

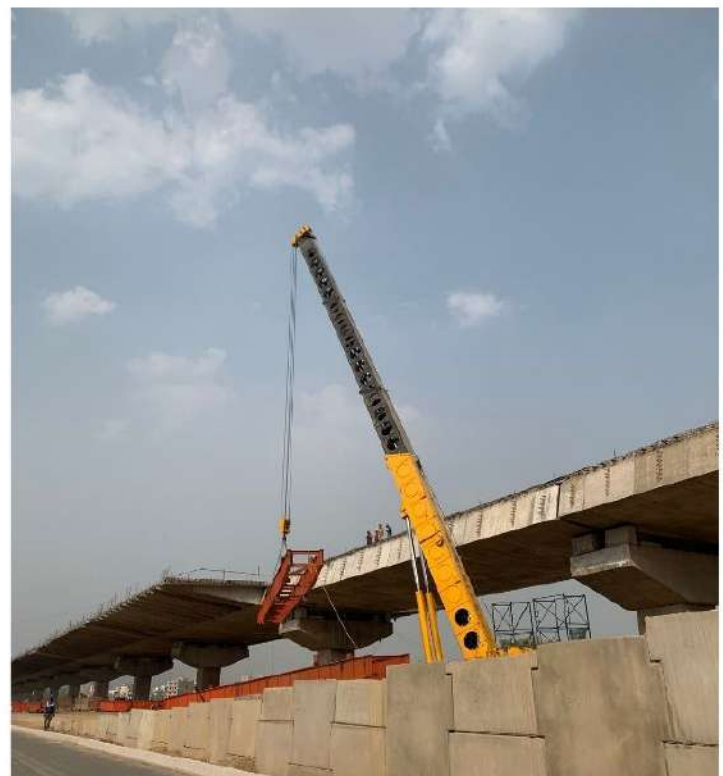
Construction Arbitration Newsletter

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Construction Arbitration Law Firm

- **Claim for increase in the Bill of Quantities (BOQ) item - geogrid / geotextile material exceeding the BOQ quantities in the contract - whether change in quantity of the RE wall constituted a variation - power of the Engineer to revise the rates given in the BOQ in the event of increase in actual quantities - enhancement in the quantity was necessitated because of wrong information furnished by the Employer at the stage of tender - Contractor was paid by the Employer for the work done in each month as per the BOQ rate - the new Engineer appointed by the Employer decided that the rate for the increased quantity of geogrid should be renegotiated - DRB recommended that variation was not established and recommended payment of geogrid at the BOQ rate for the entire quantity - an error in the interpretation of contractual terms by an arbitrator is an error within his jurisdiction and would, therefore, not be a ground to interfere with an arbitral award.**
- **Distinction between instructed variation or uninstructed variation - contract provided that the quantity set out in the contract were estimated quantities - no instructed variation and, therefore, the excess quantity of geogrid required while executing the work, limited to the facia area, should be paid as per the BOQ rates - once a contracted price is provided and the quantities are held to be tentative, any increase or decrease in quantity must be governed by the same price - only in respect of any instructed variation arising from the instruction of the Engineer on account of any additional work or less work that there could be some element of renegotiation.**

[Somdatt Builders -NCC-NEC(JV) v. National Highways Authority of India - Supreme Court - Decided on 27.1.2025]



- Force Majeure event - Covid - non-political force majeure - Employer had to hand over 90% of the ROW within 30 days of the furnishing of the performance security by the Contractor - there was 466 days delay in the declaration of the Appointed Date - delay in completion of works was only 80 days - Employer approved the Extension of Time (EOT) only for Covid induced reasons and the delays due to non-Covid reasons i.e. ROW issues, were rejected by the Employer's Engineer - 90 days EOT was granted by the Employer - delay of 80 days in completion of the works stood absorbed in the 90 days EOT granted by the Employer.

*[Mahakaleshwar Infratech Pvt. Ltd. v. Chief Engineer, National Highways, UPPWD -
Delhi High Court - Decided on 18.2.2025]*



**Somdatt Builders -NCC-NEC(JV) v. National Highways Authority of
India - Supreme Court - Decided on 27.1.2025**

The Contractor was awarded the contract by the Employer of four laning and strengthening of the existing two lane section between Km. 470.000 and Km. 38.000 on NH-2 (construction package II-B) in the State of Uttar Pradesh. The contract was a unit rate contract comprising of a detailed Bill of Quantities (BOQ). While executing the contract, dispute arose between the parties in respect of item No. 7.07 of the BOQ which provided for reinforced earth structure including soil reinforcing geogrid with all fixtures and accessories complete as per approved design and drawing. The dispute was with respect to the exceeding of the BOQ quantities i.e. geogrid / geotextile material. The dispute related to the power of the Engineer to revise the rates given in the BOQ in the event of increase in actual quantities. The Dispute Review Board (DRB) recommended that quantities of geogrid required limited to the facia area provided in the BOQ had to be paid as per the BOQ rates. The Employer invoked the arbitration clause. The arbitral tribunal held that the quantity of geogrid given at the tender stage by the Employer was wrong and therefore, the increase in quantity was a mere increase to meet the requirement for completion of the Reinforcement (RE) wall work which was indicated by the RCC facia quantity at the tender stage. There was no change in the design but mere increase in the quantity beyond the BOQ quantity did not attract clause 52.2. The arbitral tribunal further concluded that the Engineer did not possess the power to revise the rates for additional quantity of geogrid required for actual execution of work as per the approved design. Upholding the recommendations of DRB, the arbitral tribunal held that variation in terms of clause 51.1 was not established and directed the Employer to pay the Contractor for the actual quantity of geogrid required to be executed to complete the work of RE wall as per the approved design at the BOQ rate. The Division Bench of the High Court set aside the arbitral award. The Supreme Court concluded that the Division Bench was not correct to hold that even if there was error in estimating the quantity of geogrid while preparing the BOQ, that by itself would not lead to the conclusion that the Employer cannot seek renegotiation of the rates, even if the actual quantity exceeds by over 300% and that the contract did not provide that the Employer should suffer on account of the estimated quantities mentioned in the BOQ turning out to be way off the mark when the contract is executed.

**Mahakaleshwar Infratech Pvt. Ltd. v. Chief Engineer, National Highways, UPPWD -
Delhi High Court - Decided on 18.2.2025**

The Contractor was awarded the work for “Rehabilitation and Upgradation of Kulpahar-Mahoba Section (Km 133.520 To 158.040) of NH-76 & NH-86 (5.360 Km.) in the State of Uttar Pradesh to two lane with paved shoulder under EPC Mode.” There was delay in the issuance of the Provisional Completion Certificate. The Contractor took the stand that there was a delay both in the declaration of the Appointed Date as well as on account of Employer's failure in providing complete Right of Way (ROW). The Contractor referred the disputes to arbitration including the claim for unrealized cost of overheads, idling of plants, machinery and manpower on account of prolongation of the period of the project. The arbitral tribunal returned a finding that the Employer delayed the handing over of site to the Contractor. Further, there was delay attributable to the Covid-19 pandemic which was a non-political force majeure event for which neither party could claim damages from the other. The Contractor's claim for unrealized cost of overheads, idling of plants, machinery and manpower on account of prolongation was rejected by the arbitral tribunal since the Contractor was already compensated for the delay in Appointed Date and the delay in execution of the project was attributable to force majeure due to Covid-19 pandemic. The Court concluded that the delay of 80 days in completion of the works stood absorbed in the 90 days EOT granted by the Employer. The Court upheld the arbitral award.



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