

# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- **Grant of Extension of Time (EOT) may not necessary imply that the Employer was at fault – Arbitral Tribunal must go behind the reasons for the delay.**
- **Determination of the reasons for the delay and the party responsible for the delay relevant for applying the clause in the contract dealing with grant of EOT.**
- **Possession of Site – Employer obliged to hand over land as per the schedule provided in the contract.**
- **Obligation to remove obstructions and hindrances – Employer has responsibility to provide obstruction and hindrance free land to enable the Contractor to execute the works.**
- **Quantification of claims – Contractor submitted audited statements of additional costs certified by the Chartered Accountant in support of its claims – claims were allowed as it was based on actual expenses incurred.**



- **Claim for prolongation cost towards deployment of plants and machineries during the extended period of construction – the quantification of the claim based on the Monthly Progress Reports (MPRs) showing actual deployment of plants and machineries together with the Indian Standard Guidelines For Working Out Unit Rate Cost of the Construction Equipment Used For River Valley Projects, was acceptable as the Contractor had not claimed charges for usage of the equipment but only the time related cost.**
- **Certificate of the Chartered Engineer annexed with the claim and submitted to the Engineer – Chartered Engineer's certificate need not be supported by an affidavit – it is a contemporaneous document and can be relied upon.**

- **Claim for additional cost of labour – to be quantified on the basis of various categories of labour deployed at site and the MPRs.**
- **Claim for increase in minimum wages - increase in the labour wage to be determined on the basis of notifications issued for rates applicable to various categories of labour.**
- **Claim for increase in the cost of steel, cement, bitumen and POL – to be computed on the total quantities as certified by the Engineer and the invoices submitted by the Contractor.**
- **Claim for Loss of Profit - loss of earning capacity and profit due to prolongation of the work – Contractor must prove (i) it had opportunities to deploy its resources at the material time; (ii) that it could not do so as the resources were held up due to prolongation of the work; and (iii) the opportunities as available would yield certain profit.**
- **Claim for Loss of Profit - cannot be allowed merely because the Contractor had another contract at the scheduled time for completion - essential for the Arbitral Tribunal to make an assessment as to whether there was expectation of any profit by deployment of resources at the material time and, if so, at what rate.**
- **Evidence for claim for Loss of Profit - Contractor must establish that he could have deployed its resources for executing another contract and earned profit but was deprived of availing that opportunity on account of being held up in executing the contract in question.**

*[National Highways Authority of India v. Hindustan Construction Co. Ltd. - Delhi High Court -  
Decided on 12.1.2022]*

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- Extension of Time (EOT) without any claim against the employer for delay – if the Contractor has agreed under the contract that it would not make any claim against the Employer other than for extension of time for completion of the work, the Contractor cannot resile from the agreed condition.
- Claim for increase in minimum wages - constituted a change in law event resulting in an increase in the cost of labour.
- Change in law event - levy of Goods and Services Tax (GST) – constitutes a change in law event and the increase in costs should be reimbursed by the Employer.

*[NTPC Ltd. v. Tata Projects Ltd. - Delhi High Court - Decided on 8.12.2021]*

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**National Highways Authority of India v. Hindustan Construction Co. Ltd. - Delhi High Court - Decided on 12.1.2022**

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The Employer awarded the Contractor the works for "Construction of Chennai Bypass Phase - II Connecting NH-4 and NH-5 and Widening of Chennai Bypass Phase - I connecting NH-45 and NH-4 in Tamil Nadu". The completion of the works got delayed. The Contractor submitted extension of time (EOT) applications. The Engineer determined the EOT and the Employer approved the same. The Contractor claimed additional costs on account of manpower, equipment, machineries and other resources being deployed at the site. The Dispute Resolution Board (DRB) failed to issue its recommendation within the stipulated time as contained in the Agreement. The Arbitral Tribunal found that the Contractor was not responsible for the delay. On a challenge to the award, the Court held that Arbitral Tribunal had made the award after examining the relevant documents on record and that the Court cannot re-examine the evidence and material as considered by the Arbitral Tribunal.

The Contractor was awarded the works regarding Coal Handling Plant Package for Lara Super Power Thermal Project on a lump sum basis. There were delays in execution of the Project. The Employer granted provisional extensions from time to time and also stated in its communications that the grant of extension would be without any extra financial burden on it and it reserved its right to levy liquidated damages. However, the Contractor claimed that the delays were for reasons not attributable to it and the financial implications arising out of the extensions would be on account of the Employer. The Contractor subsequently raised a claim for payment of additional amounts on account of prolongation costs and change in law events. The Arbitral Tribunal rejected the Contractor's claim for prolongation costs. However, it allowed the Contractor's claim for additional expenses incurred, due to increase in labour wages and made a finding that there was a change in law event during the extended period as GST was imposed and therefore, the Respondent was liable to reimburse the increased cost to the Contractor. The Court upheld the Arbitral Tribunal's finding rejecting the Contractor's claim for prolongation costs on the ground that though there was delay on account of handing over of the work front by the Employer, since the parties had agreed in terms of Clause 20.01.00 of the Technical Specifications that if the work was delayed because of any acts or omission of another contractor, the Contractor would have no claim against the Employer other than for extension of time for completion of the work. The award of the Arbitral Tribunal that the increase in costs due to increase in the basic minimum wage rate should be compensated by the Employer, was upheld. The Court upheld the finding of the Arbitral Tribunal that the enactment of the statute for levy of GST constituted a new law and therefore, the Contract Price was liable to be adjusted.



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