

Construction Arbitration Newsletter

RAUTRAY & CO.

Construction Arbitration Law Firm

- **Grant of EOT by the Employer without imposition of liquidated damages - waiver by Contractor to claim compensation for delay caused by the Employer - arbitral tribunal can award damages to the Contractor notwithstanding the prohibition in the contract, based on the statutory provision of section 73 of the Indian contract Act - a clause in the contract cannot prevent the award of damages if the same is otherwise payable in law - however, a Contractor cannot claim prolongation costs if it fails to reserve its right to claim compensation.**
- **Deviation in quantity due to change in design - Contractor was responsible for submitting the design in accordance with the provisions of the contract subject to the approval of the Employer - design submitted by the Contractor found to be deficient by the Employer - since Contractor did not challenge the Employer's comments on the design which led to increase in the quantity of an individual item and the quantities of individual items of the track fitting system was neither sought for by the Employer in the BOQ nor quoted by the Contractor when they submitted their rates, the Contractor was not entitled to claim compensation for deviation in the quantity.**
[Irrcon International Limited v. Delhi Metro Rail Corporation - Delhi High Court - Decided on 9.10.2023]
- **Claim for overheads - Auditor's certificate cannot be treated as contemporaneous document under the contract.**
- **Method of calculating overheads with different dates for completion of each section - applicability of MoRTH Standard Data Book - contract with different stipulated periods of completion and where different sections were progressively completed on different dates - not feasible to apply overheads per month as built in the contract price for the entire period of prolongation and considering prime cost for the entire project - reasonable method would be to apportion the prime cost of the project to different stretches and work out the amount of overheads by taking into account the extent of delay in completion of the work in the relevant stretch of the road, the prime cost of the relevant stretch and overheads factor as per MoRTH Standard Data Book - overheads charges has to be reduced in the proportion of the original contract price to the final contract price.**



- **Claim for overheads - deduction during computation - Contractor required to mitigate its losses - one time overhead charges or expenditure which are not time related should be deducted from the computation of the claim.**

*[National Highways Authority of India v. PCL Suncon JV - Delhi High Court -
Decided on 9.10.2023]*



**Ircon International Limited v. Delhi Metro Rail Corporation -
Delhi High Court - Decided on 9.10.2023**

The Contractor was awarded the work of "Supply, Installation, Testing and commissioning of Ballastless Track of Standard Gauge, Part-I Corridor of sections of Mukundpur-Lajpat Nagar (excluding) Line-7 in elevated and underground sections along with ballasted / ballastless tracks in Mukundpur Depot of Delhi MRTS Project of Phase-III". The work was completed after a delay of 18 months. The Employer had granted extensions of time (EOT) for the entire prolongation of the contract without levy of liquidated damages. The Contractor raised several claims towards overheads, extra cost due to payment of bank charges for repeated extension of Performances Bank Guarantee beyond stipulated completion date, loss of profit, depreciation due to prolongation of the contract period, additional burden towards GST etc. The arbitral tribunal noted that the Contractor had sought EOT on four occasions and only when EOT was sought on the third occasion, the Contractor reserved its right to seek compensation due to prolongation of contract on ground of delay in handing over of stretches and taking over of works. On other occasions, no such right was reserved. The arbitral tribunal concluded that out of the 18 months of the period of prolongation, period of 12 months was without any financial implication as mutually agreed between the parties and thus, the claim for compensation with respect to those 12 months was rejected. The claim for loss of profit was rejected by the arbitral tribunal due to lack of evidence. The arbitral tribunal concluded that though the contract price was not to be adjusted on account of change in taxes, duties, levies, GST being a new tax was not barred by the aforesaid clause. The Court upheld the award of the arbitral tribunal rejecting the Contractor's claim for deviation in quantity due to change in design, since quantities of individual items of the track fitting system was neither sought for by the Employer in the BOQ nor quoted by the Contractor when they submitted their rates. The Contractor's claim for GST which was rejected by the arbitral tribunal, was upheld by the Court, notwithstanding the initial concession agreed to by the Employer to bear a small percentage of the GST, since the contract restricted any adjustment in the contract price either on the increase or decrease in cost as a consequence of change in tax, duties, or levies.

**National Highways Authority of India v. PCL Suncon JV -
Delhi High Court - Decided on 9.10.2023**

The dispute between the parties arose out of a contract for construction of “four laning and strengthening of the existing two-lane highway from km 317 to km 65 of NH-2 in the states of Uttar Pradesh and Bihar”. The work on the project was inordinately delayed. During the execution of the work the Employer through an order passed by the Engineer-in-Chief levied liquidated damages on the Contractor. Subsequently, disputes between the parties were referred to arbitration. The arbitral tribunal rejected all the counter claims raised by the Employer and allowed some of the claims of the Contractor including claim towards overstay and overheads charges for the delay in completion of the project. The Employer contended that the award of claim towards prolongation and overheads was completely unsubstantiated and no reliance could have been placed on the unverified Auditor’s / third party report which were required to be verified by the Employer’s Engineer to qualify as contemporaneous records under Clause 53.4 of the General Conditions of Contract (GCC). The arbitral tribunal directed the Employer to refund the liquidated damages levied on the Contractor. The arbitral tribunal concluded that Auditor’s certificate cannot be treated as contemporaneous document under the contract. Further, where different stipulated periods of completion and different sections were progressively completed on different dates, it was not feasible to apply overheads per month as built in the contract price for the entire period of prolongation and considering prime cost for the entire project. The Court upheld the finding of the arbitral tribunal stating that the only feasible method to compute the loss would be to apportion the prime cost of the project to different stretches and work out the amount of overheads by taking into account the extent of delay in completion of the work in the relevant stretch of the road. Since the Employer was responsible for the prolongation of the work, on account of the delay in handing over the sites to the Contractor, no liquidated damages could have been imposed.



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