

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Claim for idling of plants and machineries - invoices of purchase of plant & machinery should be produced - no evidence to show that the plant and machinery was available on site, which is a pre-requisite for any claim of idling - delay in execution of the work due to delay in giving possession of work sites and borrow area sites due to geological reasons and slope failures - contract clause providing that “price adjustment shall apply only for work carried out within the stipulated time or extension granted by the corporation and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor” - withholding of or freezing the indices is against the provision of the contract and the Employer committed a breach in freezing the indices.**
- **Validity of rates quoted at the time of bidding for any length of delay - grant of extension of time by the Employer - original contract period of 45 months extended due to delay of 63 months - Contractor entitled to revised rates and the rates quoted by the Contractor at the time of bidding is not valid for any length of time - Employer liable to compensate the Contractor.**
- **Revised rates in respect of quantities of work that were executed beyond the contract period - price escalation that has taken place thereafter by revising the base date to the date of the revised rates being made applicable after the contract period, also to be added - cost of materials, labour, etc., should be worked out on an accepted principle of rate analysis considering the input rates that were prevalent on the date which is the end of the contract period in respect of works carried out beyond the original contract period - rates based on the price indices prevailing as on the date which is the end of the contract period and the execution of the works will be subject to the price variations - same price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period - base prices and indices shall be as prevalent on the date which is the end of the contract period and not prior to the date of submission of the bid.**

[THDC India Ltd. v. PCL-Intertech Lenhydro Consortium JV - Delhi High Court - Decided on 24.4.2024]



- Claim for refund of the unadjusted mobilisation advance by the Sub-Contractor - Principal Employer terminated the contract with the Contractor - the contract for executing balance works was awarded by the Principal Employer to the Sub-Contractor - mobilization advance is in the nature of an advance and is required to be repaid - resources raised by utilization of the mobilization advance were used by the Sub-Contractor in executing the works relating to the project - termination of the contract between the Contractor and the Sub-Contractor, even if wrongful by the Contractor, does not mean that the Sub-Contractor would not be liable to repay the mobilization advance to the Contractor.

*[NBCC (India) Limited v. Nangia Construction (I) Pvt. Ltd. - Delhi High Court -
Decided on 16.4.2024]*



**THDC India Ltd. v. PCL-Intertech Lenhydro Consortium JV - Delhi High Court
- Decided on 24.4.2024**

The Contractor was awarded the contract for construction of “Civil Works of Dam, Spillway and Power House of 400 MW Koteswar Hydro Electric Project at Koteswar, Uttarakhand”. The work envisaged under the contract could not be completed in the original contract period of 45 months. The completion period was extended twice by the Employer on the request of the Contractor. The Contractor was made to furnish two “no claim certificates” during the course of the contract. According to the Contractor the delay was caused by the Employer in approving constructions drawings and their frequent revisions; adverse geological conditions; slope failure and execution of increased quantities of excavation and slope stabilization works; conveying decisions and changes in concrete placement methodology; treatment of cracks in the foundation blocks of dam; obstruction by villagers, including strikes etc. The Contractor raised claim for losses suffered due to non-handing over of land; extra rates for slope stabilization; construction of diversion structure (upstream dyke); idling of plant and machinery, overheads; escalation; extra costs due to mobilization advance towards interests and bank guarantees etc. The Employer raised several counter claims against the Contractor. The Court upheld the arbitral award and the claims of the Contractor and concluded that the furnishing of the “No Claim Certificate” was a pre-condition imposed by the Employer for grant of EOT which was not contemplated under the contract. Further, the Court upheld the award of claim for revised rates of inputs materials and the rates for extra works based on actual rates analysis as on the date of execution of extra work. The claim for price escalation in the rates of cement and other materials by way of revision of rates for work executed after the expiration of original stipulated completion time was upheld since the rates quoted at the time of bidding cannot remain valid for any length of time. The price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period.

The Contractor was awarded the work of 'widening of four lanes including strengthening of existing pavement of National Highway No. 1 from 50 km to 74.80 km (Murthal to Smalkha) in Haryana' by the Employer. The Contractor entered into a separate contract with the Sub-Contractor on a back-to-back basis with its agreement with the Principal Employer in the Principal Agreement. In terms of the contract, the entire work under the Principal Agreement was subcontracted to the Sub-Contractor at the value of the contract less 5%. Clause 3 of the Sub-Contract stated that "All the accepted tender terms and conditions of the Agreement as finally signed by the "Corporation" with the "Clients" are annexed herewith as Annexure-I and hereinafter called the "Agreement" shall form a part of this agreement and shall be binding on the Associate Contractor". The execution of the project was delayed for various reasons. In the arbitration between the Contractor and the Sub-Contractor, the Contractor's case was that the Sub-Contractor delayed the project due to the failure on the part of Sub-Contractor to maintain sufficient progress in execution of the project. The stand of the Contractor was in variance with the Contractor's stand in the arbitration between the Principal Employer and Contractor. The Contractor terminated the contract with the Sub-Contractor. The Principal Employer terminated the contract with the Contractor. The arbitral award in the arbitration between the Principal Employer and Contractor held that the progress of the work was slow, the Contractor had mis-utilized the mobilization advance; and thirdly, the Contractor had sublet the work to the Sub-Contractor in violation of Clauses 3 and 4 of the General Conditions of Contract as applicable to the Principal Agreement. In the arbitration between the Contractor and the Sub-Contractor, the Contractor sought to justify termination of the contract by claiming that the Sub-Contractor had failed to maintain sufficient progress in the execution of the project. The arbitral tribunal found that the Contractor was entitled to recover the balance mobilisation advance as it was in the nature of a loan and rejected the Sub-Contractor's claim that it was entitled to refund of the unadjusted mobilisation advance, on the ground that the Sub-Contractor had utilised the resources at site subsequently for execution of the balance project after the same was awarded by the Principal Employer. The Sub-Contractor took the stand that since the contract was terminated illegally, it was absolved of its liability to pay back the mobilization advance, which was admittedly fully utilized for raising resources at site. The Court upheld the conclusion in the arbitral award that the mobilization advance was in the nature of an advance and was thus, required to be repaid. Moreover, the resources raised by utilization of the mobilization advance were used by the Sub-Contractor in executing the works relating to the project.



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