

Construction Arbitration Newsletter

Construction Arbitration Law Firm

- Price Adjustment formula in Clause 70.3 (c)(v) of COPA - formula based on official retail price of bitumen at the nearest depot and therefore no scope to say that actual price paid by the Contractor should be considered in the Price Adjustment formula.
- Trade practice relevant for Price Adjustment formula - price adjustment is usually worked out on the basis of price indices published by the Ministry of Industrial Development and Ministry of Labour etc. - if price adjustment is required to be worked out on the basis of price of materials like diesel, bitumen, etc., then such price adjustment is based on the official retail price of diesel, bitumen etc.
- Price Adjustment as per trade practice - never based on actual price of materials paid by the Contractor.
- Subsequent legislation causing addition or reduction in the cost - both fall under sub-clause 70.3 and 70.8 of COPA.
- Sub-clause 70.3 of COPA dealing with contract price adjustment of materials including bitumen does not take care of the reduction in the cost of bitumen on account of any change in the legislation dealing with tax payable for bitumen - savings of the Contractor on the tax payable on bitumen on account of change of legislation should enure to the benefit of the Employer in terms of Sub-clause 70.8 of COPA - saving of the Contractor is liable to be deducted from the contract price.



- **Signing of Supplementary Agreement pre-condition to grant of Extension of Time (EOT) - Supplementary Agreement executed by the Contractor, waiving its claims, was under vitiating circumstances and hence voidable under Section 19A of the Contract Act.**
- **Proving coercion or undue influence in executing the Supplementary Agreement - communications between the parties showed that cash flow condition of the Contractor was quite adverse - circumstances must show that the Contractor was having difficulty to maintain liquidity and work progress was affected.**

[Secretary to Government Public Works Department, Government of Kerala v. Oriental Structural Engineers Pvt. Limited - Kerala High Court - Decided on 6.6.2022]

- **Recovery of interest on mobilization advance by the Employer for the extended period of construction - Employer cannot recover interest if it is responsible for the delay.**
- **Unforeseen conditions at site - encountering of rock strata instead of soil - Claim for additional costs - bore hole data indicated sand / sandy, silt / clayey and sand silt up to 30 meters - on excavation rock strata found at varying depths of 7 to 24 meters below ground level - notwithstanding that, the Contractor was obliged to carry out necessary investigation and apprise itself of site conditions - held that the Contractor was entitled to claim for encountering unforeseen conditions.**
- **Reasonable foreseeability of site conditions - bore hole data was found to be incorrect - no time available for carrying out a detailed soil survey at the tender stage - difficulties in accessing the site for carrying out detailed soil investigation including presence of extensive utilities - reasonable for the Contractor to rely on the bore hole data provided by the Employer.**
- **Claim for idling or underutilization of resources deployed - delay in handing over of site by more than 28 months - Contractor entitled to compensation.**
- **Clause in the contract absolving the Employer of any liability to pay damages or compensation for failure or delay in handing over to the Contractor site necessary for execution of works - was violative of section 23 of the Contract Act.**



[Delhi Metro Rail Corporation Ltd. v. J. Kumar-Crtg JV - Delhi High Court - Decided on 25.4.2022]

**Secretary to Government Public Works Department,
Government of Kerala v. Oriental Structural Engineers Pvt.
Limited - Kerala High Court - Decided on 6.6.2022**

The Contractor was awarded work for upgradation of State Highway. Disputes between the parties were referred to the Dispute Review Board (DRB). Employer was not satisfied with the recommendations of the DRB and therefore matter was referred to arbitration. The Contractor was informed that the consequence of failing to agree to the said term, would be non-approval of the extension of time, levy of liquidated damages and non-release of certified payments. The Contractor had not admitted in any of the letters that the delay was due to their fault. The condition put by the Employer for release of the interim payments, non-imposing of LD and grant of extension of time, was withdrawal of the claim by the Contractor for compensation on account of delay caused by the Employer. Therefore, to maintain liquidity, the Contractor had agreed to give up their claim for compensation. The vitiating circumstances in the execution of the Supplementary Agreement was made out. Supplementary Agreement restrained the Contractor from enforcing their rights under the contract and was held by the Court to be void as it violated Section 28 (a) of the Contract Act. The Court upheld the finding in the award that if the price adjustment is allowed to be based on the actual price, said to have been paid by the contractor, then the same would have been highly vulnerable to misuse. It is to avoid the same, that as per trade usage, the price adjustment formula for materials like diesel, bitumen etc. are based on the official retail price. The bid documents, prepared by the Employer, had the expression "official retail price of bitumen" at the IOC depot at Cochin. Hence, the stand taken by the Employer that there was no official retail price of bitumen at IOC depot at Cochin and that the Contractor's eligibility for price adjustment should be based on the actual price paid by the Contractor, was against the terms of the contract. The Court upheld the award based on trade practice followed, whereby the price adjustment is never based on the actual price of the materials paid by the Contractor. Taking note of the dissenting award and upholding it, the Court held that the Sub-clause 70.3 of the GCC dealing with contract price adjustment of materials including bitumen did not take care of the reduction in the cost of bitumen on account of any change in the legislation dealing with tax payable for bitumen, the savings of the Contractor on the tax payable on bitumen on account of the change of legislation should enure to the benefit of the Employer in terms of Sub-clause 70.8 of the GCC.



**Delhi Metro Rail Corporation Ltd. v. J. Kumar-Crtg JV - Delhi High
Court - Decided on 25.4.2022**

The Contractor was awarded the contract for design and construction of Tunnel by Shield TBM, Tunnels, Stations and Ramps by cut and cover. The work commenced prior to the signing of the contract. Dispute between the parties pertained to claim for payment of additional amounts as compensation for the increase in costs on account of encountering unforeseen physical conditions; compensation of loss due to flooding and leakage of pipeline; cost incurred for environmental compensation charges; compensation for underutilization of resources and refund of interest on advance. The Court held that the Contractor was not liable to pay any interest if the contract was executed within the stipulated timeframe. Therefore levy of interest was a direct loss arising from the delay or breach by the Employer. The Court held that the bore hole data submitted by the Employer was found incorrect and that there was no time available for carrying out a detailed soil survey at the tender stage. Further, there were serious difficulties in accessing the site for carrying out detailed sub-soil investigation, which included heavy traffic, inaccessibility of certain sites, and the presence of extensive utilities.



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