

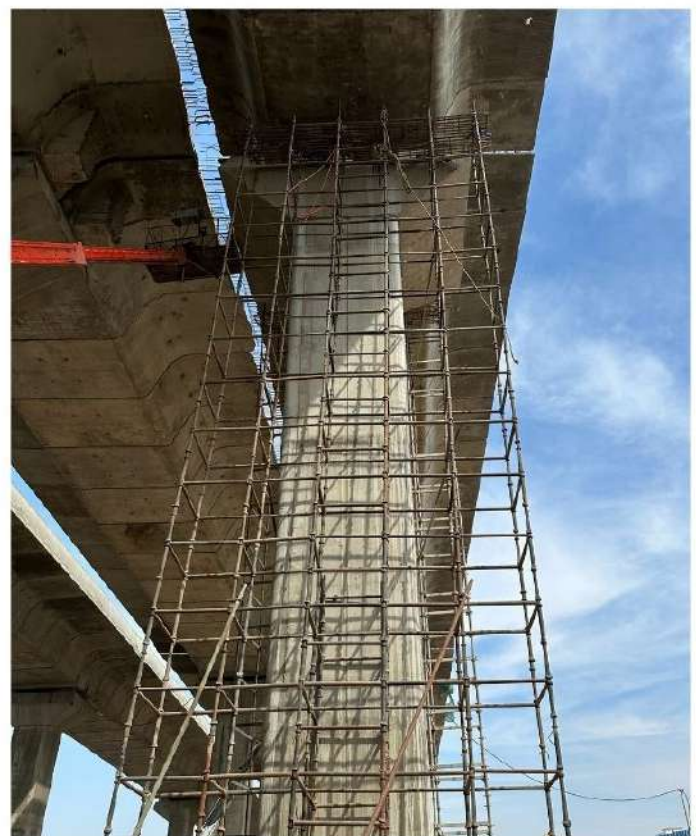
Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for compensation on account of idling of men and machinery - prolongation of work - rationale of 50% of 2.5 of the contract value - an arbitral tribunal, even when it does not accept the basis of calculation of damages as presented by the Contractor, can re-work the same and may resort to some “guess work” in certain situations - award cannot be sustained if it does not disclose on what basis the extent of overhead of 2.5% of the contract price has been assumed.**
- **Change in methodology for awarding claim - compliance with natural justice - methodology which is different from methodology set out in the statement of claim, the same must be put to the opposite party so that the opposite party has an opportunity to make its submissions.**
- **Claim for Overheads - prolongation of contract - formula of 50% of 2.5 of the contract value - awarding of claim on normative basis cannot be allowed as the same is not equivalent to producing proof of actual damage - no reasons given as to how the extent of overhead has been assumed to be 2.5% - arbitral award must offer an explanation or rationale as to the formula being adopted.**
- **Compensation on account of “increased cost of material due to prolongation of work” - compensation to the extent of 1.5% of the proportionate work done - even though the contract contains a provision debarring a Contractor from claiming enhanced rate on any ground, still it is permissible for damages to be assessed and awarded on the touchstone of Section 73 of the Contract Act - arbitrator is vested with the authority to compensate for the extra costs incurred by a party as a result of the failure of the first party to live up to its obligations.**

[Delhi Development Authority v. Sportina Payce Infrastructure Pvt. Ltd. - Delhi High Court - Decided on 4.3.2024]



- **Grant of extension of time does not automatically result in consequential cost compensation - Employer while granting Extension of Time (EOT) assigned no reasons which formed the basis of the determination of EOT except on one occasion - the contract permitted the arbitral tribunal the right to determine the amount of money payable to the Contractor even in respect of the claims with respect to which notice under Clause 53.1 of the General Conditions of Contract (GCC) is not given.**
- **Claim for increase in minimum wages - change in law event - Contractor not fully compensated through the Price Adjustment Formula - under the Price Adjustment Formula the labour price escalation is based on Consumer Price Index (CPI) which does not capture the actual rise in escalation in labour cost of the Contractor due to increase in minimum wages notified by the government - the percentage increase in the CPI Index was in the range of 18% to 70%, whereas the percentage increase in the minimum wages, during the same period, was in the range of 25% to 150% - burden of proof is on the Contractor to show that the sums were paid by it to the labour, prior to each enhancement, and enhanced wage paid, post each revision of minimum wages notified by the government - in a claim for reimbursement of cost incurred, it may not be legally justified to permit a party to quantify their claim based on a formula without leading evidence.**
- **Claim for concreting work in Geologically Accepted Over-breaks ('GAO') - variation claim - condition to issue mandatory notice - unforeseen obstructions encountered during the execution of the works - Contractor had to undertake quantity of works that far exceeded the quantities estimated in the Bills of Quantity - procedure for claiming variation prescribed in the contract was not followed by the Contractor and the mandatory notice was also not given - reduced rate of 50% of the concreting work quoted for invert and overt lining, was unreasonable and did not adequately compensate the Contractor due to excessive GAO encountered by the Contractor.**
- **Reduction in scope of work - claim for unrecovered costs and profits - reduction in the executed contract price was approx. 17% of the original contract price - non-applicability of Clause 52 of the GCC by stating that any increase or decrease of the contract price by more than 15% would result in revision of rates - no reason for the Employer to deny the compensation payable to the Contractor.**
- **Claim for additional costs incurred due to use of Aviation Turbine Fuel ('ATF') instead of High-Speed Diesel ('HSD') for the construction work - equipment could not be used due to freezing of HSD in winters - Contractor assumed that the Employer did not have any objection - Contractor went ahead and purchased large quantities of ATF - Contractor's claim based on Clause 12.2 of the GCC, treating non-availability of HSD and its non-feasibility to be used in winter, as an 'obstruction event' - Employer having benefitted from the use of ATF cannot deny the payment of additional cost incurred by the Contractor.**
- **Claim for compensation due to idling of plants and machineries at site during the prolongation period - computation of - net depreciation value of the machineries should be calculated on half yearly depreciation basis instead of hourly depreciation claimed by the Contractor.**
- **Claim for overhead costs - auditor's certificate produced by the Contractor in support of the claim is sufficient evidence, if the Employer does not raise any objection to the authenticity of the certificate or the revenue and expense statement it certified.**

- Claim for reimbursement of Building and Other Construction Workers Cess ('BOCW Cess') - at the time of submission of the bid no cess was payable under the BOCW Cess Act, 1996 - Regulations under BOCW Cess Act were notified later on, upon which the BOCW Cess became payable by the Contractor - BOCW Cess came to be first collected in the year 2010, when the regulations under the BOCW Cess Act were notified - since the liability to collect cess under the BOCW Cess Act did not arise until the constitution of Board in the state, which happened in the year 2010, the Contractor is entitled to seek reimbursement as a 'change in law' event.

*[NHPC Ltd. v. Hindustan Construction Company Limited - Delhi High Court -
Decided on 20.12.2023]*



**Delhi Development Authority v. Sportina Payce Infrastructure Pvt. Ltd. -
Delhi High Court - Decided on 4.3.2024**

The Contractor was awarded the work for "Construction of Indoor Stadium for Badminton & Squash for Commonwealth Games 2010 at Siri Fort Sport Complex, Phase-I". The work was delayed. Disputes between the parties were referred to arbitration. The arbitral tribunal allowed the claims of the Contractor towards idling of men and machinery and overheads due to prolongation of work by adopting the formula of 50% of 2.5% of the contract value. The Court observed that even if there exists a price variation clause in the contract, an arbitral tribunal is not per se precluded from awarding additional compensation, on the touchstone of Section 73 of the Contract Act, in a situation where there is an extraordinary increase in cost of execution, and where the Employer is responsible for the delay. Further, an error in interpretation of a contract in a case where there is valid and lawful submission of disputes to an arbitral tribunal, is an error within jurisdiction. The award of claims predicated on the arbitral tribunal's methodology which was different from methodology set out in the statement of claim and no opportunity was given to the opposite party to make its submissions, is liable to be set aside.

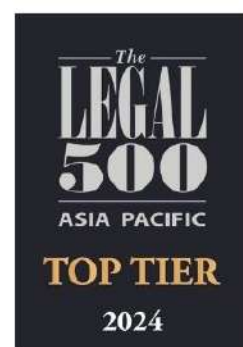
The Employer awarded to the Contractor the contract for 'Civil works for Diversion Channel, Cofferdams, Barrage, Intake structure, head race tunnel, surge shaft, pressure shaft, underground power house, TRT system and switchyard of Chutak HE Project, Kargil (J&K)'. Disputes arose between the parties regarding the Contractor's claim for payment of additional cost incurred during the extended period of contract. The arbitral tribunal allowed some of the claims raised by the Contractor. However, the Contractor's claim for reimbursement of the enhanced wages paid to the labourers, due to enhancement of minimum wages notified by the State Government during the course of the contract, was rejected. Both parties challenged the award of the arbitral tribunal. The arbitral tribunal made a finding that the Employer was responsible for the delay in handing over the site to the Contractor, delay in issuance of drawings and delays due to default of interfacing contractors appointed by Employer. The arbitral tribunal rejected the plea that there were concurrent delays. It concluded that the Contractor was entitled to cost compensation under section 73 of the Contract Act. The Court concluded that excess GAO encountered by the Contractor amounted to obstructions contemplated under Clause 12.2, which would entitle it to claim compensation. Further, there was no reason for the Employer to deny due compensation to the Contractor on account of unrecovered costs and profits due to reduction in the scope of work. The Court also upheld the claim for additional costs incurred by the Contractor from the use of Aviation Turbine Fuel instead of High Speed Diesel (HSD) due to freezing of HSD in winters. The Contractor's claim that the revision of minimum wages by way of notification of the Government, constituted a 'change in law' event, was upheld by the Court. The Employer's contention that the Price Adjustment Formula ('PAF') under Clause 70.3 of the COPA, the Contractor had been adequately compensated due to escalation in the labour cost during the course of the contract, was rejected. However, the Court concluded that the burden of proof was on the Contractor to show that the sums were paid by it to the labourers, prior to each enhancement, and enhanced wage paid, post each revision of minimum wages notified by the government. It observed that in a claim for reimbursement of the costs incurred, it may not be legally justified to permit a party to quantify their claim based on a formula without leading evidence. The Court upheld the Contractor's claim for reimbursement of Building and Other Construction Workers Cess ('BOCW Cess') since at the time of submission of the bid by it, no cess was payable. The Regulations under BOCW Cess Act were notified later on, upon which the BOCW Cess became payable by the Contractor.



Dharmendra Rautray
Barrister (Lincoln's Inn, London)
Rautray & Co.

B3/18 Vasant Vihar,
Paschimi Marg,
New Delhi – 110057
Tel: +91.11.46552244 / 46113964

M: 9899988878
E: dharmendra@rautray.com



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