

Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Claim for escalation - rates for execution of the work - absence of escalation clause in the contract - no escalation provision in the tender or the contract - jurisdiction of the arbitral tribunal to award escalation - after the expiry of stipulated period of contract, the provisions and conditions of the contract become inapplicable to both the parties - the rates for execution of the work are also not applicable after the contract period is over.**
- **Contract stipulating Contractor not to make any claim for delay in performance - still a claim would be maintainable in one of the following situations (i) if the Contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the Employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the Contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the Employer and the Employer accepts performance by the Contractor in spite of the delay and such notice by the Contractor putting the Employer on terms.**



[State of West Bengal v. PAM Developments Pvt. Ltd. - Calcutta High Court - Decided on 14.6.2024]



- **Claim for reimbursement of payments for escalation due to abnormal increase in steel, cement, aggregate, sands and bricks - prohibition in the contract that no escalation is permissible - actual increase for cement more than 100% and that of steel about 80% - Contractor was required to complete the work in the stipulated period, however this did not happen - Contractor duly notified his intention to claim escalation and damages and loss in the extended period of contract - unprecedented increase can no way be considered by a bidder while quoting his tender.**
- **No Claim Certificate (NCC) - undue influence and coercion - coercion and undue influence is to be inferred from facts and circumstances in each case - Contractor requesting time and again for release of its dues - Contractor's final bill was pending for more than 2 ½ years - immediately on issuance of the NCC, the undisputed amounts were released by the Employer to the Contractor - there was undue influence and coercion.**
- **Claim after submission of Final Bill - clause of the General Conditions of Contract (GCC) stating that "No further claims shall be made by the Contractor after submission of the Final Bill and these shall be deemed to have been waived and extinguished" - the Contractor had reserved its right to add and supplement additional claims - clause 55 of GCC not a bar to the arbitrability of claims if the payments were received by the Contractor under protest.**
- **Site conditions - provision of the contract providing that the Contractor should be fully acquainted of the site condition - claim for additional work in clearing the jungle and filling - clauses of the contract did not prohibit payment to be made for the additional work - Contractor entitled to claim for the additional work.**
- **Claim for change in site condition - during site visit only soil was encountered and no rock strata was found - Contractor entitled to claim for change in site condition.**
- **Contract clause providing that no claim for compensation shall be admitted if extension of the contract period is granted by the Employer - clause cannot be interpreted to mean that if extensions are granted due to the fault of the Employer, the Contractor would be deemed to have waived off its right to claim damages.**

[Union of India v. Vishva Shanti Builders (India) Pvt. Ltd. - Delhi High Court - Decided on 24.7.2024]



**State of West Bengal v. PAM Developments Pvt. Ltd. - Calcutta High Court
- Decided on 14.6.2024**

The Employer awarded to the Contractor the work for “Construction of Reinforcement Concrete Viaduct Structures with bored piles foundation and the retaining wall on the eastern side of the proposed road over bridge over the Howrah-Bandel Railway line of the Eastern Railway on replacement of the existing level crossing No. 1/1A at Liluah Howrah under the Howrah Highway Division”. As per Clause 2 of the conditions of contract, the Contractor was bound to execute 1/4th of the total work in 1/4th time, 1/2 of the work in 1/2 of the time, 3/4th of the work before 3/4th of the time and the total work within the total stipulated time. The said clause provided that in the event, the Contractor failed to execute the work in terms of the General Conditions of Contract (‘GCC’) the Superintending Engineer concerned shall penalize the Contractor for the remaining work still to be completed during the contract period to the extent of 1% or such smaller amount as he thinks fit. The Contractor, during the execution stage wrote to the Employer stating that it had already executed work, including extra work, which was above the contract amount and if the Contractor is requested to carry out the balance work, it would not be possible to complete the work without approval and assurance of the competent authority and therefore, it would be proper to terminate the contract amicably. On receipt of the request of the Contractor, the Superintending Engineer amicably terminated the contract. The claims of the Contractor were referred to arbitration. The arbitral tribunal awarded escalation in favour of the Contractor even though the contract provided no further additional claim is maintainable. The Court concluded that in spite of there being a contract between the parties where under the Contractor had undertaken not to make any claim for delay in performance of the contract occasioned by an act of the Employer, still a claim would be maintainable in one of the following situations: (i) if the Contractor repudiates the contract exercising his right to do so under section 55 of the Contract Act, (ii) the Employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the Contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the Employer and the Employer accepts performance by the Contractor in spite of the delay and such notice by the Contractor putting the Employer on terms. The Court upheld the finding of the arbitral tribunal that after the expiry of stipulated period of contract, the provisions and conditions of the contract became inapplicable to both the parties and thus, rates for execution of the work was also not applicable after the contract period was over. The Contractor executed additional works after the stipulated period of contract and therefore, section 70 of the Indian Contract Act was held to be applicable.



The Contractor was awarded the contract for the work of "Provision of Married Accommodation for ORs (525 DUs) including allied External Services at Mahipalpur (Package - II) Delhi Cantonment". The work was completed within the extended period of completion. During the pendency of the project, extension was granted by the Employer for completion of the work without levy of liquidated damages. The Contractor reserved its right to seek compensation for escalation, overhead loss and other losses due to delay caused by the Employer. The disputes between the parties were referred to arbitration. The arbitral tribunal allowed some of the claims of the Contractor. The arbitral tribunal held that the prohibitory clause in the General Conditions of Contract ('GCC') became redundant and the claim of escalation can be allowed provided extension was granted without levy of compensation, and where the Contractor had notified its claim. Further, clause 55 of GCC would not bar the arbitrability of claims given the fact that the payments were received under protest. The Contractor had reserved its right to add and supplement additional claims. The Court upheld the finding of the arbitral tribunal and observed that the prohibitory clause, did not indicate that the parties intended that no escalations could be claimed in the event the contract was extended. Clause 13 of the GCC provided that if the works are delayed "no claim in respect of compensation or otherwise, however arising, as a result of extensions granted under condition mentioned above shall be admitted". The Court observed that the said clause of the GCC cannot be interpreted to mean that if extensions are granted due to the fault of the Employer, the Contractor would be deemed to have waived off its right to claim damages.



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