

# Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Site conditions - geological survey of nature of rock strata - disclaimer in clause that the rough description of the rock strata was not based on any comprehensive study and information "has been given merely to assist the bidders and is not warranted to be complete" - bidders to inspect and examine the site and its surroundings and satisfy themselves before submitting their bids - construction programmes submitted by the Contractor, both at the inception and later during the execution, was accepted by the Employer without any reservation - once the detailed information as to the rock strata had been supplied by the Employer on the basis of field-mapping by the Geological Survey of India, a prospective bidder, who had to submit its bid within a finite time, cannot be faulted for not carrying out extensive tests to ascertain the nature of the rock structure.**
- **Permission to operate quarries for stone and sand - Employer to "assist the Contractor" - meaning of - a meeting with the Chief Minister and instruction to officials to facilitate the extraction of boulders by the Contractor not enough to constitute 'assistance' by the Employer to the Contractor as it was wholly inadequate to meet the demand for boulders and sand for executing the works.**
- **Claim towards idling of plants and machineries - applying Central Water Commission Guidelines for Preparation of Project Estimates for River Valley Projects - depreciation of plants and machineries taken as per the Guidelines is reasonable.**
- **Access roads - stipulation in the contract that the existing access roads in the project area had to be accepted by the Contractor on "as is where is" basis - construction program submitted by the Contractor and accepted by the Employer was based on construction and maintenance of access road by the Employer throughout the year - since the access road was incapable of bearing the load of heavy machinery and no access road was provided till the expiry of the extended period of the contract, the Employer was held to be in breach of the contract.**



- **No claim for delayed payment due to dispute - no claim for interest or damages with respect to any moneys or balances lying with the Employer owing to any dispute or “in any other respect whatsoever” - words "or in any other respect whatsoever" does not cover claim made by the Contractor for payment for the work done - no prohibition on the Contractor to raise a claim for interest by way of damages before the arbitral tribunal - a contract clause prohibiting a Contractor from claiming damages on account of any loss in respect of a particular matter, must be spelt out clearly.**

*[The North Eastern Electric Power Corporation Limited v. Patel Engineering Limited - Meghalaya High Court - Decided on 30.5.2023]*

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- **Price escalation during the extended period of completion - extension of time (EOT) necessitated due to Employer's failure despite the absence of price escalation clause - arbitral tribunal vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party.**
- **Penalty imposed by Employer for not achieving milestone - Employer cannot impose penalty on the Contractor for failing to achieve milestone, if the Employer was also responsible for delay in execution of the works.**
- **Excepted matter - jurisdiction of the arbitration tribunal to decide claims - challenge by the Contractor to measurement fell within the category of ‘excepted matter’ and therefore the arbitral tribunal had no jurisdiction to adjudicate the said claim.**

*[Union of India v. J&S Construction - Delhi High Court - Decided on 19.7.2023]*

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**The North Eastern Electric Power Corporation Limited v. Patel Engineering Limited - Meghalaya High Court - Decided on 30.5.2023**

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The Employer awarded the Contractor the work in respect of Tural Hydro Electric Power Project on the Tural river system in the Aizawl district of State of Mizoram and two connected road construction contracts. The disputes between the parties were referred to arbitration. The arbitral tribunal passed an award in favour of the Contractor and allowed several claims. The High Court upheld the award of the arbitral tribunal and observed that, although the contract specifically required the bidders to acquaint themselves with the existing site conditions and to factor in the time for executing the work, the expenses, the description of the access road and the nature of the rock composition were also furnished, albeit with the relevant disclaimers, in a commercial contract the disclaimers must not be read to a point of absurdity.

The nature of the composition of the rock was indicated and the data supplied was said to be on the basis of information furnished by the Geological Survey of India by drilling holes into the rock and assessing its structure and composition. However, it was impossible for the bidders to carry out comprehensive examinations of the rock strata before furnishing their bids within the finite period of time. Again, even though the poor condition of the access roads could be seen by the bidder, yet there was a promise of one road being constructed by the Employer along with the Border Roads Organisation. Further, the program submitted by the Contractor for moving its men and machinery clearly stipulated the minimum standards for the access road so that heavy vehicles could move at a regular albeit a reduced speed. The access road failed to adhere to the required standards and no alternate road was constructed even by the end of the initial extended period of contract or even the date of suspension of the work. The overarching problem for the work being undertaken at the project site was the absence of an access road that prevented, and grossly delayed the reaching of material and machinery at the project site. In commercial contracts, particularly in respect of power projects and the like where a private contractor is dependent on the public employer for licenses, permissions, concessional supplies and the like, it must be recognised that there are reciprocal obligations to be discharged.

### **Union of India v. J&S Construction - Delhi High Court - Decided on 19.7.2023**

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The Employer awarded the Contractor the work for "balance work of earthwork in formation in embankment and cutting, including mechanical construction from KM 72.280 to KM 65.00, construction of minor bridges of boxes, RCC slabs, hume pipes etc; various protection and other allied civil works between Vijayapur Jammu-Samba (excluding) in connection with doubling of Jalandhar-Pathankot-Jammu Tawi section (Risk and Cost Tender)". There was delay in completion of the works. The Contractor was granted extension of time due to natural causes like heavy rains, sudden flow of chemical water in bridge No. 167 and hindrances due to the encounter of S&T cables etc. Dispute arose between the the parties with regard to the pending payment. The arbitral tribunal allowed Contractor's claim on several grounds and rejected the Employer's counter claims. The Court upheld the award and observed that the Employer could not have rejected the final bill submitted by the Contractor without conducting the joint measurement. Further, the penalty recovered by the Employer while granting EOT was also not justified since the reasons for granting EOT was not due to delays attributable to the Contractor. The imposition of milestone penalty by the Employer was not justified since the Employer was also responsible for the delay.



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