

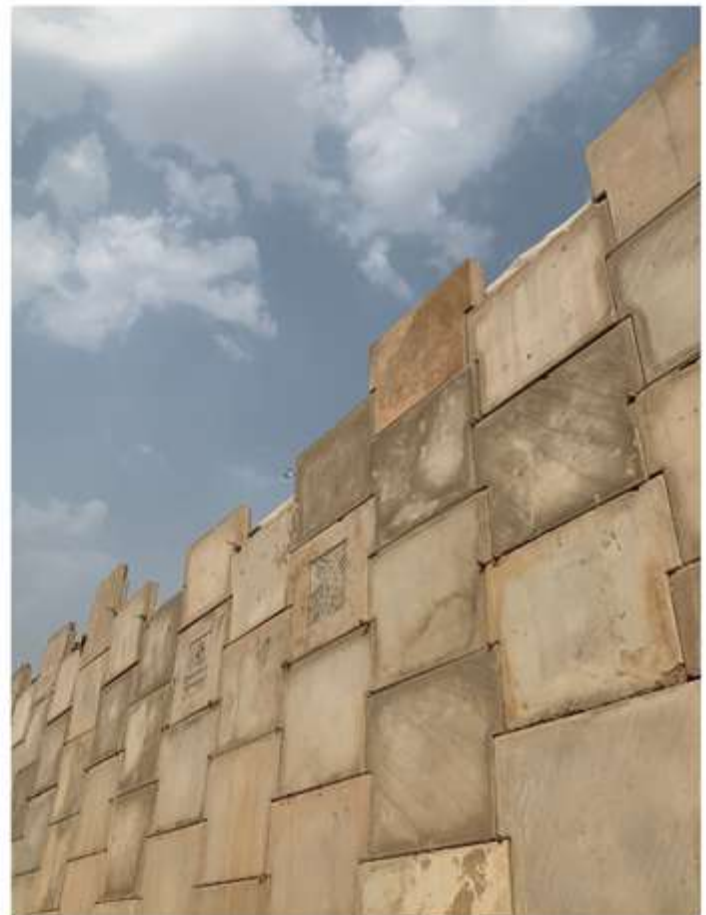
# Construction Arbitration Newsletter

## Construction Arbitration Law Firm

- Recommendation of Engineers India Limited (Engineer-in-Charge) binding on Employer - applicability of Price Reduction Schedule (PRS).
- EIL was entrusted with the primary responsibility to decide the applicability of PRS under the GCC.
- Employer cannot impose PRS where delay is not attributable to the Contractor.
- Award of refund of PRS - not dependent on finding of the Arbitral Tribunal that delay was attributable to the Employer.
- Arbitral Tribunal's finding that delay not attributable to the Contractor based on inference drawn, upheld - non-production of document by the Employer of EIL's letter recommending final EOT without levy of PRS.
- Evidence of value of work to be executed at the cost of the Contractor - can be proved by the author of the document.
- Pre-award interest at 15% upheld - Arbitral Tribunal has substantial discretion in awarding interest.

*[GAIL (India) Ltd. v. Triveni Engineering & Industries Ltd. - Delhi High Court - Decided on 12.5.2022]*

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- Undertaking by the Contractor not to claim excess rate – does not imply that total cost of Reinforced Cement Concrete Retaining Wall (RE Wall) would be the same as estimated cost of Reinforced Earth Retaining Wall. No restriction on the actual quantities executed since the Contractor had not sought increase in the BOQ rates.
- Rebate on BOQ rate offered by the Contractor – binding on the Contractor.
- Question whether work was executed at site – non-production of RFI's, draft Final Statement not showing any material utilization for the work executed in question, no record of seigniorage charges for use of granular filled material, absence of test reports to substantiate compliance with technical specifications - contemporaneous documents relevant to determine the question and also whether the Engineer at site has acknowledged execution of works.
- Whether work has been executed at site – a question of fact. Court shall not interfere with the finding of the Arbitral Tribunal. Contractor had offered to excavate the site to allay any doubts but not accepted by the Employer.
- Claim for deduction of excess royalty from the Interim Payment Certificates (IPC) - No notice issued by the Contractor under Clause 53.1 of the GCC objecting to the deduction from the IPCs – Contractor entitled to the claim.

- **Notice under Clause 53.1 of the GCC requiring issuance of notice before a claim can be lodged for additional payment - not mandatory as it is only a directory provision.**

- **Failure to issue notice - does not mean that the Contractor would lose the right to claim additional payments.**

- **No notice issued - engineer or the arbitrator(s) appointed can adjudicate upon the claim raised by the Contractor.**

- **Claim for additional expenses for extension of Bank Guarantee beyond the Defect Liability Period - Authority cannot withhold the Performance Bank Guarantee contrary to the contractual provisions.**

- **Claim for refund of the amount deducted against increase in the rate of VAT under Clause 70.7 of the Conditions of Particular Application (COPA) - reimbursement of additional tax clearly falls within the ambit of Clause 70.7 of the COPA.**

- **Claim for interest – failure to issue notice under Clause 53.1 of GCC cannot deprive the Contractor its right to claim interest.**

*[National Highways Authority of India v. Continental Engineering Corporation (CEC) - Delhi High Court - Decided on 13.4.2022]*



**GAIL (India) Ltd. v. Triveni Engineering & Industries Ltd. -  
Delhi High Court - Decided on 12.5.2022**

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Disputes arose between the parties regarding the Price Reduction Schedule (PRS). The Contractor requested Engineers India Limited (EIL) for provisional extension of time for a period of four months, without imposition of liquidated damages. The Contractor stated that the delays in execution of Project works were caused, inter alia, due to local disputes, delay in supply items, force majeure events, delay due to rainy season, delay in supply item and sequential work front. The Employer granted provisional extension of time (EOT) without prejudice to its right to impose PRS, in terms of Clause 27.1 of the General Conditions of the Contract. The Contractor completed the work. The Employer on verification found that the Contractor had failed to execute the Cathodic Protection System (CPS) works required for tankage and piping. The Contractor took the stand that CPS was not part of the scope of the work and EIL had reviewed and approved the entire basic engineering. This was agreed to by EIL. The final bill raised by Contractor was sent by EIL to the Employer for payment. The Employer, however, decided to deduct an amount towards non-execution of CPS works by the Contractor. The Arbitral Tribunal awarded the Contractor the sum retained as PRS. The Court held that the decision of EIL (Engineer-in-Charge) regarding the applicability of PRS is binding on the Employer. Further, the Court rejected the contention that an award for refund of PRS could be granted, only if the Arbitral Tribunal found that the delay was attributable to GAIL.

**National Highways Authority of India v. Continental Engineering  
Corporation (CEC) - Delhi High Court - Decided on 13.4.2022**

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The Contractor was awarded the work of four laning of Hyderabad-Bangalore section from KM 293.400 to KM 336.000 of NH-7, in the State of Andhra Pradesh. The Contractor being a company incorporated in Taiwan, the arbitration proceeding was an international commercial arbitration. The Arbitral Tribunal held that the Contractor had agreed to maintain the BOQ rate and provide the agreed rebate as well. However, there was no restriction on the actual quantities executed. The Contractor was held to its bargain to provide the rebate. Finding of the Arbitral Tribunal upheld by the Court. The question whether the Contractor had executed the work relating to Water Harvesting System is a question of fact. The Defect Liability Certificate not recording any reservation regarding the work is binding on the Employer. The Contractor is entitled to make a claim notwithstanding that it had not issued a notice under Clause 53.1 of GCC as the provision is not mandatory, and that, it is only a directory provision. If notice is not issued, as contemplated under Clause 53.1, then, the engineer or the arbitrator(s) appointed to adjudicate upon the claim lodged, can assess its tenability and value with reference to contemporary record. There was no justifiable ground for the Employer to withhold the Performance Bank Guarantee contrary to the contractual provisions. A claim for reimbursement of additional tax clearly falls within the ambit of Clause 70.7 of the COPA. The claim for interest computed in terms of Clause 60.8 of the COPA was upheld by the Court.



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