

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Engineer's Oral Instructions whether binding on Employer - Unless the oral instructions to carry out extra works issued by Engineer are confirmed in writing by NHAI, NHAI cannot be compelled to pay for the extra work done or variation.**
- **Claim for work done during Defect Liability period - Contractor cannot claim payment for any amount of work done during the Defect Liability Period if the contract provides that no amount is payable in the said period.**
- **Risk and Cost clause - Failure of the Contractor to carryout repairs within a reasonable time, would enable NHAI to get the work executed through another agency in terms of the contractual provision.**
- **Evidence of work done at risk and cost - Claim for work done by the Employer at Contractor's risk and cost must be supported by evidence.**

[Sarada Construction vs. National Highways Authority of India – Delhi High Court - Decided on 28.3.2012]



- **Claim for change in design - Claim towards cost incurred by the Contractor due to increase in height of the bridge as result of change in alignment, as the original alignment did not fit in the acquired land, not maintainable if the Contractor had accepted that would not claim any extra cost on account of change in superstructure.**
- **Undertaking by Contractor not to claim extra cost - Contractor's unconditional undertaking for execution of change in design without any extra cost, barred him for later claiming extra cost towards increase in the height of the bridge.**

- Engineer's right to adjust overpayments in IPCs - Engineer can make necessary corrections or modifications in the previous Interim Payment Certificates (IPC) or Running Bills (RA Bills) and adjust overpayments to the Contractor if the contract so permits.
- Overpayment made in IPCs not an admission of extra cost - Contractor cannot contend that extra payments on account of rise in superstructure had been admitted by the Employer in the running bills, if adjustments towards overpayments are made by the Engineer subsequently.

- Claim for change in superstructure alignment - Although the Contractor was not permitted to claim extra costs incurred due to increase in height of the bridge due to change in design, which it had agreed to, the Contractor could, however, claim extra cost incurred due to change in alignment both longitudinally and laterally, if there is change in the height of piers at various locations.
- Arbitral Tribunal with Technical experts more competent - Courts not to interfere with the findings of Arbitral Tribunal comprising of Technical Experts due to lack of expertise.
- Claim for cost towards idling charges due to strike or bundhs - Contractor is eligible for extension of time (EOT) as well as compensation if there is physical obstruction or condition which stops the Contractor from carrying out the works.

- **Obligation of Contractor to mitigate loss due to idling – Contractor could not possibly redeploy men and machineries since the bundhs are declared in short notice.**
- **Claim for escalation cost – Employer cannot take theoretical quantity to determine the escalation cost of cement and steel. Actual quantity consumed should be taken into account.**

[State of Kerala, Represented by the Chief Engineer, National Highway, Kerala State Public Works Department vs. Hindustan Construction Company Ltd. – Kerala High Court – Decided on 9.3.2022]



Sarada Construction vs. National Highways Authority of India – Delhi High Court - Decided on 28.3.2012

The Contractor challenged the award rejecting the claim for extra work done and cost of arbitral proceedings. NHAI pre-closed the Contract in respect of the stretch of the highway from KM 51.00 to KM 52.400 of NH – 34 in the State of West Bengal. NHAI had invited tender for work of “Repair & Maintenance work by BM, SDBC and Mastic Asphalt”. Contractor disputed that the Defect Liability Period was foreclosed and claimed that the Defect Liability Period Certificate, issued by the Engineer does not mention any pre-closure. NHAI encashed the Bank Guarantee furnished by the Contractor. NHAI got the remaining works at the risk and cost of the Contractor and contended that the Contractor had failed to do the work during the Defect Liability Period. Before the Arbitral Tribunal the Contractor claimed that it had carried out extensive work on the oral instructions of the Engineer. However, NHAI did not approve the estimates submitted by the Engineer. Contractor also contended that NHAI was aware that the Highway required extensive reconstruction but had concealed the said information. The Court held that the Contractor had not founded any claim of damages on account of fraudulent misrepresentation. Its claim was essentially for extra work done and not that it had suffered a loss on account of misrepresentation, which required to be compensated.

State of Kerala, Represented by the Chief Engineer, National Highway, Kerala State Public Works Department vs. Hindustan Construction Company Ltd. – Kerala High Court – Decided on 9.3.2022

A lump sum contract was entered between the parties for “design and construction of link road NH47-A Phase - II connecting Wellington Island and the Railway Over Bridge (ROB) portion”. Certain disputes and difference arose between the Contractor and the NHAI in the performance of the contract agreement. Parties referred the disputes to the Arbitral Tribunal. According to the Contractor / Claimant, they had prepared the design of the bridge based on the tender data and initial drawings prepared by NHAI. But while setting it out, it was found that the tendered profile/alignment of the proposed bridge would not fit in the acquired land. NHAI took a few months to finalise the new alignment to fit the proposed bridge within the acquired land, duly accommodating the revised alignment requirements of the Railways for its 110M long ROB. According to the Contractor the new alignment caused considerable shift both laterally and longitudinally and this affected the gradients/levels also. The Chief Engineer PWD, Kerala, conveyed his no objection to the Contractor’s revised design, subject to the condition that no extra cost would be paid to the Contractor on account of the proposed change in the design of the bridge. According to the Contractor, extra payments on account of rise in superstructure had been admitted by the Respondent in the running bills, as the rise in the level of superstructure was consequent to change in alignment and change in location of ROB.

The Contractor took the plea that a lump sum contract did not preclude them for claiming extra cost incurred due to rise in superstructure. The Court upheld the Award of the Arbitral Tribunal rejecting the Contractor's claim for extra cost incurred for execution of the project on account of change in superstructure since they had agreed not to claim it. The Court upheld Arbitral Tribunal's finding that the contract permitted the Engineer to make necessary corrections or modifications in the previous interim payment certificates and that the Engineer was justified in subsequently adjusting the overpayments to the Contractor. However, Contractor was entitled to claim cost towards change in alignment both longitudinally and laterally, as there was change in the height of piers at various locations. The Court held that the Arbitral Tribunal comprising of technical experts are competent to decide this technical aspect and not the court as it lacks the expertise. The Contractor was entitled to claim for idling during bundhs / strike as it was also not possible to redeploy men and machineries at short notice at which bundhs are declared. The Arbitral Tribunal rejected NHAI's contention that the contract conditions do not stipulate that for the purpose of calculation of escalation, only theoretical quantity should be considered.



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