

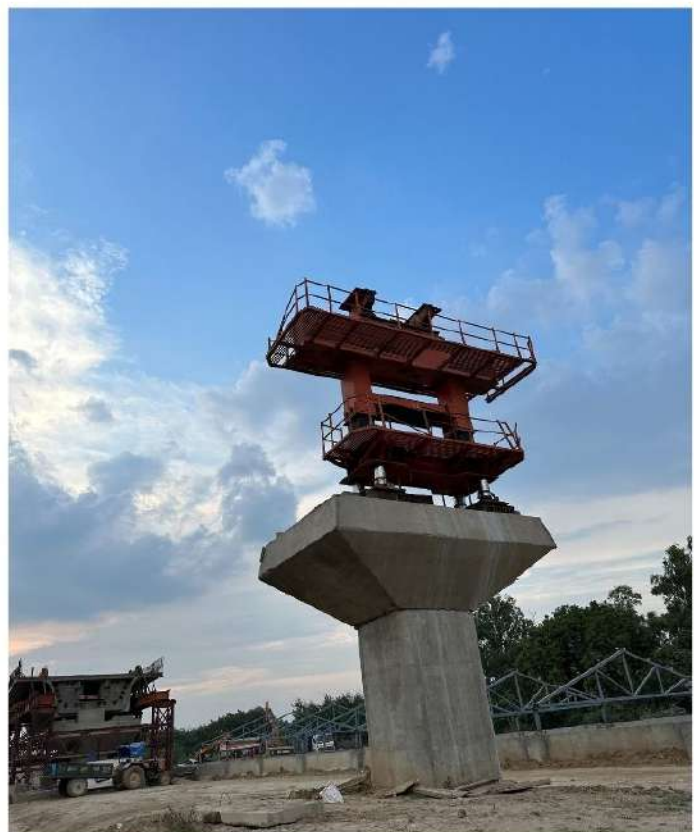
Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Possession of site - whether entire site was to be handed over before construction activity could commence - site or land must be handed over according to the agreed contract terms prior to commencement of any activity.**
- **Fixed price contract - maintainability of claim for price escalation - in the absence of express prohibition, statutory right to damages under section 73 of the Contract Act, 1872 still exists with the Contractor - the contract cannot be considered as a firm price contract beyond the original completion date.**
- **Extension of time - only remedy for delay - no liability to pay compensation - Contractor will be entitled to claim compensation for delay caused by the Employer provided there is no express contractual stipulation against payment of compensation for Employer caused delay in the contract.**
- **Price escalation formula - contract silent on award of price escalation for delay caused by Employer - a party can apply a universally accepted formula to raise a claim for price escalation - formula used in other projects of similar nature is reasonable - minute details of escalation of price need not be proven.**
- **Replacement of damaged imported materials with indigenous supply items - Employer's delayed acceptance of the Contractor's request to replace imported materials with indigenous supply items from contractually approved vendors - Employer in order to justify its claim for liquidated damages need to establish that obtaining of the indigenous material caused delay in the commissioning.**
- **Auditor's Certificate in support of Contractor's claim for overheads - Chartered Accountant (CA) certificate by itself would not be sufficient evidence - actual evidence must be produced to support as to how the CA certified the claim - CA must explain in its affidavit how he arrived at the figures in support of the claim raised by the Contractor - while relying upon parties' books of account there should be additional safeguard of insistence upon other evidence - finding of the arbitral tribunal based only on the CA certificate is finding based on no evidence.**

[Damodar Valley Corporation v. Reliance Infrastructure Limited - Calcutta High Court - Decided on 29.9.2023]



- **Variation claim - change in sizes of Roads under Bridges (RUB) - increase in earthwork - contract providing any change would be treated as variation - since the sizes of bridges could potentially vary from the Ministry of Road Transport and Highways (MoRTH) / Indian Roads Congress (IRC) Specifications to the specifications worked out/negotiated with Local bodies / villages, this conclusively establishes that the extent of variation that would finally be approved was unpredictable - no bidder is expected to have factored in costs that may widely vary in the course of execution - change in sizes of RUBs is a variation - not possible for a bidder to design a vertical profile where the structures are potentially subject to indeterminable changes in scope, type and size - a claim for additional earth work on account of size of structure is reasonable.**
- **Lump sum contract - provision of variation in the contract which could not have been evaluated at the time of bidding is indicative of the fact that all risks of variation is not on the Contractor.**

*[Dedicated Freight Corridor Corporation of India Limited v. Tata Aldesa JV -
Delhi High Court - Decided on 24.8.2023]*



**Damodar Valley Corporation v. Reliance Infrastructure Limited -
Calcutta High Court - Decided on 29.9.2023**

The Contractor was awarded with the contract for the construction of Phase - 1 of a power plant comprising two units of 600 MW each near Raghunathpur in the district of Purulia, West Bengal. There was delay in completion of the project and the construction continued beyond the stipulated time period. Disputes between the parties were referred to arbitration. The arbitral tribunal allowed Contractor's claims including overheads, price escalation, delay in payment of Contractor's bills, extra expenditure incurred by the Contractor towards tax on goods, loss of revenue from tariff due to delay in completion etc. The Court held that the CA's certificate for a claim is nothing but a statement based on the books of account of the Contractor and if it does not state that additional overhead expenses were incurred because of the delay in the project, the claim of the Contractor for additional overhead should be rejected. Further, even if there is no clause in the contract providing for payment of price escalation in the event of delay, the arbitral tribunal has the power to allow such claim raised by the Contractor. Consequently, the contract will not be considered as a firm price contract beyond the original completion date. Handing over of the site for commencement of construction activity is pre-requisite for the Contractor to comply with its contractual obligation. The land or site should be handed over by the Employer prior to commencement of any construction activity. The Court upholding the arbitral award concluded that when there is no specific price variation formulation provided in the contract, and the Contractor is held to be entitled to damages for delay caused by the Employer, the claim can be quantified based on formula which has been used in other projects.

**Dedicated Freight Corridor Corporation of India Limited v. Tata Aldesa JV -
Delhi High Court - Decided on 24.8.2023**

The Contractor undertook the work for “Design and Construction of Civil, Structures and Track Works for Double Line Railway involving formation in Embankments/Cuttings, Ballast on formation, Track Works, Bridges, Structures, Buildings including Testing and Commissioning on Design-Build Lump Sum Basis for Bhaupur-Khurja Section of Eastern Dedicated Freight Corridor” which was split into three contract packages. Dispute pertaining to the question whether the increase in the number and changes in the size of the RUBs can be considered as ‘variation’ was first referred to the Dispute Adjudication Board (DAB). Both the parties, dissatisfied with the decision of the DAB invoked the arbitration clause. Employer's Requirement of the Contract Agreement stated that the technical data such as plans, profiles, proposed alignment, etc. provided by the Employer were indicative and to be reviewed and verified by the Contractor, pursuant to which the Contractor was required to modify the plan and profile accordingly. Under the contract the Engineer was to decide whether such changes would be deemed as “variations” under Clause 13 of the GCC or just as “minor deviations” for which no consideration would be payable by the Employer. The contract laid down that construction of RCC Boxes should conform to IRS Code, IRC and MoRTH Specifications. However, Employer had given sizes / specifications for many of the bridges that were different from the codes mentioned above. The Employer was not consistent with regard to the specifications of the structures. The arbitral tribunal concluded that the sizes of bridges could potentially vary from the MoRTH / IRC Specifications to the specifications worked out/negotiated with Local bodies / villages, goes further to conclusively establish that the extent of variation that would finally be approved was unpredictable, given the myriad options available. The arbitral tribunal observed that in these rather speculative circumstances, no bidder is expected to have factored in costs that may widely vary in the course of execution, thereby making his bid unviable. The Court refused to interfere with the findings of the arbitral tribunal and upheld the arbitral award.



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