

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- **Claim for Loss of Profit – Contractor should establish**
(a) the contract had been delayed and extended solely for the reasons attributable to the Employer; (b) there were opportunities to take up other contracts and execute the same; (c) it could have executed those contracts profitably; and (d) it could not take up those contracts because its resources were held up in executing the present contract.
- **Claim of Loss of Profit does not overlap with the claim for overhead expenditure - compensation for additional overhead expenses due to prolongation of the contract period or any other claim, is separate.**
- **Claim for Overheads during the extended period – methods of computation – (i) normative method, which is premised on the basis that the head office and site office overheads amount to 15% of the contract price; (ii) actual expenditure method, claim to be supported by producing vouchers and certificates of the Chartered Accountant to evidence the actual expenditure incurred on account of overheads during the extended period; and (iii) MORTH Standard Data Book, indicates overheads in respect of bridge works would be 25% of the contract price and for other civil works would be 8% of the contract value.**
- **MORTH Standard Data Book for determination of Loss of Profit - is a valuable guide for determining the estimated value of works – arbitral tribunal's reliance on the Standard Data Book, to determine the profit margin, cannot be faulted.**
- **Interest awarded whether exemplary or punitive - 10% interest compounded on monthly rests, is not exorbitant or punitive.**



- **Determination of claim for Loss of Profit - on the basis of material such as the Contractor's past performance and other material, which would indicate the quantum of anticipated profits - the Contractor's past performance would reflect the profit margin on the basis of which the Contractor usually takes up the assignment - Contractor can establish the estimated profits by other material documents, which would show reasonable profits that it could earn from executing contracts of a similar nature.**
- **Absence of evidence to prove Loss of Profit – failure to file account statements to establish the profit margins on which the Contractor executes the contracts - it is not sufficient for the Contractor to simply show that there were other opportunities available and such opportunities, if exploited, would have yielded profit - it is also essential for the Contractor to establish that it was prevented from taking up other projects as its resources were completely deployed in executing the contract in question.**

*[IJM Gayatri JV v. National Highways Authority of India - Delhi High Court -
Decided on 7.10.2022]*



- **Whether excavation done in hard rock or ordinary soil – question of fact – arbitral tribunal’s decision is final.**
- **Evidence of hard rock based on correspondence exchanged between the parties during the construction stage - relevant.**
- **Report filed to prove hard rock – relevant - previous contractor engaged by Employer also recorded encountering of hard rock and was paid accordingly by the Employer.**
- **Machines used for excavation – relevant for determining the nature of the sub-soil when blasting is not resorted to by the Contractor.**

- **Increase in rate of royalty payment - reimbursement on account of any additional levy – Special Conditions of Contract entitled the Contractor to reimbursement of the additional royalty on building material and excise duty on steel.**

[Ircon International Limited v. Cannon Engineering Construction - Delhi High Court - Decided on 1.10.2021]



IJM Gayatri JV v. National Highways Authority of India - Delhi High Court - Decided on 7.10.2022

The Contractor was awarded the work of “widening of 4/6 lanes and upgrading of existing 2 lane Road of NH-5 in the State of Andhra Pradesh from Km. 291.000 to Km. 358.000 of Ongole-Chilakaluripet-Contract Package AP-13”. The disputes between the parties were referred to the Dispute Review Board. However, the DRB failed to give a decision within the contractually stipulated period. The Contractor invoked the arbitration clause. The arbitral tribunal found that the contract was delayed for a period of 26 months and 24 days for reasons attributable to the Employer. The arbitral tribunal accepted that 10% was a reasonable profit margin in contracts of similar nature on the basis of MoRTH Data Book, which provided analysis for estimating the costs of similar contracts. The Court held that in order to establish a claim for loss of profits on account of prolongation of the works, it is not sufficient for the contractor to simply show that there were other opportunities available and such opportunities, if exploited, would have yielded any profit. It is also essential for the contractor to establish that it was prevented from taking up other projects as its resources were completely deployed in executing the contract in question. Since the arbitral tribunal failed to examine this vital condition, which is essential for establishing the claim for loss of profits during prolongation of the contract, the award on loss of profits was set aside.

**Ircon International Limited v. Cannon Engineering Construction - Delhi
High Court - Decided on 1.10.2021**

Disputes arose between the parties with respect to a contract for “Construction of service buildings, loco shed, RCC Trunk Drain and Misc. Civil Works in connection with the Construction of Private Railway Siding for Solapur Super Thermal Power Project of NTPC Limited near Hotgi Railway Station in Solapur District, Maharashtra-Pkg.4”. The Contractor during excavation experienced 0.90 meters of hard rock at the bottom layer and therefore requested the Project Head of the Employer to physically visit the site to classify the excavated work. The Project Head of the Employer visited the excavated site and classified the earth-work. He also recorded the reduced level of the earth including hard rock in the field book. Thereafter, the Employer regularly recorded the measurement of the earth-work in the field book, classifying the soil as hard rock. The Running Account Bills (RA Bills) from the 2nd RA Bill till the 5th RA Bill reflected these levels, which were jointly signed by the Contractor and the Employer. Subsequently, the Employer informed the Contractor that as per the recommendations of the committee constituted, the trench of the corridor drain fell under the category of ‘ordinary rock’ and the earthwork could not be considered as hard rock as per the CPWD Specifications. The Contractor also claimed payments towards additional extra items for fixing of the tie bolts. The arbitral tribunal held that the Contractor was entitled to the difference of amount between the ordinary rock and hard rock as an extra item and that even if the tie bolts were not specifically mentioned under the BOQ item for wall shuttering, the tie bolts were, nevertheless, used. Accordingly, the arbitral tribunal held that since the number of tie bolts and its rate analysis were never denied the Contractor was entitled to payment for the same. The Court held that the classification of soil and whether the Contractor had performed earth work in ordinary soil or hard rock, is a question of fact and the arbitral tribunal's finding as to a question of fact cannot be interfered with. The Court observed that the finding of the arbitral tribunal that the Contractor had carried out earth work in hard rock is not based solely on a finding that the Contractor had used mechanical tools such as poclain, JCB, etc. The Court also upheld the award on reimbursement of additional royalty and excise duty on steel.



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