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**MOOT PROPOSITION**

**AUAP-JLU**

**INTERNATIONAL MOOT**

**COURT COMPETITION, 2022**



**CASE RECORD**

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**IN THE MATTER OF ARBITRATION BETWEEN**

**BILL TURNER CONSTRUCTION CO.**

**CLAIMANT**

**V.**

**ROAD DEVELOPMENT CORPORATION OF BORDURIA**

**RESPONDENT**

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**UNDISPUTED FACTS - BACKGROUND OF THE DISPUTE**

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1. Bill Turner Construction Co. (“BTC”) (“**Claimant**”) is a limited liability company registered in Zembla in the country of Syldavia incorporated in 1990. It is one of the leading construction companies in the world broadly dealing with construction of roads, bridges, stadiums and state of the art modern day buildings. It has worked in over 45 countries in the world and has a large presence outside Syldavia. The principal office of Claimant is at Plot no.38, Sector-A, Zone-D, Averno, Zembla - 751001 Syldavia.
2. The Road Development Corporation of Borduria (“RDC”) (“**Respondent**”) is a Statutory Body established under the National Expressways Act, 2005 and is entrusted with the construction and maintenance of all inter-state expressways in Borduria. The principal office of Respondent is at 16A, Arera Hills, Verora, Malagu, Borduria, 462011. (**The laws of Borduria are in parimateria with the laws of India**)
3. In the year 2015, the RDC outlined their vision for greater inter-connectivity through roads and reducing the transport durations between main towns and satellite cities. In this endeavour they promised to bring out tenders for construction of long-lasting roads using a mix of white top and black top surfaces especially for areas of Borduria facing heavy rainfall.
4. BTC saw this as an opportunity to expand their operations in Borduria as they were the pre-dominant experts in the field and had gained considerable experience while building roads and bridges in other countries especially in the tropical regions since these parts of the world also required long lasting roads due to heavy rains experienced by them throughout the year.
5. RDC released a tender dated 10 February 2018 for construction of a new High Speed White Top Expressway between Molvania and Latveria (approx 267 Kilometers) to be built on Turnkey basis. The tender postulated that the lowest bidder who qualifies the technical qualification of the tender will be awarded the construction contract.

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6. These bids were open to non-resident construction companies as well. However, such interested companies would have to have prior experience of 10 years in the Construction Sector and preferably in constructing roads.
7. On 16 March 2018, BTC submitted its final bid of USD 197 Million (approx. BNR 1465 Crores - Bordurian Rupee).
8. Pursuant to a thorough review process, the Chief General Manager (Technical) of the Respondent communicated its acceptance of the said bid submitted by Claimant vide their Letter of Award (“LOA”) RDC/RDSRP-III/112/Pkg-4/LOA/2018 dated 30 April 2018 and directed the Claimant to sign the EPC Contract and furnish performance security equivalent to 5% of the bid amount (i.e USD 9.85 Million).
9. P.V. Helsing of YekigawaBorduria Limited was appointed as the Independent Engineer to supervise the project on behalf of the Respondent and ensure compliance with the milestones and other requirements under the contract for the construction of the expressway.
10. The formal EPC Contract embodying the mutually agreed terms and conditions was duly executed by and between Respondent and Claimant on 24 May 2018 and the commencement date was noted in the agreement as 1 month from the signing of the EPC Contract. The term of the contract was 32 months.
11. Even as per the tender dated 10 February, 2018, out of the total project length of 267 kms, the 75% of the ROW in the non-forest land of length of about 198kms was to be handed over within 1 month from the Commencement Date and the entire stretch including the 69 kms in the forest land was to be made available within 6 months from the Commencement Date.i.e. by January 2019.
12. Notably, the Project Completion Schedule postulated the following completion milestones:

*“(Milestone I - 8 months 20% ~ 35 KMS - 240 days)*

*Milestone II - 14 Months 40% ~ 80 KMS - 420 days*

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*Milestone III - 20 Months 60% ~ 150 KMS - 600 days*

*Milestone IV - 26 Months 80% ~ 200 KMS - 780 days*

*Milestone V - 32 Months 100% ~ 267 KMS - 960 days)*”

13. Independent Engineer by way of its letter dated 7 July 2018 had warned BTC regarding the rainy season in the stretch on which the road is being prepared and suggested that BTC utilise the same time for constructing prefabricated units for the flyovers to be made at the Munro, Lorraine and Lubniti intersections of the Expressway.
14. Certain disputes arose between the parties regarding the performance of the contract. The Claimant sought two extensions of time for performance of the contract on account of various reasons such as delay in handing over of the land, excessive rains and delay in grant of permission from forest department for cutting of trees. The Independent Engineer did not completely agree with the request however granted extension of time of 5 months from the total of 12 months claimed by BTCt. In the response to the requests for extension, the independent engineer had also stated that the contractor was also responsible for the delays and slow progress of work due to inadequate deployment of plant and machinery.
15. Thereafter, due to a lockdown imposed by the Government of Borduria on 15 March 2020 due to the pandemic of COVID-19, the Claimant terminated the Contract on the grounds of Force majeure by its letter dated 17 July 2020.
16. The Respondent also issued a termination notice for fault of the Claimant, dated 17 August 2020 and also encashed the Performance Security in the form of a bank guarantee which was submitted by the Claimant.
17. The Independent Engineer by its letter dated 30 September 2020 shared its status report of the project. The details of which are as hereunder:

*“MAJOR ACTIVITIES COMPLETED/CARRIED OUT VIS-A-VIS OBJECTIVES:*

*·Milestone I ~ 35kms completed*

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*·Milestone II ~ 80kms completed*

*·Rest are under progress and incomplete.”*

18. The Claimant sent its notice to the Respondent dated 3 October 2020 invoking arbitration. The Respondent replied to the notice by its letter dated 17 October 2020.
19. On 2nd November 2020 in the first preliminary hearing, Tribunal at the very outset put on record that there existed no circumstances that are likely to give rise to justifiable doubts as to the independence or impartiality of the Tribunal. Tribunal noted that Claimant had appointed Justice Vincent Powar as its nominee arbitrator. By reply to notice invoking arbitration dated 17 October 2020, the Respondent nominated Justice Russel S. Haddock as its Nominee arbitrator. By email dated 19 October 2020 Justice Powar and Haddock nominated Justice Timothy Halland, Former Chief Justice of Borduria as the Presiding Arbitrator. Justice Halland gave his consent to be the presiding arbitrator on 22 October 2020 and the constitution of the arbitral tribunal was thereby complete. Lastly, Tribunal passed procedural directions with respect to the timeline for filing of relevant documents and pleadings by the Parties. Additionally, the Tribunal enumerated the timetable for service of such pleadings and inspection or production of documents.
20. On 2 January, 2021, during the hearing, on the basis of the pleadings filed by the parties formulated the following issues to be determined by the arbitral tribunal in this arbitration matter:
  - A. Whether the Claimant is entitled to damages from the Respondent for delay in handing over of the site and delay in receiving permission from the forest department for the cutting of the trees? If yes to what extent?
  - B. Whether the Claimant is entitled to re-imbusement of the value of the bank guarantee encashed by the Respondent.?
  - C. Whether the Claimant has exercised its right of termination of the contract for Force Majeure correctly. If yes, what amount is the Claimant entitled to receive.

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- D. Whether the Claimant is entitled to pre-award interest on the cashed bank guarantee and the damages if any payable under issue A. If yes, at what rate and from which date?
- E. Whether the Claimant is entitled to post award interest on the awarded sum if any. If yes, at what rate.
- F. Which party is entitled to costs of the arbitration proceedings and what would be the reasonable costs payable to the parties?

21. During the course of the hearing the Claimant informed the Tribunal that it shall be submitting the evidence affidavit of one witness in support of its Claims while Respondent informed the Tribunal that it shall be relying only on documentary evidence.

22. The cross examination of the Claimant witness was recorded on 16 June 2021. Thereafter, the matter was fixed for arguments on behalf of the parties on 6<sup>th</sup> – 7<sup>th</sup> August, 2022. **The Advocates for the parties were asked to address the arbitral tribunal only on issues A, B and C.** The parties were also directed to file Written Submissions only to the extent of issue A, B and C.

**ANNEXURE A - NOTICE OF ARBITRATION BY CLAIMANT**

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**3 October 2020**

1. We write this letter highlighting our grievances with regard to the disputes that have arisen between Bill Turner Corporation and Road Development Corporation of Borduria for the construction of the High-Speed White Top Expressway between Molvania and Latveria. The basis of our disputes and our claims are as described hereunder.
2. Bill Turner and Co. was awarded the Contract for Building a High-Speed White Top Road Expressway by way of Letter of Award dated 30 April 2018 based on the lowest bid offered by BTC for construction of the 267 KM long Expressway project. The primary reason BTC bid for the contract was due to its expertise in building such roads which are durable even in extreme weather conditions having built similar roads in the tropical regions of the world which receive heavy rainfall namely Colombia, Brazil, Malaysia, Philippines and Indonesia.
3. The project however suffered from day one due to the lackadaisical attitude of RDC which started with the delay in handing over the Right of Way of the forest land.
4. The RDC breached its obligations of handing over the land to BTC as it handed over only 67.5% of the non-forest land to BTC by 25 July 2018. Further the forest land was also not handed over to the Claimant within the time as stipulated in the Contract. The delayed handing over of the project affected the schedule of construction and caused us losses relating to idling of labour and machinery.
5. Eventually RDC granted the entire land area required for the project by 15 March 2019. The delayed handing over of the forest land also delayed the application on the part of BTC to seek clearance from the forest department for felling of trees. BTC applied for the permission for forest clearance by its letter dated 23 March 2019 and also marked a copy of the same to RDC. However, no assistance or support was provided to BTC regarding the BTC's application for forest clearance even though the same was the obligation of the RDC and the same remained pending at the office of the Forest Department in Latveria.



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Eventually after repeated persuasion and meeting with the Forest Officer, the permission for the cutting of trees in the forest area was granted by letter dated 7 July 2019.

6. That Latveria experienced heavy rainfall during the month of July, August and upto mid September in both 2018 and 2019 causing considerable slowdown of the progress of works. In addition to the fact that sufficient workfronts were not available due to delay in handing over of non-forest and forest land and the delayed clearance for felling of trees, BTC was not able to proceed as per schedule. The extremely heavy rains resulted in flash floods and disrupted the progress of the works.
7. Due to the delay in handing over of the land and the flash floods caused by the rains. BTC had filed two applications dated 4 December 2018 and 1 October 2019 respectively. The application dated 4th December 2018 sought extension of construction period by 3 months due to rains and flash floods. Additionally, the application dated 1st October 2019 was for an extension of 9 months for delay due to rains, delay in clearance for cutting of trees in forest area and delay in handing over of the land for construction works.
8. BTC disallowed our application for extension of time dated 4 December 2018 however was pleased to grant extension of time of 5 months for delay in handing over of the land against our application dated 1 October 2019.
9. BTC continued the construction of the works since October 2019 however on 15 March 2020, the Govt. of Borduria ordered a complete lockdown in the country due to the pandemic of COVID-19 for an initial period of 15 days. This lockdown period was subsequently extended and all construction activities could not be restarted until 15 June 2020.
10. During the lockdown, BTC was unable to retain its labour force and the same had to be released. The economic impact of the lockdown was such that the construction of the project work could not be continued to be taken up by the Contractor. Considering all the factors involved, the contractor decided to terminate the contract by its letter dated 17 July 2020. BTC terminated the contract under Clause 21.2 i.e., non-political force majeure event and sought for termination payment under Clause 21.8 of the Agreement.

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11. It is a matter of record that BTC was not in a position to put the contracted equipment and tools to alternative purpose(s) or any other project/assignment during the period of the lockdown. Thus, in the absence of utilization for some other purpose or project, BTC has incurred substantial cost and damages in maintaining and mobilizing the said equipment and tools for no fault of BTC.
12. By its letter dated 27 July 2020 BTC sent an updated calculation of the termination payment eligible under the Contract and also its claims for damages for loss caused due to idling of labour and machinery and loss due to delay not attributable to BTC during the construction period of the contract.
13. BTC was shocked to realise that on 17 August 2020, RDC encashed the performance bank guarantee of BTC and by its letter dated 17th August 2020 also sent an illegal letter terminating the contract due to default of BTC also denying the issue raised by us in the termination notice.
14. By way of this letter we invoke arbitration under Clause 26 of the EPC contract and appoint Mr. Justice Vincent Powar, Former Judge, Supreme Court of Borduria as the nominee arbitrator on behalf of BTC to adjudicate the disputes between the parties. The Claims of BTC are as hereunder:
  - A. Damages for underutilisation of manpower and machinery due to delay in handing over of land quantified at USD 35 Million and delay in permission for cutting of trees by the Forest Department quantified at USD 2 Million.
  - B. Reimbursement USD 9.85 Million equivalent to value of encashed bank guarantee submitted as performance security.
  - C. Claim for payment of unpaid works due to termination of the contract under Force Majeure.
  - D. Interest on cashed bank guarantee at the rate of 10% per annum Compound Interest from date of encashment to date of filing of statement of claim.

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**E.** Post Award interest from the date of award to date of payment of the amount to the Claimant.

We invite you to appoint your nominee arbitrator within 30 days. If you fail to do the same we shall be constrained to take adequate steps for appointment of arbitrator on your behalf under the Borduria Arbitration and Conciliation Act, 1996.

**ANNEXURE B - REPLY TO NOTICE INVOKING ARBITRATION**

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**17 October 2020**

1. We write this letter in response to your notice invoking arbitration dated 3 October 2020 by which you have alleged irregularities on the part of RDC and notified your disputes against RDC. We are of the considered opinion that your allegations in the notice invoking arbitration are baseless. Please find hereunder our response setting out the true facts which have not been brought out by you notice invoking arbitration.
2. Firstly, we would like to point out our apprehension regarding your alleged expertise in constructing durable white top roads in rainy areas of the world. Further we are also of the belief that any expertise that you boast of as a contractor surely does not include in experience and expertise in planning of a project of this magnitude, because it is evident from the reports submitted by the Independent Engineer that you did not deploy adequate manpower and machinery
3. It is denied that the delay in handing over of the land has caused any delay in construction of the project. By your own admission you had received 67.5 % of the land in the non-forest area for the construction of the project. It is pertinent to mention that you had adequate workfronts to continue construction on the portions of the project which were available to you. Hence, any claims on your part for delay in handing over of the land by us are unsustainable and devoid of any merit whatsoever.
4. Improper planning and delay in deployment of plant and machinery is evident from the fact that even though BTC had two months before handing over of the land and start of the construction period, there was inadequate deployment of plant and machinery at the beginning of the construction period.
5. Furthermore, the most outrageous reason cited by BTC requesting extension of time for construction is evident from the applications for extension of time (“EOT”) wherein you have sought extension of 3 months on two occasions for rains. The entire premise of this tender and the preparation of a white top road is to make the road more durable and efficient during the rainy season because of the frequent rains in this region. Hence, it is

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surprising and an indication of your callous attitude that inspite of you being aware about frequent rains in the region you did not deem it appropriate to adopte adequate measures.

6. Independent Engineer by way of its letter dated 07.07.2018 had warned BTC regarding the rainy season in the stretch on which the road is being prepared and suggested that BTC utilise the same time for constructing pre-fabricated units for the flyovers to be made at the Munro, Lorraine and Lubniti intersections. The Independent Engineer urged BTC to provide a programme for the progress of the construction works at the earliest since BTC had not provided the same yet.
7. The rains in this region are a yearly phenomenon and not an extreme event for which the force majeure clause of the contract can be invoked. The lack of adequate planning on the part of the contractor is clearly evident.
8. In response to the allegation of delay on the part of RDC it is rightly mentioned that the first application for EOT was rejected and the second application for extension of time. Pursuant to an analysis of the application and keeping in view of the importance of the project, RDC allowed EOT for a period for which delay in handing over of the land had been caused. Notably, as stated above no delay was allowed for the rains and rightly so.
9. The Monthly Progress Reportsdated 1 November 2018, 1 July 2019 and 1 January 2020 of the Independent Engineer, is also relevant to show that the Contractor had not mobilised adequate plant and machinery to progress the works in a manner to achieve the milestones. Hence any delay in completion of works is not attributable to RDC and hence BTC is not entitled any compensation on any account for the delays.
10. The global pandemic of COVID-19 was an unprecedented event which caused total chaos around the world. The orders passed by the Government of Borduria regarding the lockdown and non-performance of any construction activities starting from March 2015 and invariably continuing into July 2020 cannot be exercised by BTC when it is already in breach of its obligations of not achieving the milestones. The continued delay in the performance of the project cannot be covered up by the fact that a global pandemic affected construction activity.

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11. For that matter, if BTC had performed the contract as per the schedule and achieved its milestones, more than 80 % of the construction activity would have been complete by the time the lockdown was announced and we would have adequately arranged for extra privileges to BTC to complete the construction at a later date and provided for extra compensation for its men and machinery.
12. RDC announced that it would grant extra time and additional payments for the loss the pandemic would have caused to them for all such eligible contractors who performed their work diligently, however the status of the project of this magnitude and importance was left in a miserable state due to the defaults and breaches on the part of BTC. Hence, we were totally shocked when rather than asking for the accommodation, BTC sent a termination letter. The same was obviously illegal as BTC was itself in breach of the Contract. Hence RDC rightly terminated the contract for default of the Contractor and encashed the bank guarantee for performance security submitted by BTC.
13. In light of the aforesaid, we do not believe that BTC is entitled to any compensation and that the bank guarantee amounting to 5% of the contract price has been rightfully invoked.
14. Further the Claimant is not entitled to any payment for unpaid works since the losses suffered by us are in excess of the bank guarantee encashed by us and equivalent to the cost of unpaid works that you seek. Hence your claim for unpaid works is set off by losses incurred by us in maintenance of the existing road and further costs that will be incurred by us in re-tendering of the project.
15. Be that as it may as the claims of BTC are not agreeable to RDC and since BTC has invoked the arbitration clause under the EPC contract. Accordingly, RDC nominates Justice Russel S. Haddock, Former Judge of Supreme Court of Borduria as its nominee arbitrator to the arbitral tribunal.

**ANNEXURE C –RELEVANT EXTRACTS FROM THE ENGINEERING  
PROCUREMENT AND CONSTRUCTION (EPC) CONTRACT FOR CONSTRUCTION  
OF THE MOLVANIA - LATVERIA EXPRESSWAY**

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**DEFINITIONS**

“**Applicable Permits**” means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under Applicable Laws in connection with the construction, operation and maintenance of the Project Highway during the subsistence of this Agreement;

“**Construction Period**” means the period commencing from the Appointed Date and ending on the date of the Completion Certificate;

“**Construction Zone**” shall have the meaning set forth in Clause 8.3 (i);

“**Contract Price**” means the amount specified in Clause 19.1 (i);

“**Contractor**” shall have the meaning attributed thereto in the array of Parties hereinabove as set forth in the Recitals;

“**Contractor Default**” shall have the meaning set forth in Clause 23.1;

“**Dispute**” shall have the meaning set forth in Clause 26.1;

“**Dispute Resolution Procedure**” means the procedure for resolution of Disputes set forth in Article 26;

“**Encumbrances**” means, in relation to the Project Highway, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss to payees or beneficiaries or any similar arrangement under any insurance policy pertaining to the Project Highway, where applicable herein but excluding utilities referred to in Clause 9.1;

“**Force Majeure**” or “**Force Majeure Event**” shall have the meaning ascribed to it in Clause 21.1;

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“**Indirect Political Event**” shall have the meaning set forth in Clause 21.3;

“**Project Completion Schedule**” means the progressive Project Milestones set forth in Schedule-J for completion of the Project Highway on or before the Scheduled Completion Date;

“**Project Milestone**” means the project milestone set forth in Schedule-J;

“**Right of Way**” means and refers to the total land required and acquired for the project, both in its width and length, together with all way leaves, easements, unrestricted access and other rights of way, howsoever described, necessary for construction and maintenance of the Project Highway in accordance with this Agreement;

“**Scheduled Completion Date**” shall be the date set forth in Clause 10.3;

“**Scheduled Construction Period**” means the period commencing from the Appointed Date and ending on Scheduled Completion Date;

“**Termination**” means the expiry or termination of this Agreement;

“**Termination Notice**” means the communication issued in accordance with this Agreement by one Party to the other Party terminating this Agreement;

“**Termination Payment**” means the amount payable by either Party to the other upon Termination in accordance with Article 23;

### **ARTICLE 3**

#### **3 Obligations of the Authority**

##### **3.1 Obligations of the Authority**

(i) The Authority shall, at its own cost and expense, undertake, comply with and perform all its obligations set out in this Agreement or arising hereunder.

(ii) The Authority shall be responsible for the correctness of the Scope of the Project, Project Facilities, Specifications and Standards and the criteria for testing of the completed Works.



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(iii) The Authority shall, upon submission of the Performance Security as per the RFP by the Contractor, shall provide to the Contractor:

(a) No less than 75% (Seventy Five per cent) of the required Right of Way of the Construction Zone of the non-forest land will be handed over within a period of 1 Month from the Commencement date and the total land including forest land will be handed over latest within 6 months from the Commencement Date.

(b) .....

(c) all environmental clearances as required under Clause 3.3.

(iv) Delay in providing the Right of Way ..... in accordance with the provisions of Clause 3.1 (iii) shall entitle the Contractor to Damages in a sum calculated in accordance with the provisions of Clause 8.3 of this Agreement and Time Extension in accordance with the provisions of Clause 10.5 of this Agreement.

(v) Notwithstanding anything to the contrary contained in this Agreement, the Parties expressly agree that the aggregate Damages payable for delay in providing the Right of Way shall not exceed 10% (Ten per cent) of the Contract Price.

Both the parties agree that payment of such Damages shall be full and final settlement of all claims of the Contractor and such compensation shall be the sole remedy against delays of the Authority and both parties further agree that the payment of Damages shall be the final cure for the Contractor against delays of the Authority, without recourse to any other payments.

(vi) The Authority agrees to provide support to the Contractor and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and the Applicable Laws, the following:

(a) upon written request from the Contractor, and subject to the Contractor complying with Applicable Laws, provide reasonable support to the Contractor in procuring Applicable Permits required from any Government Instrumentality for implementation of the Project;

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- (b) upon written request from the Contractor, provide reasonable assistance to the Contractor in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable than those generally available to commercial customers receiving substantially equivalent services;
- (c) .....
- (d) .....
- (e) support, cooperate with and facilitate the Contractor in the implementation of the Project in accordance with the provisions of this Agreement; and
- (f) .....

**ARTICLE 4**

**4 Obligations of the Contractor**

**4.1 Obligations of the Contractor**

- (i) Subject to and on the terms and conditions of this Agreement, the Contractor shall undertake the survey, investigation, design, engineering, procurement, construction, and maintenance of the Project Highway and observe, fulfil, comply with and perform all its obligations set out in this Agreement or arising hereunder.
- (ii) The Contractor shall comply with all Applicable Laws and Applicable Permits (including renewals as required) in the performance of its obligations under this Agreement.
- (iii) Subject to the provisions of Clauses 4.1 (i) and 4.1 (ii), the Contractor shall discharge its obligations in accordance with Good Industry Practice and as a reasonable and prudent person.
- (iv) The Contractor shall remedy any and all loss, defects, or damage to the Project Highway from the Appointed Date until the end of the Construction Period at the Contractor’s cost, save and except to the extent that any such loss, defect, or damage shall have arisen from any wilful default or neglect of the Authority.
- (v) .....

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(vi) .....

(vii) The Contractor shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in this Agreement:

(a) make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars and details as may be required for obtaining Applicable Permits set forth in Schedule-F and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;

(b) .....

**ARTICLE 7**

**7 Performance Security**

**7.1 Performance Security**

(i) (A) Within 30 (thirty) days of receipt of Letter of Acceptance, the selected Bidder shall furnish to the Authority an irrevocable and unconditional guarantee from a Bank in the form set forth in Annex-I of Schedule-G (the “Performance Security”) for an amount equal to 5% (five percent) of its Bid Price.

**ARTICLE 8**

**8 Right of Way**

**8.1 The Site**

The site of the Project Highway (the “Site”) shall comprise the site described in Schedule-A in respect of which the Right of Way shall be provided by the Authority to the Contractor. The Authority shall be responsible for:

(a) acquiring and providing Right of Way on the Site in accordance with the alignment finalised by the Authority, free from all encroachments and encumbrances, and free access thereto for the execution of this Agreement; and

(b) obtaining licences and permits for environment clearance for the Project Highway.

...

**ARTICLE 10**

**10 Design and Construction of the Project Highway**

**10.1 Obligations prior to commencement of Works**

(i) Within 20 (twenty) days of the Appointed Date, the Contractor shall:

(a) appoint its representative, duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;

(b) appoint a design director (the “Design Director”) who will head the Contractor’s design unit and shall be responsible for surveys, investigations, collection of data, and preparation of preliminary and detailed designs;

(c) undertake and perform all such acts, deeds and things as may be necessary or required before commencement of Works under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and

(d) make its own arrangements for quarrying of materials needed for the Project Highway under and in accordance with the Applicable Laws and Applicable Permits.

(ii) The Authority shall, appoint an engineer (the “Independent Engineer”) before the Appointed Date to discharge the functions and duties specified in this Agreement, and shall notify to the Contractor the name, address and the date of appointment of the Authority’s Engineer forthwith.

(iii) Within 30 (thirty) days of the Appointed Date, the Contractor shall submit to the Authority and the Independent Engineer a programme (the “Programme”) for the Works, developed using networking techniques, for review and consent of the Engineer, giving the following details:

(a) Part I : Contractor’s organisation for the Project, the general methods and arrangements for design and construction, environmental management plan, Quality Assurance Plan including design quality plan, traffic management and

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safety plan covering safety of users and workers during construction (including use of ‘ROBOTS’ for diversion and control of traffic), Contractor’s key personnel and equipment.

(b) Part II : Programme for completion of all stages of construction and Project Milestones of the Works as specified in Project Completion Schedule set forth in Schedule-J. The Programme shall include the order in which the Contractor intends to carry out the Works, including the anticipated timing of design and stages of Works;

.....

### **ARTICLE 21**

#### **21 Force Majeure**

##### **21.1 Force Majeure**

As used in this Agreement, the expression “Force Majeure” or “Force Majeure Event” shall mean occurrence in Borduria of any or all of Non-Political Event, Indirect Political Event and Political Event, as defined in Clauses 21.2, 21.3 and 21.4 respectively, if it affects the performance by the Party claiming the benefit of Force Majeure (the “Affected Party”) of its obligations under this Agreement and which act or event (i) is beyond the reasonable control of the Affected Party, and (ii) the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice, and (iii) has Material Adverse Effect on the Affected Party.

##### **21.2 Non-Political Event**

A Non-Political Event shall mean one or more of the following acts or events:

(a) act of God, epidemic, extremely adverse weather conditions, lightning, earthquake, landslide, cyclone, flood, volcanic eruption, chemical or radioactive contamination or ionising radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);

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(b) .....

(c) .....

(d) any judgement or order of any court of competent jurisdiction or statutory authority made against the Contractor in any proceedings for reasons other than (i) failure of the Contractor to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of this Agreement, or (iv) exercise of any of its rights under this Agreement by the Authority;

(e) .....

(f) any event or circumstances of a nature analogous to any of the foregoing.

**21.3 Indirect Political Event**

An Indirect Political Event shall mean one or more of the following acts or events:

(a) .....

**21.4 Political Event**

A Political Event shall mean one or more of the following acts or events by or on account of any Government Instrumentality:

(a) Change in Law, only if consequences thereof cannot be dealt with under and in accordance with the provisions of Clause 19.17;

(b) ....

(c) unlawful or unauthorised or without jurisdiction revocation of, or refusal to renew or grant without valid cause, any clearance, licence, permit, authorisation, no objection certificate, consent, approval or exemption required by the Contractor or any of the Sub-contractors to perform their respective obligations under this Agreement; provided that such delay, modification, denial, refusal or revocation did not result from the Contractor's or any Sub-contractor's inability or failure to comply with any condition

## AUAP-JLU International Moot Court Competition, 2022

relating to grant, maintenance or renewal of such clearance, licence, authorisation, no objection certificate, exemption, consent, approval or permit;

(d) .....

(e) any event or circumstances of a nature analogous to any of the foregoing.

### **21.5 Duty to report Force Majeure Event**

(i) Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice pursuant hereto shall include full particulars of:

(a) the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Article 21 with evidence in support thereof;

(b) the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under this Agreement;

(c) the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and

(d) any other information relevant to the Affected Party's claim.

(ii) The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than 10 (ten) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under this Agreement.

(iii) For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 21.5 (i), and such other information as the other Party may reasonably request the Affected Party to provide.

**21.6 Effect of Force Majeure Event on the Agreement**

(i) Upon the occurrence of any Force Majeure after the Appointed Date, the costs incurred and attributable to such event and directly relating to this Agreement (the “Force Majeure costs”) shall be allocated and paid as follows:

(a) upon occurrence of a Non-Political Event, the Parties shall bear their respective Force Majeure costs and neither Party shall be required to pay to the other Party any costs thereof;

(b) .....

(c) upon occurrence of a Political Event, all Force Majeure costs attributable to such Political Event shall be reimbursed by the Authority to the Contractor.

(d) .....

(ii) Save and except as expressly provided in this Article 21, neither Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant hereto.

(iii) Upon the occurrence of any Force Majeure Event during the Construction Period, the Project Completion Schedule for and in respect of the affected Works shall be extended on a day for day basis for such period as performance of the Contractor’s obligations is affected on account of the Force Majeure Event or its subsisting effects.

**21.7 Termination Notice for Force Majeure Event**

(i) If one or more Force Majeure Events subsists for a period of 60 (Sixty) days or more within a continuous period of 120 (one hundred and twenty) days, either Party may in its discretion terminate this Agreement by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Article 21.

**21.8 Termination Payment for Force Majeure Event**



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(i) In the event of this Agreement being terminated on account of a Non-Political Event, The Contractor will be entitled to return of the Performance Security and shall also be paid Termination Payment which shall be an amount equal to the sum payable under Clause 23.5.

(ii).....

**21.9 Dispute resolution**

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure, provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/ or excuse on account of such Force Majeure Event.

**21.10 Excuse from performance of obligations**

If the Affected Party is rendered wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:

- (a) the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- (b) the Affected Party shall make all reasonable efforts to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- (c) when the Affected Party is able to resume performance of its obligations under this Agreement, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations hereunder.

**ARTICLE 23**

**23 Termination**

**23.1 Termination for Contractor Default**

(i) Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the “Contractor Default”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

(a) .....

(b) .....

(c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;

(d) .....

(e) .....

(f) .....

(ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor.

(iii) The following shall apply in respect of cure of any of the defaults and/ or breaches of the Agreement:

(a) The Cure Period shall commence from the date of the notice by the Authority to the Contractor asking the latter to cure the breach or default specified in such notice;

(b) The Cure Period provided in the Agreement shall not relieve the Contractor from liability for Damages caused by its breach or default;

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(c) The Cure Period shall not in any way be extended by any period of suspension under the Agreement;

(d) If the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Authority hereunder the applicable Cure Period (and any liability of the Contractor for damages incurred) shall be extended by the period taken by the Authority to accord its required approval.

(iv) After termination of this Agreement for Contractor Default, the Authority may complete the Works and/or arrange for any other entities to do so. The Authority and these entities may then use any Materials, Plant and equipment, Contractor's documents and other design documents made by or on behalf of the Contractor.

### **23.2 Termination for Authority Default**

(i) In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default has occurred as a result of any breach of this Agreement by the Contractor or due to Force Majeure. The defaults referred to herein shall include:

(a) the Authority commits a material default in complying with any of the provisions of this Agreement and such default has a Material Adverse Effect on the Contractor;

(b) the Authority has failed to make payment of any amount due and payable to the Contractor within the period specified in this Agreement;

(c) the Authority has failed to provide, within a period of 180 (one hundred and eighty) days from the Appointed Date, the environmental clearances required for construction of the Project Highway;

(d) the Authority becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with its creditors, or carries on

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business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs which (under Applicable Laws) has a similar effect;

(e) the Authority repudiates this Agreement or otherwise takes any action that amounts to or manifests an irrevocable intention not to be bound by this Agreement;

(f) the Authority's Engineer fails to issue the relevant Interim Payment Certificate within 60 (sixty) days after receiving a statement and supporting documents; or

(g) the whole work is suspended by Authority beyond 120 (one hundred twenty) days for any reason which is not attributed to the Contractor.

(ii) Without prejudice to any other right or remedy which the Contractor may have under this Agreement, upon occurrence of an Authority Default, the Contractor shall be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Contractor shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

If on the consideration of the Authority's representation or otherwise, the contractor does not issue the Termination Notice on such 15th (fifteenth) day and prefers to continue with the project, it is deemed that the cause of action of the Termination Notice has been condoned by the Contractor and he would be deemed to have waived any claim and forfeited any right to any other remedy on that count or in relation to such action or omission.

### **23.3 Termination for Authority's convenience**

Notwithstanding anything stated hereinabove, the Authority may terminate this Agreement for convenience. The termination shall take effect 30 (thirty) days from the date of notice provided to the Contractor.

### **23.5 Valuation of Unpaid Works**

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(i) Within a period of 45 (forty-five) days after Termination under Clause 23.1, 23.2 or 23.3, as the case may be, has taken effect, Employer shall proceed in accordance with Clause 18.5 to determine as follows the valuation of unpaid Works (the “Valuation of Unpaid Works”):

(a) value of the completed stage of the Works, less payments already made;

(b) reasonable value of the partially completed stages of works as on the date of Termination, only if such works conform with the Specifications and Standards; and

(c) value of Maintenance, if any, for completed months, less payments already made, and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement; and (ii) all taxes due to be deducted at source. (ii) The Valuation of Unpaid Works shall be communicated to the Authority, with a copy to the Contractor, within a period of 30 (thirty) days from the date of Termination.

**23.6 Termination Payment**

(i) Upon Termination on account of Contractor’s Default under Clause 23.1, the Authority shall:

(a) encash and appropriate the Performance Security, and make a claim for any amount in excess of the amount of the encashed Performance Security for any losses, delays and cost of completing the Works and Maintenance, if any;

(b) .....

(c) pay to the Contractor, by way of Termination Payment, an amount equivalent to the Valuation of Unpaid Works after adjusting any other sums payable or recoverable, as the case may be, in accordance with the provisions of this Agreement.

(ii) Upon Termination on account of an Authority Default under Clause 23.2 or for Authority’s convenience under Clause 23.3, the Authority shall:

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(a) return the Performance Security , Additional Performance Security and Retention Money forthwith;

(b) encash and appropriate the bank guarantee, if any, for and in respect of the outstanding Advance Payment; and

(c) pay to the Contractor, by way of Termination Payment, an amount equal to:

i. Valuation of Unpaid Works;

ii. the reasonable cost of temporary works, as determined by the Authority's Engineer; and

iii. 10% (ten per cent) of the cost of the Works and Maintenance that are not commenced or not completed, and shall adjust from the sum thereof (i) any other amounts payable or recoverable, as the case may be, in accordance with the provisions of this Agreement, and (ii) all taxes due to be deducted at source.

(iii) Termination Payment shall become due and payable to the Contractor within 30 (thirty) days of a demand being made by the Contractor to the Authority with the necessary particulars, and in the event of any delay, the Authority shall pay interest at Bank Rate + 3% per annum, on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

(iv) The Contractor expressly agrees that Termination Payment under this Article 23 shall constitute a full and final settlement of all claims of the Contractor on account of Termination of this Agreement and that it shall not have any further right or claim under any law, treaty, convention, contract or otherwise.

## **ARTICLE 26**

### **26. Dispute Resolution**

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26.1 All disputes or differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of this Contract or the breach thereof shall be settled by arbitration in accordance with the Borduria Arbitration and Conciliation Act, 1996.

26.2 The Arbitration should be conducted by a panel of 3 (three) Arbitrators, where each party shall appoint one Arbitrator and such Arbitrators should mutually select and appoint the third and Presiding Arbitrator.

26.3 If any party fails to appoint an Arbitrator within 30 (thirty) days of being notified to do so by the other Party or if the two Party appointed Arbitrators fail to agree on the third Arbitrator, the Parties shall be at liberty to seek appointment of Arbitrator in accordance with the Borduria Arbitration and Conciliation Act, 1996 by a petition before a Court having jurisdiction.

26.4 The seat of arbitration will be Verora. The award made in pursuance thereof shall be binding on the parties.

### **ARTICLE 27**

#### **27. Governing Law**

The contract shall be governed by the Bordurian Contract Act, 1872 (equivalent to the Indian Contract Act, 1872)

### **Schedule F**

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**(See Clause 4.1 (vii)(a))**

#### **APPLICABLE PERMITS**

##### **1. Applicable Permits**

(i) The Contractor shall obtain, as required under the Applicable Laws, the following Applicable Permits:

(a) Permission of the State Government for extraction of boulders from quarry;

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- (b) Permission of Village Panchayats and Pollution Control Board for installation of crushers;
  - (c) Licence for use of explosives;
  - (d) Permission of the State Government for drawing water from river/reservoir;
  - (e) Licence from inspector of factories or other competent Authority for setting up batching plant;
  - (f) Clearance of Pollution Control Board for setting up batching plant;
  - (g) Clearance of Village Panchayats and Pollution Control Board for setting up asphalt plant;
  - (h) Permission of Village Panchayats and State Government for borrow earth; and
  - (i) Any other permits or clearances required under Applicable Laws.
- (ii) Applicable Permits, as required, relating to environmental protection and conservation shall have been procured by the Authority in accordance with the provisions of this Agreement.

### **Schedule - J**

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**(See Clause 10.3 (ii))**

#### **Project Completion Schedule**

**(Milestone I - 8 months 20% ~ 35 KMS - 240 days)**

**Milestone II - 14 Months 40% ~ 80 KMS - 420 days**

**Milestone III - 20 Months 60% ~ 150 KMS - 600 days**

**Milestone IV - 26 Months 80% ~ 200 KMS - 780 days**

**Milestone V - 32 Months 100% ~ 267 KMS - 960 days)**



**1. Project Completion Schedule**

During Construction period, the Contractor shall comply with the requirements set forth in this Schedule-J for each of the Project Milestones and the Scheduled Completion Date. Within 15 (fifteen) days of the date of each Project Milestone, the Contractor shall notify the Authority of such compliance along with necessary particulars thereof.

**2. Project Milestone-I**

(i) Project Milestone-I shall occur on the date falling on the 240th (Two hundred and Fortieth) day from the Appointed Date (the “Project Milestone- I”).

(ii) Prior to the occurrence of Project Milestone-I, the Contractor shall have commenced construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 20% (twenty per cent) of the Contract Price.

**3. Project Milestone-II**

(i) Project Milestone-II shall occur on the date falling on the 420th (Four Hundred and Twentieth) day from the Appointed Date (the “Project Milestone- II”).

(ii) Prior to the occurrence of Project Milestone-II, the Contractor shall have continued with construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 40% (Forty per cent) of the Contract Price and should have started construction of all bridges

**4. Project Milestone-III**

(i) Project Milestone-III shall occur on the date falling on the 600th (Six hundredth) day from the Appointed Date (the “Project Milestone- III”).

(ii) Prior to the occurrence of Project Milestone-III, the Contractor shall have continued with construction of the Project Highway and submitted to the Authority duly and validly prepared

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Stage Payment Statements for an amount not less than 60% (Sixty per cent) of the Contract Price and should have started construction of all project facilities.

### **5. Project Milestone-IV**

(i) Project Milestone-IV shall occur on the date falling on the 780 (Seven Hundred and Eightieth) day from the Appointed Date (the “Project Milestone- IV”).

(ii) Prior to the occurrence of Project Milestone-IV, the Contractor shall have continued with construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 80% (eighty per cent) of the Contract Price and should have started construction of all project facilities.

### **6. Project Milestone-V - Completion**

(i) Project Milestone-V shall occur on the date falling on the 960 (Nine Hundred and Sixtieth) day from the Appointed Date (the “Project Milestone- V”).

(ii) Prior to the occurrence of Project Milestone-V, the Contractor shall have continued with construction of the Project Highway and submitted to the Authority duly and validly prepared Stage Payment Statements for an amount not less than 100% (hundred per cent) of the Contract Price. The project completion shall occur on this day and on completion of construction of 100 % of the project facilities.

**ANNEXURE D - PROCEDURAL HISTORY**

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**BEFORE THE ARBITRAL TRIBUNAL CONSISTING OF:**

**HON'BLE MR. JUSTICE TIMOTHY HALLAND, PRESIDING ARBITRATOR  
FORMER CHIEF JUSTICE OF BORDURIA, SUPREME COURT OF BORDURIA**

**HON'BLE MR. JUSTICE VINCENT POWAR, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**MR. RUSSEL.S. HADDOCK, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**IN THE MATTER OF ARBITRATION BETWEEN:**

**Bill Turner Construction Co.**

**....Claimant**

**AND**

**Road Development Corporation of Borduria ....Respondent**

**ORDER DATED 02.11.2020 (FIRST PRELIMINARY HEARING)**

**Between 11:30 A.M. to 12:45 P.M. at Malcom chambers, Verora**

1. Pursuant to the Notice dated 25 October, 2020 issued by Arbitral Tribunal, Hearing is held today.
2. By Notice Invoking Arbitration dated 3 October 2020, the Claimant appointed Justice Vincent Powar as its nominee arbitrator. By Reply to notice invoking arbitrator dated 17 October 2020, the Respondent nominated Justice Russel S. Haddock as its Nominee arbitrator. By email dated 19 October 2020 Justice Powar and Haddock nominated Justice Timothy Halland, Former Chief Justice of Borduria as the Presiding Arbitrator. Justice Halland gave his consent to be the presiding arbitrator on 22nd October 2020 and the constitution of the arbitral tribunal was thereby complete.
3. At the outset, the Tribunal declared u/s 12 (1) of the Borduria Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act, 1996") that they had no

## AUAP-JLU International Moot Court Competition, 2022

financial or other interest in the Parties involved in the current Arbitral proceedings and that they are in a position to act independently and impartially.

4. After discussion with the parties, it is further directed as follows:

<b>On or before</b>	<b>Steps to be taken</b>
15.11.2020	The Claimant to file its Statement of Claim with documents
10.12.2020	Statement of Defence and Counter Claim, if any, to be filed by the Respondent along with documents.
18.12.2020	Reply to Counter Claim / Rejoinder to be filed by the Claimant and for additional documents, if any.
30.12.2020	For Admission and Denial of documents by way of Affidavits by both the parties and for exchange of proposed Points of Determination.
02.01.2021 at 10:00 A.M at Malcolm Chambers, Verora	For framing Points of Determination and for further procedural order to be passed

Both Parties to strictly adhere to the dates fixed as per their request.

5. Parties will file the pleadings and documents before the Arbitral Tribunal after serving copies of the same on other side. Parties shall adhere to the time lines appointed by the Tribunal and there shall not be any deviation in this regard as Parties have specifically agreed to abide by it.

## **AUAP-JLU International Moot Court Competition, 2022**

6. The next meeting in the main case is fixed for Settlement of Points of Determination and to inform the Tribunal if Parties would wish to lead oral evidence.
6. By consent of the Parties, it is declared that further procedure in the matter will be decided by the Tribunal after hearing from the parties from time to time. However, both parties shall be given fullest possible opportunities to put up their case.
7. Pleadings and documents shall be filed on A-4 size paper for the Parties and also for the Arbitrators.
8. (i) The documents shall be placed in Volume/s separate from the volume of the pleadings.
9. Applications/communications to the Tribunal may be made by e-mail followed by Hard copy sent per courier or speed post. All substantive pleadings, applications and documents shall necessarily be filed as Hardcopies and as also in soft copies in Word and PDF file.
10. To be listed on 02.01.2021 at 10:00 A.M at Malcolm chambers, Verora.

**DATE:** 02.11.2020

**PLACE:** Verora

**Mr. Justice Timothy Halland**

**Presiding Arbitrator  
Former Chief Justice of Borduria, Supreme Court of Borduria**

**AUAP-JLU International Moot Court Competition, 2022**

**BEFORE THE ARBITRAL TRIBUNAL CONSISTING OF:**

**HON'BLE MR. JUSTICE TIMOTHY HALLAND, PRESIDING ARBITRATOR  
FORMER CHIEF JUSTICE OF BORDURIA, SUPREME COURT OF BORDURIA**

**HON'BLE MR. JUSTICE VINCENT POWAR, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**MR. RUSSEL.S. HADDOCK, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**IN THE MATTER OF ARBITRATION BETWEEN:**

**Bill Turner Construction Co.**

**....Claimant**

**AND**

**Road Development Corporation of Borduria ....Respondent**

**ORDER DATED 02.01.2021**

**Between 10:00 A.M. to 11:00 A.M. at Malcolm chambers, Verora**

1. Both Parties informed that Pleadings are complete. Therefore, following issues for Determination are formulated;-

- A. Whether the Claimant is entitled to damages from the Respondent for delay in handing over of the site and delay in receiving permission from the forest department for the cutting of the trees? If yes to what extent?*
- B. Whether the Claimant is entitled to re-imburement of the value of the bank guarantee encashed by the Respondent.?*
- C. Whether the Claimant has exercised its right of termination of the contract for Force Majeure correctly. If yes, what amount is the Claimant entitled to receive.*
- D. Whether the Claimant is entitled to pre-award interest on the cashed bank guarantee and the damages if any payable under issue A. If yes, at what rate and from which date?*
- E. Whether the Claimant is entitled to post award interest on the awarded sum if any. If yes, at what rate.*

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*F. Which party is entitled to costs of the arbitration proceedings and what would be the reasonable costs payable to the parties?*

Learned Counsel for Parties agree that the aforesaid two Points of Determination would broadly cover all the disputed questions projected in the Pleadings.

2. Learned Counsel for Respondent has also submitted Draft Points of Determination on its behalf but after having gone through the Points of Determination formulated by the Tribunal, Learned Counsel for Respondent submitted that they cover all the points which have been formulated by the Tribunal and there is no need to have any additional Points of Determination. Thus, both Parties agree that Points of Determination as formulated by the Tribunal would be sufficient to resolve the controversy involved in the Matter.
3. Both Parties have also filed Affidavits of Admission and Denial of Documents. The same are directed to be taken on record.
4. Today Learned Counsel for Claimant has informed the Tribunal that it shall be submitting evidence affidavit of one witness in support of its claims. Learned Counsel for Respondent has informed the Tribunal that it shall be submitting only documentary evidence as according to Respondent the Matter depends on the interpretation of the terms and conditions and Clauses of the Contract entered into between the Parties.
5. Looking to the time constraint at the disposal of the Tribunal, both Parties are hereby directed to keep minimum number of Witnesses on their respective behalf. And the evidence shall contain only the relevant portions, which maybe really necessary to be put across to the Tribunal and would not make it unnecessarily lengthy.

**To be posted on 16.06.2021 at 11:00 A.M at Malcolm chambers for recording of Claimant's evidence.**

Date: **02.01.2021**

Place: Verora

**Mr. Justice Timothy Halland  
Presiding Arbitrator  
Former Chief Justice of Borduria, Supreme Court of Borduria**

**AUAP-JLU International Moot Court Competition, 2022**

**BEFORE THE ARBITRAL TRIBUNAL CONSISTING OF:**

**HON'BLE MR. JUSTICE TIMOTHY HALLAND, PRESIDING ARBITRATOR  
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FORMER JUDGE, SUPREME COURT OF BORDURIA**

**MR. RUSSEL.S. HADDOCK, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**IN THE MATTER OF ARBITRATION BETWEEN:**

**Bill Turner Construction Co.**

**....Claimant**

**AND**

**Road Development Corporation of Borduria ....Respondent**

**ORDER DATED 16.06.2021**

**Between 10:00 A.M. to 11:00 A.M. at Malcolm chambers, Verora**

1. The cross examination of Claimant's witness No.1 Mr. Phil Walker commenced and completed. He has been discharged. As already noted in the previous order, Respondent does not wish to produce any witness. Hence, the matter is ripe for hearing final arguments on merits.
2. The Written statement(Memorials) of final arguments will be submitted in the format as prescribed in the Rule 10 of the Brochure of the AUAP-JLU International Moot Court Competition, 2022.



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3. Accordingly, before the commencement of final arguments, both parties are directed to file their Written Submissions which should be short, crisp and concise and not exceeding 40 pages.

**To be posted on 5th – 7th August, 2022 to be held at Faculty of Law, Jagran Lakecity University by the Moot Court Committee of the Jagran Lakecity University, Bhopal.**

Date: **16.06.2021**

Place: Verora

**Mr. Justice Timothy Halland**  
**Presiding Arbitrator**  
**Former Chief Justice of Borduria, Supreme Court of Borduria**

**ANNEXURE D - RELEVANT EXTRACTS FROM CLAIMANT'S EVIDENCE**

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**BEFORE THE ARBITRAL TRIBUNAL CONSISTING OF:**

**HON'BLE MR. JUSTICE TIMOTHY HALLAND, PRESIDING ARBITRATOR  
FORMER CHIEF JUSTICE OF BORDURIA, SUPREME COURT OF BORDURIA**

**HON'BLE MR. JUSTICE VINCENT POWAR, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**MR. RUSSEL.S. HADDOCK, CO-ARBITRATOR  
FORMER JUDGE, SUPREME COURT OF BORDURIA**

**IN THE MATTER OF ARBITRATION BETWEEN:**

**Bill Turner Construction Co. ....Claimant**

**AND**

**Road Development Corporation of Borduria ....Respondent**

I, Mr. Phil Walker, s/o late Sh. M.L.Walker aged about 50 years resident at E-567, 1st Floor, BBE, Verora do hereby depose under solemn oath and affirmation as under that I tender my Evidence by way of Affidavit which is CW-1.

The said Affidavit is duly signed by me and has been notarized in Verora. Whatever I have to depose about the case has been stated in the said Affidavit. I have already marked the documents which are on record as Exhibit CW-1/1 to Exhibit CW-1/10. The same may be marked accordingly.

Cross Examination by Learned Counsel for Respondent Mr. Bruno Fernandes:

Q.1 What is your qualification?

Ans. I have bachelors degree in civil engineering and masters in project management.

Q.2 Can you explain your role with regard to the project in hand?

Ans. I was project manager in charge of the project on behalf of the claimant

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Q.3. Who calculated the total contract value with respect to the project?

Ans. The project team headed by me calculated the value of the project.

Q.4 Can you explain how finance was organised for completing the construction work in the project?

Ans. The Claimant had its own funds and had sidelined a huge corpus of its own funds to complete construction of the project.

...

Q.20. Whether the accounts between the parties were yet to be settled before invocation of arbitration?

Ans. The accounts were to be settled in terms of the contract and termination. There were certain works which remained unpaid and have been claimed by Claimant under Claim No.C.

Q.21. What steps were taken by Claimant to settle the accounts?

Ans. I am not aware.

...

Q.25 I put it to you that no steps were taken by Claimant to settle the accounts as in this situation Respondent was seeking meetings/sending reminders but Claimant was not bothered, what do you have to say?

Ans. I will check and revert.

...

Q. 40. Did you read the Statement of Claim and Statement of Defence before filing your affidavit of evidence?

Ans. Yes, I have read only the Statement of Claim and the documents submitted along with that as also the documents submitted along with my affidavit of evidence.

Q.41. Can you tell us which part of your affidavit of evidence is based on records and which parts are to your personal knowledge?

Ans. Looking to the nature of the affidavit filed by me, it will be difficult to segregate as to which part of the same is based on documents and which part is based on my personal knowledge. But according to me, it is based on both.

...

## AUAP-JLU International Moot Court Competition, 2022

Q.70. Were you dealing with the finance and accounts of any other projects of Claimant, apart from the present project?

Ans. Yes, I am dealing with all the construction business of Claimant.

Q.71. Have you ever dealt with banks for bank guarantee arrangements?

Ans. For this particular project, I was not involved. Presently, I am involved in bank guarantee arrangements from banks.

Q.72. Can you provide us with the details of the bank guarantees furnished by Claimant?

Ans. In compliance with the tender conditions, the Claimant on 17 June 2018 had submitted an irrevocable bank guarantee of USD 9.85 million as performance security for the entire duration of the project.

Q.73. What was the validity period and claim period of the Bank Guarantee, when it was initially issued?

Ans. It is a matter of record. As far as I remember, the said Bank Guarantee is already available in the record of these proceedings.

Q.74. Which bank had issued the Bank Guarantee?

Ans. Bank guarantee amounting to USD 9.85 million was issued by the Matador Bank, Verora.

....

Q.101 I put it to you that Claimant has suffered no actual loss because of the alleged underutilisation of manpower and machinery. What do you have to say?

Ans. It is incorrect.

...

Q.126 How have you calculated the damages for underutilisation of plant and machinery?

Ans. The independent engineer maintained monthly progress reports and indicated therein the plant and machinery and manpower maintained at the site. I have specifically relied on the Monthly Progress Reports of November 2018, July 2019 and January 2020. Further, I have examined the vouchers, salary slip and audited accounts maintained by the contractor and tabulated the damages for the period of delay attributable to the RDC i.e., delay in handing over land and delay in grant of permission for felling of trees.

**AUAP-JLU International Moot Court Competition, 2022**

.....

Q.200 I put it to you that whatever you have said in your cross-examination and evidence affidavit is false.

Ans. I do not agree.

....

**ANNEXURE E- PROGRESS REPORT (RESPONDENT DOCUMENTARY EVIDENCE)**

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**YEKIGAWA**

**YEKIGAWA BORDURIA LIMITED**

**MolvaniaLatveria Expressway**

**(Name of the Project)**

**Road Development Corporation of Borduria**

**(Name of the end user)**

**Bill Turner Construction Co.**

**(Name of the Customer)**

**Progress Report**

**For the period**

**From 01 July 2018 to 30-09-2020**

## AUAP-JLU International Moot Court Competition, 2022

<b>YEKIGAWA</b> <b>YEKIGAWA BORDURIA LIMITED</b>	<b>PROGRESS REPORT</b>
Customer: Bill Turner Construction Co.	Project Doc. No.: ML14-GT1-JPR-016
Job Name: MolvaniaLatveria Expressway	
Job Code: ML14	YIL Doc. No.: ML14-GT1-JPR-016
	Revision: 0

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## AUAP-JLU International Moot Court Competition, 2022

<b>YEKIGAWA</b> <b>YEKIGAWA BORDURIA LIMITED</b>	<b>PROGRESS REPORT</b>
Customer: Bill Turner Construction Co.	Project Doc. No.: ML14-GT1-JPR-016
Job Name: MolvaniaLatveria Expressway	
Job Code: ML14	YIL Doc. No.: ML14-GT1-JPR-016
	Revision: 0

### 1.PROJECT BACKGROUND INFORMATION

Project: MolvaniaLatveria Expressway

Location: Borduria

Customer: Bill Turner Construction Co.

Tender Date: 10.02.2018

Scope of Services: DCS, ESD and FGS System which includes Design, Engineering, FAT, E&C Supervision & Project Management

Zero Date: 10.02.2018

Effective Date: 10.02.2018

Time elapsed w.r.t. Zero Date: 20 months

Scheduled Date of Commissioning: TBA

Independent Engineer: P.V. Helsing

Job Code: ML14



## **AUAP-JLU International Moot Court Competition, 2022**

SAP Reference: 101787

### **2. EXECUTIVE SUMMARY**

#### **2.1.GENERAL REMARKS:**

Basic engineering & design review meeting followed by a prototype testing is completed. Detail engineering is also completed. Procurement activities have been completed and manufacturing activities are in advanced stage.

#### **2.2. OBJECTIVES FOR THE MENTIONED PERIOD:**

- Complete mobilization of machinery
- Submit Drawings
- Milestone I ~35 kms
- Milestone II ~ 80 kms
- Milestone III ~ 150 kms
- Milestone IV~ 200 kms
- Milestone V~ 267 kms

#### **2.3. MAJOR ACTIVITIES COMPLETED/CARRIED OUT VIS-A-VIS OBJECTIVES:**

- Completion of Mobilization
- Submitted drawings
- Milestone I ~ 35kms completed
- Milestone II ~ 80kms completed
- Rest are under progress and incomplete.

#### **2.4. POINTS REQUIRING URGENT ATTENTION:**

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- Requesting Bill Turner Construction Co. to expedite the mapping process of the highway
- Requesting Bill Turner Construction Co. to expedite completion of remaining milestones.
- Requesting Bill Turner Construction Co. to review and examine the deterioration of the built roads.

### **2.5. OVERALL PROGRESS:**

- Delay in completing some common activities like site survey.
- Catchup plan: Application for forest clearance is underway.
- Delay in review of suggestions in documents submitted by Bill Turner Construction Co.
- Delay in carrying out scheduled detail engineering because of cascading effect posed by delaying engineering inputs.

.....

**ANNEXURE F: MONTHLY PROGRESS REPORT FOR NOVEMBER 2018**

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<b>YEKIGAWA YEKIGAWA BORDURIA LIMITED</b>	<b>PROGRESS REPORT FOR NOVEMBER, 2018</b>
Customer: Bill Turner Construction Co.	Project Doc. No.: ML14-GT1-JPR-016
Job Name: MolvaniaLatveria Expressway	
Job Code: ML14	YIL Doc. No.: ML14-GT1-JPR-016
	Revision: 0

**PROJECT COMPLETION STATUS AS OF 1 NOVEMBER 2018-5%**

Sr.No.	Particulars	Required deployment	Actual deployment
1.	Hot mix plant	3	2
2.	Cement Mixer	10	7
3.	Transport truck for earthwork (Tipper)	15	6
4.	Road Roller	5	1
5.	Labourers	50	29
6.	Site Supervisor	5	2

**ANNEXURE G: MONTHLY PROGRESS REPORT FOR JULY 2019**

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<b>YEKIGAWA</b> <b>YEKIGAWA BORDURIA LIMITED</b>	<b>PROGRESS REPORT FOR JULY, 2019</b>
Customer: Bill Turner Construction Co.	Project Doc. No.: ML14-GT1-JPR-016
Job Name: MolvaniaLatveria Expressway	
Job Code: ML14	YIL Doc. No.: ML14-GT1-JPR-016
	Revision: 0

**PROJECT COMPLETION STATUS AS OF 1 JULY 2019-27%**

Sr.No.	Particulars	Required deployment	Actual deployment
1.	Hot mix plant	5	2
2.	Cement Mixer	12	5
3.	Transport truck for earthwork (Tipper)	12	7
4.	Road Roller	5	2
5.	Labourers	70	41
6.	Site Supervisor	5	1

**AUAP-JLU International Moot Court Competition, 2022**

**ANNEXURE H: MONTHLY PROGRESS REPORT FOR JANUARY 2020**

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<b>YEKIGAWA</b> <b>YEKIGAWA BORDURIA LIMITED</b>	<b>PROGRESS REPORT FOR JANUARY, 2020</b>
Customer: Bill Turner Construction Co.	Project Doc. No.: ML14-GT1-JPR-016
Job Name: MolvaniaLatveria Expressway	
Job Code: ML14	YIL Doc. No.: ML14-GT1-JPR-016
	Revision: 0

**PROJECT COMPLETION STATUS AS OF 1 JANUARY 2020-44%**

Sr.No.	Particulars	Required deployment	Actual deployment
1.	Hot mix plant	7	1
2.	Cement Mixer	15	7
3.	Transport truck for earthwork (Tipper)	10	4
4.	Road Roller	3	1
5.	Labourers	40	19
6.	Site Supervisor	7	4