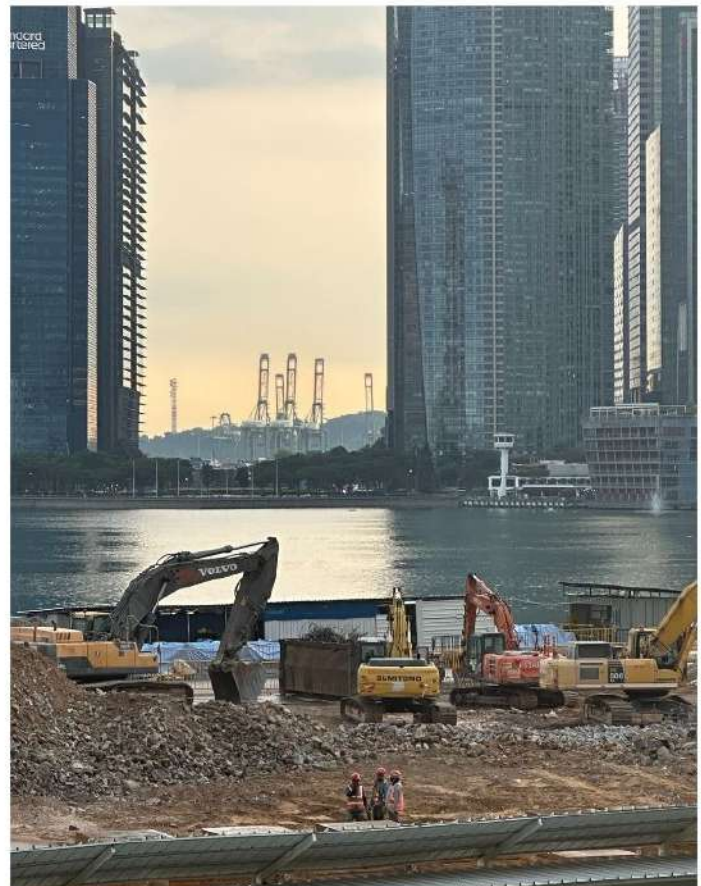


Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Feasibility Study Report (FSR) - modification - increase in scope of work - bid document stated that the work will have to be executed only as per the Detailed Project Report ('DPR') approved by the Railway Authorities which included Engineering Scale Plan ('ESP') and not on the basis of the FSR submitted during the pre-bid stage - revised FSR was thereafter provided to the Contractor after the award of the contract, which increased the track length to 27.66 Kms - Employer cannot circumvent the competitive procurement process by resorting to drastic modifications between what is indicated in the tender documents and what is indicated in the final procurement order - Employer cannot take refuge in the words 'indicative of' used in the bid documents.**
- **Claim for increase in minimum wages - change in law - 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 - notification of the minimum wages for labour is in two parts - first being the basic minimum wage rate and the second being a Variable Dearness Allowance (VDA) - the contract only factored in the VDA and did not factor in any rise in the basic minimum rate of wages.**



- Unforeseen site conditions - bore hole data to be generated by the Contractor under the contract - additional work - Contractor had worked out 2.18m as founding level below Natural Ground Level (NGL) which got revised to 4.92m after the bore hole data was generated - reference to the NGL and the other data and parameters given in the bid documents changed - the foundation level worked out to 151.07 and the RL to+ 153.25 - site could not be physically accessed because there were coal boulders lying all over - the said conditions constituted a change in the scope of work arising out of unforeseen conditions which could not reasonably be foreseen.
- Principle of quantum meruit - Compensation under quantum meruit is awarded for the services rendered by the Contractor when the payment is not fixed under the contract - where work is done or services rendered by the Contractor for the Employer or Owner, in circumstances which entitle the Contractor doing the work or rendering the services to receive a reasonable additional remuneration, the situation being one where either there is no construction contract or there is a contract but the particular situation is not covered under that construction contract.

*[NTPC Ltd. v. Tata Projects Ltd. - Delhi High Court -
Decided on 31.7.2023]*

- Foreclosure compensation - DBFOT contract - valuation of the work - work executed during 2012-2013 and the total amount worked out by the IE after joint measurement, was binding on the Employer.
- Computation of costs of capital and finance costs - foreclosure compensation is limited to actual cost and does not include any other cost like the cost of the capital and the finance cost - investment made by the Concessionaire towards the capital infused from its own sources, was with a reasonable expectation of return on such investment - Concessionaire entitled to head office overhead expenditure, since the foreclosure compensation was based on actual expenses.

*[National Highway Authority of India v. Orissa Steel Expressway Pvt. Ltd. -
Delhi High Court - Decided on 26.5.2023]*



The Employer awarded to the Contractor the contract for Telangana Super Thermal Power Project Phase - I (2 × 800) at Karimnagar, in Telangana which is a coal based power plant with an installed capacity of 160 MW (i.e. two units of 800 MW). During the execution process of the said project, the Contractor encountered some deviation / variation in the specifications of the work contract and change in regulations. The disputes arose between the parties which were referred to arbitration. The arbitral tribunal arrived at a finding that the Contractor had submitted its price bid with reference to the scope of work indicated in the bid documents and that the increase in scope of work was a modification to the FSR resulting in the increase in the track length. In the final approved FSR the length got enhanced to 27.66 Kms, as against 21.5 Kms listed in the earlier FSR, along with a reduction in the number of new bridges to be constructed from 4 to 2 units, it also increased the work related to existing bridges from 2 to 8 units. There was a fundamental change in the scope of work because the scope of work finally indicated increased by 29%, in contrast to the scope of work contemplated in the bid documents. The Court concluded that Contractor had the right to claim additional amounts notwithstanding the scope of work in the earlier FSR was described as 'indicative' and the contract was an EPC Contract. The Court observed that before invoking the principle of quantum meruit, the three conditions must be satisfied, namely (a) the Contractor must lawfully do something for or deliver something to the Employer, (b) Contractor must not act gratuitously when doing or delivering something, and (c) the person for whom or to whom something is done or delivered must have taken the benefit of the work done or the service rendered. Further, with respect to the Contractor's claim for additional costs incurred based on unforeseen site conditions, the Court upheld the finding of the arbitral tribunal stating that although the clause required the Contractor to conduct an inspection, the Employer neglected to provide access to the site. There were no means for a visual inspection to determine the actual ground and underground conditions at the site. The Court upheld the claim for additional costs incurred due to increase in minimum wages and observed that the increase in minimum wages is due to issuance of notification by the Central Government and the same is fairly covered by Clause 25 read with Clause 31.4 of the Special Conditions of Contract.



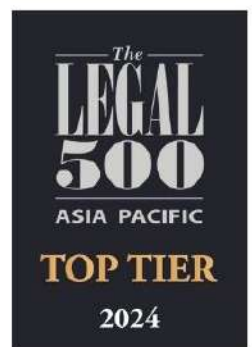
The Concessionaire was awarded the concession for four laning of the Rimuli-Roxy - Rajamunda section of NH-215 from km 163.00 to km 269.00 on Design, Build, Finance, Operate, and Transfer (DBFOT) basis. The Concessionaire waived off the Conditions Precedent under the Concession Agreement. The Concessionaire informed the Independent Engineer that the encumbrance free land for the length of 100% of project highway was not handed over. The Independent Engineer issued a letter to the Employer for the extension of the concession period. The Concessionaire did not agree to terms of extension of the concession period. The Concession Agreement was signed in 2010 but even after six years in 2016, the Employer was not able to obtain requisite approvals and failed to handover the right of way for a substantial part of the land. The Concessionaire provided the actual cost incurred by it in the project till the date of foreclosure. The disputes between the parties were referred to arbitration. The arbitral tribunal awarded the Concessionaire the total cost expenditure, cost of capital and finance cost, and head office overheads. The arbitral tribunal held that the Concessionaire is entitled to the foreclosure compensation since the Employer unilaterally foreclosed the Concession Agreement and unilaterally fixed the terms and conditions of such foreclosure including the foreclosure compensation. The Court upheld the arbitral tribunal's award allowing the claims raised by the Concessionaire.



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Author of the book “Principles of Law of Arbitration in India”

Successfully handled construction arbitrations relating to DBFOT projects, EPC Contracts and FIDIC based contracts in infrastructure projects.