

Construction Arbitration Newsletter

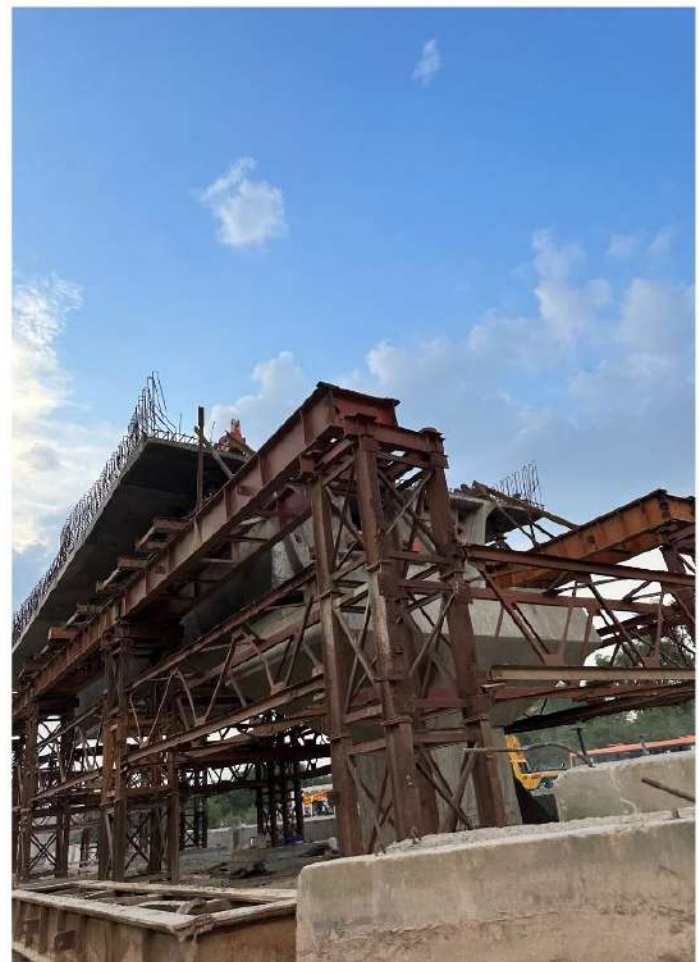
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Construction Arbitration Law Firm

- **Levy of Liquidated Damages - Employer's failure to indicate to the Contractor of its intention to levy liquidated damages - Employer choosing not to terminate the contract on the ground of delay and permitting the Contractor to continue with the work, whether constitutes granting of extension of time (EOT) - clause in the contract enabling the Employer to terminate the contract for delay in mobilization unless time has been extended - conduct of the Employer important to determine whether the EOT should have been granted to the Contractor - time not the essence of contract.**
- **Additional work executed beyond the scope of work - completion of additional work necessary to make the bridge workable - prohibition in the contract to make payment to the Contractor for any additional work done unless he has received an order in writing from the Engineer-in-charge - Employer cannot take the plea that since no sanction order was issued for the work, the entire work was illegal and unauthorised and no payment can be made to the Contractor.**
- **Failure to issue notice of imposition of liquidated damages by the Employer - Section 55 of the Indian Contract Act mandates issuance of notice to the promisor raising claim of compensation for any loss occasioned by non-performance of the contract within stipulated time, at the stage when the promisee accepts performance after stipulated period - in the absence of notice from the Employer to impose liquidated damages, the Employer cannot raise a claim for compensation or liquidated damages.**

*[Oil and Natural Gas Corporation Ltd. v. Deep Industries Ltd.
- Gujarat High Court - Decided on 9.10.2023]*

*[N.R. Construction Pvt. Ltd. v. State of Jharkhand -
Jharkhand High Court - Decided on 18.12.2023]*





Oil and Natural Gas Corporation Ltd. v. Deep Industries Ltd. - Gujarat High Court - Decided on 9.10.2023

The Employer awarded to the Contractor the work for “Hiring of Gas Compression Service” at Balol, Phase-I of Mehsana. The Contractor was expected to purchase a compressor from Houston, USA. There was delay in the arrival of the compressor at site and hence, it could not be commissioned on time. This overall delayed the extending of services of providing compressed gas to the Employer. The disputes between the parties were referred to arbitration. The arbitral tribunal allowed the claim of the Contractor for refund of the amount recovered by the Employer towards liquidated damages. The arbitral tribunal concluded that the Employer ought to have extended time to enable the Contractor to complete the work. The Contractor was entitled to EOT since the Employer permitted the installation of the compressor despite the delay in its arrival at the site. The Court upheld the arbitral award and observed that since the Employer chose not to terminate the contract even in the absence of any request for extension of time, permitted installation of compressor on site and started with the Gas compression, the subsequent conduct of the parties made time not the essence of the contract. The Court concluded that in the absence of any material indicating the levying of liquidated damages with extension of time prior to the stage of installation of compressor or any resistance on the part of the Employer with progression of mobilization, the subsequent levying of liquidated damages by not terminating the contract on the ground of delay in mobilization after successful installation, cannot be treated as lawful.

The Employer awarded to the Contractor the work for construction of minor bridge on N.H. 23 in K.M. 49 pertaining to National Highway Road. The Contractor carried out additional work which was necessary for completion of the bridge and the inflow of traffic. The Contractor contended that on the direction of the Engineer-in-Charge and assurance of extra payment, it executed certain additional and extra work which was not provided in the item of work in the agreement. The dispute relating to non-payment by the Employer was referred to arbitration by the Contractor. The Contractor raised claim for the additional quantity of work on account of the additional cost spent over procurement of materials, actual loss, and expenditure over establishment and overhead due to inordinate by the Employer. The arbitral tribunal concluded that since the rate prescribed was of the year 1986 and the work was completed in the year 2001 i.e. after 15 years from preparation of the chart for schedule rates, the cost of additional work was prepared at the escalated rate keeping in mind the difference of the price rise from the time when the old chart was prepared and this was approved by the Superintending Engineer of the Circle. The Employer's contention, that since no sanction order was issued for the work, the entire work becomes illegal and unauthorised and thus no payment can be made, was unethical. The Court observed that the provision in the contract that the Contractor shall not be entitled to any payment for any additional work done unless he has received an order in writing from the Engineer-in-charge for the additional work, cannot be relied upon by the Employer. However, claims such as overheads, turnover losses and escalation not forming part of the additional works could not have been allowed by the arbitral tribunal. The arbitral award could not have allowed such claims merely because the higher authority did not take any decision. The Court set aside the award of the arbitral tribunal.



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