd v.Sheffield City Council (1988).

4.3.37.4. In the case of *Whittall Builders v Chester-le-Street DC (1985),* the contractor claimed (amongst other things) the cost of off-site overheads and profit arising from the prolonged and unproductive use of machinery and labour on site. The Court held, following Bernard Sunley, that if evidence pointed to alternative profit-earning work being available, overheads would be recoverable.

In this case, Mr Recorder Percival QC chose a formula similar to Emden as being most appropriate and he said:

> *'Lastly, I come to overheads and profit. What has to be calculated here is the contribution to off-site overheads and profit which the contractor might reasonably have expected to earn with these resources if not deprived of them. The percentage to be taken for overheads and profits for this purpose is not therefore the percentage allowed by the contractor in compiling the price for this particular contract, which may have been larger or smaller than his usual percentage and may or may not have been realised. It is not that percentage that one has to take for this purpose, but the average percentage earned by the contractor on his turnover as shown by the contractor's accounts.'*

4.3.38. The Claimant also made reference to the Shore v Horwitz Construction Co Ltd v Franki of Canada Ltd (1964).

4.3.38.1. This decision of the Canadian Supreme Court concerned a dispute with the defendant subcontractor for the driving of piles in relation to the construction of a government building. The piles were defective and the defendant had to carry out the works again. The claimant main contractor sought to recover damages in relation to additional overheads and the cost of idle plant during the four months that the project was in delay. The Supreme Court held that overheads were indeed recoverable, but hiring charges were only recoverable if the contractor did not own the plant; if it does, it should be treated as a non-profit-making asset. (It is noteworthy that Judson J dissented, on the basis that the main contractor could not prove that it could have moved onto another job in the mean time. This appears to be a precondition to recovery)

4.3.39. From the cases relied upon by both the Claimant and Respondent, it is clear that the use of the Hudson, Emden, Eichleay Formulae to calculate overheads and profit has received judicial approval.

4.3.40. It is also clear from the same cases, that contractors engaged in any construction project will have overheads as a matter of course, as such, delays or disruption to works may mean that the contractor is precluded from diverting such overheads to new projects (which themselves would contribute to those overheads), or even that the costs of running the contractor's general business increase, such as through the employment of additional staff.

4.3.41. With regard to which formula is more preferred, in my view, all the three formulae have gained considerable acceptance, but courts and boards have generated numerous opinions concerning their application, going alternately back and forth. In the end, various legal cases have concluded that each of the three formulae can be used with varying degrees of success leading to the conclusion that, all the three formulas, including others not covered here, are all “fair realistic methods” of estimating damages and that it shouldn’t matter which formula is used. Usually the so called “Direct Method” is proposed, which suggests that the Contractor should obtain a 100% accurate estimate of home office expenses and estimate his proper loss. However, this method is impractical, if not infeasible.

4.3.42. In addition, various technical papers provide concepts of required prerequisites for using the alternate formulas. In brief, the following preliquisites have been suggested for the Contractor’s recovery of the HOOH, namely:

4.3.42.1. Compensable delay (caused by the owner or Employer)

4.3.42.2. Reduced income available to offset HOOH costs (e.g. suspension or stoppage of work)

4.3.42.3. Contractor could not mitigate damages by taking new work during the delay denying them to replace the lost income e.g. all available equipment committed to the project in question.

4.3.43. Accordingly, based on my discussions above, I am persuaded by the Contractor's submission of a copy of the Contract Agreement for the Development of the Kabaale International Airport in Hoima, Uganda dated 5th May 2017 and the Commencement Order for the same works dated 23 April 2018, and I accept it as proof of available work during the period of delay namely, 27th January 2017 to 12th January 2020, that would have funded the overheads in that period and that the resources could not be released from the project in question for the new Kabaale airport site.

4.3.44. It is, therefore, my FINDING, that on a balance of probabilities, the Contractor's submission has met the above preliquisites (paragraphs 4.3.42) for an entitlement to replace its lost HOOH Costs.

4.3.45. **What remains, is to determine which of the three formulae is applicable?**

4.3.46. Once the Contractor has satisfied the criterion in paragraph 4.3.42 above, it then comes down to how to reasonably quantify the loss, and here it is most helpful if the tender has been structured to show a separate figure, expressed in lump sum or percentage terms, for Overheads and Profit. If this has been done there is every chance that the claim can, by common acceptance, be assessed on a formula basis-the only question being which of the three formulae?

4.3.47. In the Hudson formula approach, it requires the tender to show a monetary figure or percentage for Overheads and Profit. Recovery of time-based Overheads and Profit on the "Emden" formula, one substitutes the level of Overheads and Profit from the audited accounts instead of taking the percentage declared in the tender for Overheads and Profit, preferably for the preceding three years of trading. The third formula, rarely used, is the "Eichleay" formula - in this approach under-recovery of Overheads and Profit is calculated based on the actual spend as certified, in relation to the contract programme, and taking the audited level of Overheads and Profit as in "Emden".

4.3.48. As to which formula to adopt, I am persuaded by the Contractor's submission that based on the parameters used for the different formulas, it provided its mark-up under (Table F mark-ups) in the Appendix to tender, which according to him supports the use of the Hudson formula. On this issue, it is not in dispute that Table F [the Supplementary Price

Breakdown of Prices submitted as part of its Tender]. I consider the addition of the mark-up as an appropriate estimate of its overhead multiplier percentage (%) added to its bid to account for the Contractor's HOOH pay item.

4.3.49. Accordingly, for reasons stated above, I am persuaded by the Contractor's argument relating to the reasons for relying on the Hudson formula, and I accept it.

4.3.50. I am of course alive to the fact that the use of the Hudson's formula has faced criticism over the years. Most recently, Construction Industry practice such as the "SOCIETY OF CONSTRUCTION LAW, **DELAY AND DISRUPTION PROTOCOL**. 2nd edition. February 2017" which was relied upon by the Employer has advised that:

> *"The use of the Hudson formula is not supported. This is because it is dependent on the adequacy or otherwise of the tender in question, and because the calculation is derived from a number which in itself contains an element of head office overheads and profit, so there is double counting."*

4.3.51. The PROTOCOL has advised that the use of the *Emden* or the *Eichleay* formulae be preferred. However, on the facts of this case the parties have not provided the 'fair annual average' overheads earned by the Contractor to enable the application of either the Emden or the Eichleay Formula. The Contractor's argument was that it had already provided its mark-up for HOOH, therefore, there was no need to use another basis for calculation of the HOOH.

4.3.52. The Employer's argument was that the use of the Hudson formula was a misrepresentation and not supported by case law.

4.3.53. Having considered all the evidence and submissions and in view of the authorities cited, including thos not repeated here, it is my FINDING and DECISION that the application of the Hudson formula which utilises the overhead percentage markups which were provided by the Contractor in the Appendix to Tender is appropriate in this instance.

4.3.54. I am aware that the major criticism with regard to the use of the Hudson formula is that it uses the tendered overhead percentage rather than the actual overheads. However, it is my view that the issue of double counting can be overcome by adopting a NET contract sum less overheads. My finding that the net contract sum should be used has the support of the learned authors of the text **Evaluating Contract Claims,** R. Peter Davison & John Mullen. Under the heading "The Hudson formula" at page 207 the authors states as follows:

> "In applying the overhead and profit percentage to the weekly amount of the contract sum, the percentage is being applied to a figure which itself includes an

element of overheads and profit. The recovery being calculated therefore includes some double counting because of this failing. If the Hudson formula is to be applied at all the formula needs correcting to reduce the contract sum used in the formula to a figure net of overhead and profit". [Emphasis added]

4.3.55. I will therefore proceed to calculate the Overheads based on the modified Hudson formula by adopting the net contract sum - net of overhead and profit.

4.3.56. I now turn to discuss the Parameters applicable.

4.3.57. The Contractor asked me to find in his favour that he was entitled to overheads for a total delay of 899 days broken down as shown in Table 1 below:

Table 1: Summary of Claimed delays

No	EOT Description	Delay Days
1	VO1 was for Additional 40mm thick asphalt work and was paid at **UGX 1,667,854,194.82**	60
2	Activities in new swamp locations	51
3	Activities in new swamp locations	91
4	VO.2 for additional drainage design for stormwater disposal to the swamps at **UGX 135,965,202.63**	83
5	Reduced Rate of Work due to Delayed Payment IPC 7-20	93
6	Reduced Rate of Work due to Delayed Payment IPC 7-20	62
7	Delayed access to the Re-alignment Km 5+200 to 6+500	92
8	Addendum No. 1 10Km Section from Njenga to Njeru (6 Months)	181
9	50mm Asphalt Overlay from Km 0+00-4+00(38 days)	0
10	Increase in Work Quantities.	96
11	Delayed relocation of UMEME High Voltage Power Lines	55
12	Abnormal Rainfall	25
13	Abnormal Rainfall	10
	Total Delayed Days claimed	**899**

4.3.58. The Employer argued that the Contractor already recovered the Head Office Overheads for the delayed period from additional works. With regard to the 35 days due to abnormal rainfall, the Employer usubmitted the 35 days was a neutral event as provided for under the Contract, meaning that the extension attracted No Costs. The Contractor did not provide any evidence against this submission. Accordingly, I am peruaded by the Employer's argument and FIND that no Costs will be allowed.

Whether the delay period of 899 days is applicable in the computation of HOOH or not?

4.3.59. I reviewed the total extension of time as summarized in Table 1 above.

4.3.60. I have already determined that there were two provisions for recovery of office over heads. The two were separate, and independent of each other, as follows:

4.3.60.1. Pay Item 13.01(b) applies to time related obligations, and

4.3.60.2. Item 9 of Table F[Supplementary Price Breakdown of Prices submitted as part of its Tender] applies to all other Bill of Quantities rates for labour, equipment, plant, materials, overheads costs and profit for all work.

4.3.61. The problem as I see it is whether the Contractor is entitled to recovery of office over heads for the entire period of delays of 899 days or not? The Employer's argument was that the Contractor recovered HOOH from all the changes or variations. The Contractor denies this assertion.

4.3.62. Accordingly, the unabsorbed home office overhead that will be discussed here consists of the home office overheads for delays for which the Contractor was not compensated relating to compensable delays.

4.3.63. At the hearing the Employer asked the Contractor to explain how he catered for HOOH in the original duration of 911 days? The Employer's view was that the Contractor failed to substantiate the claim and considered it speculative and an "after thought". The Contractor did not address this question but in its rejoinder, stated that there was no need to provide further details than what was already submitted and included in its prices as shown in Table F. On this issue, it is already my FINDING that the Contractor recovered HOOH from all MEASURED pay items as these where imbedded in the rates.

4.3.64. The detailed submissions as regards extension of time for work changes or variations are on record. It is not in dispute that the Contractor was paid for additional works under a number of variations including Addendum No.1. It, therefore, follows that these payments on measured works included recovery of office overhead and profit costs imbedded in the rates as broken down in Table F.

4.3.65. I am persuaded by the Employer's testimony that the effect of this was that any delays or Extension of Time attributed to changes in the scope of Works meant that the Contractor already recovered Office Overheads under the works already executed and paid for.

4.3.66. I therefore accept the Employer's submission that, in as far as recovery of additional office over heads attributed to changes in the scope of Works, there is a duplication if indeed the Contractor is paid HOOH for all the days (899 days) the contract was delayed.

4.3.67. I therefore perused the detailed submissions as regards the extension of time as tabulated in Table 1 above. It is clear that some of the extension of time related to delays not caused by changes or variations – for example delays due lack of access. Therefore, the Contractor's argument that it did not recover its office over heads is partially valid but only to the extent of delays not attributed to Addendum No.1 changes or other work changes/variations. Accordingly, it is my FINDING and DECISION that, in my calculation of delay period contributing to the unrecovered overheads, delay periods where the Contractor was executing extra work or variations as well as periods of abnormal rainfall (a neutral event) will be discounted or count as zero.

4.3.68. My decision has support of the authors of the CM eJournal (Presented by the Contractor at the hearing) who guide that if delay to the project grows solely out of variations or additions to scope rather than work suspension, then the Contractor is not entitled to recover HOOH. This is because delay caused by changes to the work is properly compensated through application of the contract's overhead and profit rates and no unabsorbed overhead is owed.

4.3.69. As a consequence, in my calculation of delay period contributing to the unrecovered overheads, I have, therefore, only considered days delayed by events not caused by work changes, as follows:

4.3.69.1. Delays where the rate of work was reduced due to delayed payments of IPC 7 - 20;

4.3.69.2. Delayed access to the Re-alignment Km 5+200 to 6+500, and

4.3.69.3. Delayed relocation of UMEME High Voltage Power Lines.

4.3.70. It is therefore my FINDING that the Contractor is entitled to recover office overheads for a total of 302 days delayed by events not caused by work changes or rainfall (neutral) as shown in Table 2 below.

Table 2: Summary of Recoverable delay periods

No	Delay Description	Claimed Delay Days	Remarks by DB	Recoverable Delay days Recommend by DB
1	VO1 was for Additional 40mm thick asphalt work	60	Overheads recovered from measured works	0
2	Activities in new swamp locations	51	Overheads recovered from measured works	0
3	Activities in new swamp locations	91	Overheads recovered from measured works	0
4	VO.2 for additional drainage design for stormwater disposal to the swamps	83	Overheads recovered from measured works	0
5	Reduced Rate of Work due to Delayed Payment IPC 7-20	93	Unabsorbed Overheads due	93
6	Reduced Rate of Work due to Delayed Payment IPC 7-20	62	Unabsorbed Overheads due	62
7	Delayed access to the Re-alignment Km 5+200 to 6+500	92	Unabsorbed Overheads due	92
8	Addendum No. 1 10Km Section from Njenga to Njeru (6 Months)	181	Overheads recovered from measured works	0
9	50mm Asphalt Overlay from Km 0+00-4+00(38 days)	0	Overheads recovered from measured works	0
10	Increase in Work Quantities.	96	Overheads recovered from measured works	0
11	Delayed relocation of UMEME High Voltage Power Lines	55	Unabsorbed Overheads due	55
12	Abnormal Rainfall	25	Neutral Event	0
13	Abnormal Rainfall	10	Neutral Event	0
	Total days granted as EoT	**899**	**Total days allowed for HOOH recovery by the DB**	**302**

Whether the HOOH Mark-up of 18.63% is applicable or not?

4.3.71. As to the HOOH percentage, the Contractor has claimed 18.63%. The Employer argued that the correct percentage was 3.3% as provided in Table F [Supplementary Breakdown of Prices]. In coming up with a percentage of 18.63%, the Contractor included cost components of Middle Management and Management to that of Overheads and Fees. I reviewed, the Supplementary Breakdown of Prices. I FIND that these two components did not form part of overheads and Fees. I must hasten to state that the Contractor had a right to claim prolongation Costs and recover the cost for equipment/personnel which he considered entitled to. This was not done. Therefore, he cannot assert his entitlement by simply adding the percentage for management fees without any relevant submissions. Accordingly, I reject it the inclusion of the management fees.

4.3.72. Under Item 9 *'Overheads and Fees'*, the breakdown was as shown in Table 3 Below:

Table 3: Extract from Table F showing Head Office Supplementary Cost breakdown

	Item	**% of Contract Price**
9	**Overheads, Fees**	
(a)	Overheads head Office	3.30
(b)	Fees, profit	3.00
(c)	Finance Charges	1.76
(d)	Freight (not transport of materials)	0.34
(e)	Insurance Bonds	1.20
(f)	Taxation	0.90
Sub-total		**10.49**

4.3.73. I therefore dismiss the Contractor's assertion that the total percentage is the total sum of overhead fees at 10.49%, middle management costs at 1.95% and management costs of 6.19% in the aggregate percentage of 18.63%.

4.3.74. The Contractor referred to other provisional items where it indicated a mark-up of 18.63% for Overheads. The Contractor did not provide any evidence to show that all measured items included a mark-up of 18.63% apart from a mere reference to other provisional items such as BoQ Items 12.01 (Land Acquisition) and 12.02 (Relocation of Services) which showed an 18.6% as mark-up for overheads and profit. Therefore, I am not persuaded by the Contractor's submission. I FIND that the allowable mark-up for HOOH and Profit was 10.49% as provided for under item 9 of Table F of the Contractor's Appendix to Tender.

4.3.75. As regards the Employer's argument that Table F only provided for 3.3% in Head Office Overheads, my FINDING is that item 9 provided for both Overheads and Fees amounting to 10.49% as shown in Table 3 above. This is supported by my FINDING under 4.3.14 above, that the Office Overheads also include Fees of various types. Therefore, I am persuaded to allow all items provided for under Item 9 of Table F which adds up to 10.49% as shown in Table 3 above.

4.3.76. In its preamble, the Contractor submitted that the basis for its claim, among other provisions, was Sub Clause 1.1.4.3 [Costs]. The argument was that the claim for Office Overheads fell within the definition of 'Cost' - "all expenditure reasonably incurred (or to be incurred) by the Contractor whether on or off the Site, including overhead and similar

charges but [not including] profit" – that it was directly linked to the clause giving rise to the claim.

4.3.77. For my part, I have no difficulty in accepting that the overheads are also recoverable – the cost of running the business as distinct from general site costs is expressly allowed for in the definition of Cost. They can be claimed. The exception is, the profit.

4.3.78. Profit, however, is excluded, from both the definition of Cost and by Clause 17.6. Accordingly, Profit is not recoverable, unless expressly allowed for in the Contract. **This item is self explanatory and cannot be resisted. Accordingly, from any view point, the mark-up for 'Profit' has to be taken account of and deducted from the mark-up for Over heads.**

4.3.79. I perused Table F which provided for the breakdown of the mark-up for the BoQ rates. The entire schedule adds up to 100%. The only item where profit is shown is under Item 9. The provision does not differentiate between "Fees, Profit" and allocated a mark-up of 3%. The appropriate percentage for profit is not separated. In the absence of any separation between "Fees and Porfit" percentages I have considered the figure of 3% (as the Profit margin for such a project) against the total price of the Contract and I do NOT find the percentage of 3% to be unrealistic or extravangant. The effect of this FINDING is that the percentage for 'Office Overheads" of 10.49% will be reduced by the 3%, in accordance with the provisions under Sub Clause 1.1.4.3 – that profit is excluded in any determination for "Costs". Accordingly, it is my FINDING and DECISION that the mark-up for HOOH, net of Profit, is 7.49%.

4.3.80. Accordingly, I will proceed to assess the Overheads based on 7.49% of the contract sum using the Modified Hudson formula.

4.3.81. It is already my FINDING that the following parameters apply:

4.3.81.1.	The original net Contract Price:	UGX 179,336,243,750
4.3.81.2.	Overheads mark-up:	7.49%
4.3.81.3.	Original Contract period:	911 days
4.3.81.4.	Period of delay: (delayed by events not caused by work changes or rainfall)	302 days

4.3.82. There was an argument by the Contractor as to the use of the gross Contract Price and pointed to the definitions of the Contract Price under Sub Clauses 1.1.4.2 and 14.1

adding that the contingency amount was also included in the Contract Price of UGX 253,940,121,150.00.

4.3.83. I perused the definition of Contract Price under Sub Clause 1.1.4.2 which provided as follows:

> "**Contract Price**" means the price defined in Sub-Clause 14.1 [*The Contract Price*], and includes adjustments in accordance with the Contract.[DB Emphasis added].

4.3.84. All I can say is that this brave submissionn was off tangent and represents departure from the normal measure of computing damages of the specific contract under discussion and no other. Therefore, the argument cannot be reasonably pardoned so to enable the claim for HOOH be calculated on the gross amounts. I am further persuaded to accept the testimony of the Employer that the Contractor used the net Contract Price of UGX 179,336,243,750 to calculate the Over Head and other mark-ups under Table F.

4.3.85. On these arguments and given the literature cited by both Parties, it is indeed a misnomer to suggest the use of the gross Contract Price in the calculations for HOOH, and I reject it.

4.3.86. Therefore, using the Hudson formula to calculate the HOOH, the figures are adjusted to remove the overheads and profit and double counting elements to provide a revised figure, as shown in the following text.

Table 4: *Modified Hudson Formula*

Modified Hudson (to remove OHP on OHP): Formula (1)
CH7 = CH2×(1-CH1) = CH4; (2) (CH1×CH4/CH5)×CH6

	CH1	Allowance (%) in the tender for HO overhead and profit		7.49%
	CH2	Original NET contract price	UGX	179,336,243,750.00
	CH3	HO overheads, Profit at 10.49%	UGX	18,819,780,832.00
CH4	*Contract price net of HO overhead and profit (CH2-CH3)*		UGX	160,516,462,918.00
	CH5	Original contract period		911 days
	CH6	Period of delay *(Period where no extra work was being done)*		302 days
	CH7	Recoverable HO overhead and profit	**UGX**	**3,985,565,628.88**

$$\text{Recoverable HOOH} = \frac{\text{Tender Off-site Overheads \& Profit}}{100} \times \frac{\textbf{Net Contract Sum}}{\text{Contract Period}} \times \text{Period of Delay}$$

$$\text{Recoverable HOOH} = \frac{7.49}{100} \times \frac{160{,}516{,}462{,}918.00}{911} \times 302 = \textbf{UGX 3,985,565,628.88}$$

4.3.87. **Accordingly, It is the DB's FINDING and DECISION that the Contractor is entitled to payment of UGX 3,985,565,628.88 plus VAT being unabsorbed Head Office Overhead costs.**

4.4. Issue 3 – Financing Charges and/or interest

4.4.1. The Contractor requested in its pleadings and submissions that I should award financing charges and/or interest on any sums determined in its favour, at the rate in the contract in accordance with Sub Clause 14.8 compounded monthly.

4.4.2. For avoidance of doubt the financing charges and/or interest is recoverable. The Contractor has an express right to interest on any unpaid sums under the Contract.

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

4.4.4. From the onset, it is necessary to immediately address the Contractor's contention as regards the claim for Financing Charges. The Contractor submitted that the Resident Engineer made a Determination in accordance with Sub Clause 3.5, dated 5th April 2018, for an entitlement of UGX 7,362,312,272 (Exhibit C8). The Contractor submitted that soon after the Determination was issued, the Employer terminated the services of the Engineer, on 10th April 2018 and was replaced by "in house" Engineer, who then revised the Determination on 28th May 2018, to UGX 922,469,416 (Exhibit C10). In his letter dated 28th May 2018, the RE stated as follows:

> "Please find herewith the revised analysis of the claim as per Sub Clause 3.5 of the GCC FIDIC 2010 for your consent".

4.4.5. Although, the Contractor submitted a reply dated 30th May 2018 and requested for a higher amount of UGX 5,906,630,493, the Engineer's Determination still stood unless amended by him or the Parties as required under SC 3.5. Therefore, this amount should have been effected by the Employer, not withstanding any objection by either Party.

4.4.6. I also perused Exhibit C14 and FIND that there was a Determination dated 5th February 2019 for a sum of USD 875,226.64 and UGX 825,614,380.51 for Prolongation Costs (Claims 1,2 & 3). However, there was no submissions on this issue, therefore, outside of this Referral No.1.

4.4.7. I perused Exhibit C8, C9 and C10 and of the Contractor's Statement of Claim and

considered the Parties written submissions and oral testimonies during the hearing.

4.4.8. Both Parties testified for and against the appointment of an inhouse Engineer as the reason for failure to deal with the claim for HOOH Costs. I do not consider the arguments as relevant as to whether this was the reason why the contractual procedures were overlooked. It was clear at the hearing and the Parties' written submissions, that they were flaws in the manner the Determnation and implementation was managed.

4.4.9. As regards Sub Clause 3.5, only the Engineer was obliged to make any Determination or an agreed Person (by both Parties). In this case, Eng Samuel Muhoozi was the replacement SC 3.1 'Engineer' tasked with the responsibilities under SC 3.5. However, this was not done. Instead SC 3.1 and 3.5 responsibilities were undertaken by different persons without any evidence on record of delegated authority, as per requirement of the Contract. The Contractor's arguement was that it was the Employer's responsibility to appoint the Engineer, but I find no evidence of any objection by the Contractor, as to the various persons who played a role in the Determination and amendments thereto, as required under Sub Clauses 3.2 [Delegation by the Engineer] and 3.4[Replacemenet of the Engineer]. Sub Clause 3.2 provided as follows:

> "The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties. However, unless otherwise agreed by both Parties, the Engineer shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [Determinations]."

4.4.10. It is acknowledged and respected that the Parties' rights to freely enter into a Contract. Further, once Parties had freely entered into such Contract, the Courts or indeed the DB as in this case, must respect the text of the Contract between the parties. The reference to respecting the text of the Contract is that in interpreting the Contract, the Court or DB will limit itself to determining the intention of the parties from the Contract document itself. However, the law or indeed the Court does not forbid parties from altering the text or intention of the agreement as witnessed by the Contract. By this I mean that, parties are permitted at law to vary the Contract either by writing out a fresh Contract or conducting their business in a manner different from what they have agreed in the Contract. As long as this conduct is agreed upon by the parties and contradicts the written Contract it varies the written Contract.

4.4.11. In the current Referral, the Parties agreed to allow any person to act as the Engineer as well as allow an earlier Determination to be amended contrary to the provisions of SC

3.5. The Parties, therefore, by their conduct varied Sub Clause 3.5 of the Contract by which Determination were being made in a manner that was distinct from what they agreed. This was an acceptable departure from the Contract because both parties consented to it by conduct and as such validly varied the Contract. The Contractor has not provided any evidence that it objected to the changed procedures.

4.4.12. In its rebuttal, the Contrcator argued that it made adjustments to its claim in order to reach an amicable agreement. All this, in my view, reveals that there was no objection by the Contractor, to remind the Employer as to the written text or provisions of the Contract.

4.4.13. As regards the consequences of variation of the provisions of SC 3.5 I perused the provisions of the Sub Clause and find that it provided as follows:

> "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, within 28 days from the receipt of the corresponding claim or 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*]."

4.4.14. I further perused Exhibits C8, C9 and C10 of the Contractor's Statement of Claim and FIND that in all instances of Determinations by RE "Mamdouh Youssef" and RE "Kizza Stephen", they notified the Parties of their Determinations for amounts already stated above.

4.4.15. The Contractor requested me declare that Financial Charges are due with regard to my FINDING and DECISION in its favour. However, the Contract only supports claims for FINANCING charges for certified amounts or on unpaid amounts DETERMINED under SC 3.5.

4.4.16. 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]" [DB emphasis added]

4.4.17. The Determinations by RE "Mamdouh Youssef" was amended by RE "Kizza Stephen". And the amount was notified to the Parties. It is already my Finding that RE Youssef's Determination was amended by RE Kizza. The last Determintion was made on 28th May 2018, for an amount reduced to UGX 922,469,416.

4.4.18. According to the Employer, it was too late in the day for the Claimant to complain of bias that the Determination was reduced by the Engineer who was an employee of UNRA. For my part, I am quite happy to go along with the views expressed by the Employer's counsel and in saying so I agree with the submission by the Employer that the replacement of the Engineer was a mandate of UNRA and that the Contractor was well notified. I do also have to agree with the general proposition that supervising engineers need to maintain professional independence from the parties so that they can discharge their functions with fairness. After all the principles of fairness it has been said in a number of cases are principles in their own right. And this was the requirement under SC 3.1 and SC 3.5 when the Engineer or indeed any appointed person supervised the project and made any Determination.

4.4.19. Accordingly, it is my FINDING and DECISION that the proper Engineer was to be appointed by the Employer and remained an employee of UNRA. Let me hasten to add that this finding does not obviate the need to consider whether factually the arguments by the Contractor of any bias were valid or not. The Employer argued that UNRA always appointed the SC 3.1 'Engineer' and this did not mean that there was bias in his performance and asked the Contractor to support its argument with facts. The Contractor testified that there was no opportunity to object the internal Engineer's appointment and did not consider him to be impartial.

4.4.20. On this issue, I further reviewed the provisions of the Contract. Sub Clause 3.4 [Replacement of the Engineer] provided as follows:

> "If the Employer intends to replace the Engineer, the Employer shall, not less than 21 days before the intended date of replacement, give notice to the Contractor of the name, address and relevant experience of the intended replacement Engineer. If the Contractor considers the intended replacement Engineer to be unsuitable, he has the right to raise objection against him by notice to the Employer, with supporting particulars, and the Employer shall give full and fair consideration to this objection."(DB Emphasis added)

4.4.21. The Contractor did not provide any evidence that he objected or raised any concerns with the appointment of an internal 'Engineer'.

4.4.22. On the available evidence, I am persuaded by the Employer's submission that the internal 'Engineer' discharged his duties with fairness and in accordance with the Contract.

4.4.23. I already pointed out the Determination by RE "Mamdouh Youssef" was amended by RE "Kizza Stephen". The last Determintion was made on 28th May 2018, for an amount of UGX 922,469,416 . This amount was notified to the Parties as required under SC 3.5. This is the only amount on record as having been Determned before the Referral was made to the DB.

4.4.24. Accordingly, this is the amount which should have been effected according to SC 3.5. Consequently this is the amount which attracts Financing Charges from the date when it was due (that is effective from a date of 28th May 2018 + 56 days), up and until 10th December 2021, when the new amount has been determined by the DB. 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.

4.4.25. I perused the Contract. Particular Conditions SC 14.8 provided for **Simple Interest at the rate of 1% above the central bank discount rate**.

4.4.26. It is already my FINDING that the only unpaid sums was the amount of UGX 922,469,416 which was not certified and paid. Accordingly, this amount will carry interest or financing charges as already determined above. **This claim SUCCEEDS.**

4.5. **Issue 4 – Adjudication Costs**

4.5.1. The Contractor asked the DB for a declaration that JV SBI&RCC was entitled to payment of costs incurred in relation to this Adjudication in accordance with Sub Clause 20.2.

4.5.2. In this referral, the Contractor's claim for HOOH Costs was UGX UGX 48,659,247,818.13 (Uganda Shillings Forty Eight Billion Six Hundred Fifty Nine million, Two Hundred Forty Seven Thousand Eight Hundred Eighteen and Thirteen cents) VAT exclusive.

4.5.3. It is already my FINDING and DECISION that UGX 3,985,565,628.88 (Uganda Shillings Three Billion Nine Hundred Eighty Five million, Five Hundred Sixisty Five Thousand, Six Hundred Twenty Eight and Eighty Eight cents) VAT exclusive, is due to the Contractor as compensation for HOOH Costs.

4.5.4. With regard to the claims for Adjudication Costs, my view is that such claims fly in the teeth of the Agreement for Submission which the parties had signed on 12th January, 2015. Accordingly they are allowed and I DETERMINE that this claim succeeds.

4.5.5. I know of no good reason not to follow the applicable provision under PCC Sub Clause 20.2. Accordingly, it is my FINDING and DECISION that the Contractor shall recover 50% of payments made to the DB + 15% of the DB invoices as overhead and profit costs.

4.5.6. The Contract Agreement does not specify otherwise, therefore, 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, in accordance with PCC Sub Clause 20.2.

5. Summary of the DB Decisions

5.1. The DB wishes to give the Parties its professional assurances that it has approached this adjudication in a fair, independent and impartial manner. The DB has done its best to give a Decision that complies with the Contract, is based on the facts as the DB sees them and reflects what the DB perceives to have been the mutual intent of the Parties at the time the Contract was executed. When the DB finds in favour of one party, this means nothing more than that the evidence and augments put by that party over the competing evidence and arguments advanced by the other party is sufficiently persuasive to either discharge the burden of proof or disprove the facts placed in issue by the claiming party. Neither party should feel that its case is necessarily dismissed out of hand by the DB finding in favour of the other party. It is a matter of the **balance of probability**. The DB trusts that both Parties will respect this decision and give effect to it.

5.2. **Decisions**

5.3.1 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 DB in this referral and for the reasons stated in the narrative in the foregoing sections **the DB DECIDES in terms of Sub-Clause 20.4 as follows:**

5.3.2 **First Decision Sought by the Contractor:** Whether or not Head Office Overheads paid to the Contractor as part of the certified payments under item 13.01(b) of the bill of quantities covered all associated head office over heads for both executed works and the time delays, being claimed by the Contractor?

5.3.2.1 **DB Decision:**

The Bill Item 13.01 (b) and the provisions under Table F apply independently not withstanding that they both relate to the reimbursement of Office Overhead Costs. **The Claim succeeds.**

5.3.3 **Second Decision Sought by the Contractor:** As to whether the Contractor is entitled to payment of UGX 48,659,247,818.13 or other amount to be determined by the DB, arising from the same?

5.3.3.1 **DB Decision:**

The Contractor is entitled to payment of UGX UGX 3,985,565,628.88 plus VAT being unabsorbed Head Office Overhead costs. **The Contractor's claim, therefore, Succeeds.**

5.3.4 **Third 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?

5.3.4.1 DB Decision:

The DB finds that the last Determintion was made on 28th May 2018, for an amount to UGX 922,469,416. Therefore, the Financing Charges are due on this amount, from the date when it was due (that is effective from a date of 28th May 2018 + 56 days), up and until 10th December 2021, when the new amount has been determined by the DB. The Particular Conditions Contract, Sub Clause 14.8 provided for Simple Interest at the rate of 1% above the central bank discount rate. **The Contractor's claim, therefore, Succeeds.**

5.3.5 **Fourth Decision Sought by the Contractor:** Whether or not the Contractor is entitled to Costs of adjudication?

5.3.5.1 **DB Decision:**

In principle, the Contractor's claim SUCCEEDS. However, the Particular Conditions Contract, Sub Clause 20.2, provides for procedures to recover 50% of payments made to the DB + 15% of the DB invoices as overhead and profit costs ONLY. No other adjudication costs are due.

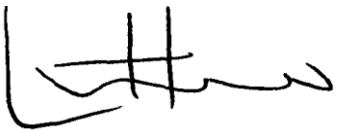
5.4 This is the Decision of the DB.

5.5 The DB thanks the Parties for their submissions and for their courtesy.

6. DB CONCLUDING COMMENT

6.1. As provided for in GCC Clause 20.4, the above DB 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 DB for the Upgrading of the Mukono-Kyetume-Katosi/Kisoga-Nyenga Road, Uganda

Issued at: Ndola, Zambia.

Date: 10th December 2021