

**NOTES ON ADMINISTRATION OF CONTRACTS IN PWD (B&R) –
A GUIDANCE TO DEPARTMENTAL OFFICERS**

After the acceptance tender and issue of Letter of Acceptance (LOA) by the competent authority, a Contract Agreement is signed between the Contractor and the Executive Engineer on the furnishing of Performance Security (as specified in the LOA) by the Contractor. The Contract has to be administered and implemented by the Executive Engineer. The Executive Engineer has to administer the Contract with due diligence, timely and as per provisions of the Contract including arranging prior sanction of the competent authority where provided for.

2. The important steps in administering the Contract on behalf of the Department by the Executive Engineer invariably include but not limited to :

- (a) Scrutiny of Construction Programme as submitted by the Contractor ensuring its completion within stipulated time with reference to resources planned to be deployed by Contractor with due consideration to scope of work.
- (b) Handing over by the Executive Engineer to the Contractor of the Site in commensurate with the Construction Programme as approved.
- (c) Joint Inspection of site (Representatives of Executive Engineer and Contractor) in the case of hindrances and making a detailed Memorandum specifying hindrances reach-wise and reaches where the work can be executed.
- (d) Follow up by the Executive Engineer with the concerned authorities owning the services (both under-ground and overhead) resulting in hindrances – with a view to ensure early removal.
- (e) Follow up by the Executive Engineer with the Forest Department in case of forest clearance (it may be included in the hindrances list as prepared under 'c' above).
- (f) Timely reply to references based on record as received from the Contractor (Under Indian Contract Act, 1872 no reply on part of

Department amounts to acceptance of the contents as submitted by the Contractor).

- (g) Review and monitor the progress as achieved by the Contractor at regular interval including preparation of complete "Contemporary Record" in terms of resources as deployed by the Contractor including materials, labour, machinery and equipment; supervisory technical staff (*Note: the machinery and equipment, technical personnel as included in the 'Instructions to Bidders' is only for the purposes of determining Eligibility criteria and it do not amount to minimum to be deployed by Contractor for execution of work*).
- (h) Grant of approvals by the Executive Engineer as specified in the Contract in a time bound manner.
- (i) Conducting regular review meetings with the Contractor and to maintain record thereof including decisions taken in terms of 'action to be taken by whom'.
- (j) Conducting of tests on the completed work or otherwise and to review record of test results as conducted by Contractor to ensure that work is being executed as per Specifications and Standards under the Contract.
- (k) Processing of Application for Extension of Intended Completion Date – comments on reasons as quoted by Contractor and corresponding assessment of delay, if agreed and admissible. (*It has to be noted that Extension is granted only in case of "compensation event" or variations*). In the event the delay is on account of Department failure and there are chances for no early solution to delay, the following possibilities need to be examined in consultation with the Chief Engineer :
 - Withdrawing of affected portion of the work from scope of work under the Contract;

- Suspension of affected portion of work and adequately compensating the Contractor in terms of de-mobilization and mobilization costs.
- (l) In the event of failure of Contractor to achieve laid down "Milestone under Contract Data", consider the alternative of action under Clause 49 'Liquidated damages' or 'shifting of Milestone' depending on facts of the case and ground realities.
- (m) The 'Variation order' be issued where justified with specific details of quantities of items of work and rates thereof.
- (n) In case of any Early Warning by the Contractor under Clause 32 of Contract, assess the situation including aspect of extension of time and /or increase of Contract Price as sought by Contractor; decide on mitigation measures as necessary; and seek necessary advice of Chief Engineer (whether to continue or to take measures in terms of entering into Supplementary Agreement, where appropriate as per ground realities).
- (o) In case of Compensation Event, consider and assess the reference from the Contractor in terms of 'extension in intended date of completion' and /or 'increase in Contract Price'. In case of Contractor seeking for 'increase in Contract Price' assess the same precisely and seek approval of the Chief Engineer.
- (p) It is to be understood that as per law laid down by Hon'ble Supreme Court, even in case of 'Undertaking(s)' as being arranged from the Contractor's, the Contractor can still has the right to raise Claims under the Law.
- (q) A reference from Contractor in terms of 'prolongation of stay at site' or 'claiming of damages' has to be reacted, replied and rejected based on ground realities, documents as on record and a final decision as to what constitutes the delay and appropriate action has

to be taken in consultation with the Chief Engineer in a time bound manner.

[*For illustration* – In case the delay is attributable to a reason beyond the control of Department and time on account of reasons resulting in delay cannot be assessed, it shall be appropriate to withdraw said portion of the work from Contract as it would lead to a definite amount of damages to the Department or alternatively enter into a supplementary agreement for execution of said component of work by defining the liability of the Parties. This shall help in avoiding disputes later and avoidable payment to the Contractor in the form of arbitration awards.]

3. Role of Dispute Review Expert (DRE): In most of the Contracts there is provision and a role of 'Dispute Review Expert' and it is expected that DRE shall visit the site at regular intervals, review the progress and shall prepare an independent Contemporary Record in terms of :

- (i) Progress of work as achieved – physically and financially; achieving of mile stones/ or delays therein;
- (ii) Record in terms of deployment of resources, machinery and equipment, labour, technical qualified supervisory staff;
- (iii) Status of hindrances, if any; removal thereof with dates;
- (iv) Resolution of disputes in a time bound manner as provided under the Contract by giving adequate opportunity to parties.

A copy of 'Visit & Site Report' has to be made and issued to both the Parties and Chief Engineer.

Dispute Review Expert has to give its recommendations on the dispute(s) as raised by either party after having heard both the parties, consideration of documents as on record, affording them due opportunity and within the frame work and provisions of the Contract and substantive law.

4. It is equally important to understand what constitute a "dispute" which leads arbitration between the Parties to a Contract. The Hon'ble Supreme Court has

defined the **dispute** as under in *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* (1988) 2 SCC 338 :

"There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to acceded to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

5. It is to be understood that construction Contract between the parties is governed by the "Substantive law" i.e. The Indian Contract Act, 1872. Sections 51 to 55 of the said Act provides for reciprocal promises. The Construction Contract as entered into between the Contractor and Department is of reciprocal promises and sequence of performance of promises is the manner in which they are to performed so that parties to Contract can perform subject to meeting with same, e.g. :

- i) Handing over of site to the Contractor and drawings where to be provided by the Department; followed by
- ii) Execution of work by the Contractor as per Specifications and Standards and submission of bills for Interim Payment or final payment; followed by.
- iii) Release of interim or final payment by Department within agreed time period.

Failure to comply with any of the above obligations is termed as "breach" of the Contract on the part of the respective party, the other party is entitled to be compensated in the form of damages under law.

Sections 51 to 55 of the Indian Contract Act, 1872 are reproduced below for your reference:

"51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.- when a contract consists of reciprocal

promises to be simultaneously performed, no promiser need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

52. Order of performance of reciprocal promises.- *where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order ; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.*

53. Liability of Party preventing event on which the contract is to take effect.- *when a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented : and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non performance of the contract.*

54. Effect of default as to that promise which should be performed, in contract consisting of reciprocal promises.- *when a contract consist of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promiser of the promise last mentioned fails to perform it, such promiser cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non performance of the contract.*

55. Effect of failure to perform at a fixed time, in contract in which time is essential.- *when a party to a contract promises to do a certain thing at or before a specified time, or certain thing at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of such failure when time is not essential.- *If it was not the intention of the parties that time should be of the essence of the contract,*

the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promiser for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.- *If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."*

[In the above sections of Indian Contract Act, Department is "*promisee*" and Contractor is "*promisor*"]

It may be noticed that Section 51 of the Contract Act provides that a promisor is not bound to perform, unless reciprocal promisee is ready and willing to perform his promises. Section 52 provides that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, then they shall be performed in that order which the nature of transaction requires. Section 53 provides for liability of a party in case of a contract containing reciprocal promises and one party to the contract containing reciprocal promises and one party to the contract prevents the other to perform its promises. Section 54 provides for compensation to the affected party in case of such reciprocal promises.

6. It has been observed that most Claims as raised by the Contractor's under the Arbitration are invariably on account of :

- (i) Failure of Department to hand over hindrances free site.
- (ii) Delay in acquisition of land, shifting of utilities, forest clearance etc which results in consequent delay in execution of work and prolongation of stay at site.
- (iii) Delay in making of Interim payments or final payment under the Contract.
- (iv) Delay in decision on issues as sought for by the Contractor as required for execution of work.

- (v) Delay in approval of drawings as submitted by the Contractor or delay in issue of drawings by the Department.
- (vi) Dispute or difference as regard interpretation of implementation of a Clause or provision of Contract.
- (vii) A decision taken by the Executive Engineer is beyond the provisions of Contract. Contractor not satisfied with the decision of the Executive Engineer on any of the issue(s) raised by the Contractor.
- (viii) Delay for handing over of Piers common with Railway in case of ROBs.
- (ix) Failure to issue a variation order where required.
- (x) Dispute as regard any compensation event.
- (xi) Idling of resources, machinery and equipment on account of prolongation of stay at site for reasons attributable to the Department.

The disputes on the above grounds as raised by Contractor's are in the form of prolongation of stay at site beyond the stipulated period and damages are sought in form of: (i) additional cost on materials; (ii) idling of machinery and equipment; (iii) idling of labour; (iv) increased overhead charges (site and head office); (v) additional charges in terms of extension of bank guarantees; (vi) loss of profit; (vii) loss of opportunity etc.

7. Now, for administering the Contract which can help in avoiding the disputes between the Parties and later arbitration claims and further defending the Department in arbitration, the pertinent Clauses of the Contract in addition to other are :

"21. Possession of the Site

21.1 The Employer shall give possession of the site to the Contractor, as per the work programme of the Contractor approved by Engineer. If possession of a part of the site required as per the work programme is not given by the date when it is actually required for carrying out the work, the

Employer is deemed to have delayed the start of the relevant activities for that part of the site and this will be a Compensation Event.”

The Clause provides for handing over the site to the Contractor commensurate with the Work Program as submitted by the Contractor and approved by the Engineer failing which it shall be compensation event and provisions of Clause 44.2 and 44.3 shall be applicable.

[It shall be appropriate on the part of Executive Engineer to undertake joint inspection with Contractor or through their Representatives and to make a detailed Memorandum listing out hindrances and defining reaches of site where work can progress without any hindrance which shall help in avoiding disputes later or at least ground realities shall be on record.

Further complete record need to be maintained as regard removal of hindrances and handing over to the Contractor.]

“28. Extension of the Intended Completion Date

28.1 The Engineer shall extend the Intended Completion Date if a Compensation Event occurs or Variation is issued which makes it impossible for Completion to be achieved by the Intended Completion Date without the Contractor taking steps to accelerate the remaining work and which would cause the Contractor to incur additional cost.

..... ”

The Clause provides for Extension in Intended Completion Date only in the event of an ‘Compensation Event’ or ‘Variation’ which makes it impossible to complete the work by Intended Completion Date without the Contractor taking steps to accelerated balance work and Contractor has to incur additional cost.

It need to be observed that in certain situations, purpose of extension in Intended Completion Date is to save the Contract by agreeing to new dates fixed by the Contractor and Department in view of powers of the Engineer (Executive Engineer) to extend the period, power of the Employer to levy liquidated damages etc.

Grant in extension in Intended Completion Date only signifies that a new Date of Completion has been fixed and simply by granting it does not mean :

- There has been any condonation of the conduct of Parties by either of the Parties.
 - Any liability resulting from delay has been admitted.
- Or
- Reasons causing delay have been admitted.

"32. Early Warning

32.1 The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonably possible.

32.2 The Contractor shall cooperate with the Engineer in making and considering proposals for how the effect of such an event or circumstance can be avoided or reduced by anyone involved in the Works and in carrying out any resulting instruction of the Engineer."

There is a reason and purpose of having Clause 32 in the Contract. In case there is a likelihood of the happening of a Compensation Event, the Contractor is required to notify the Executive Engineer, about the likely affect of such an event on the progress of the work as well as the financial implication, if any. It would only be fair and just to the Executive Engineer/Department and will also provide an opportunity to the Executive Engineer/ Department to take necessary steps to either remedy for the likely consequences or minimize the effect of such compensation event.

Further the purpose behind the Clause is that party to a Contract against whom a claim for damages is sought to be raised cannot be taken by surprise and in all fairness should know the conditions under which the work is being executed,

in case it will lead to a situation that can result in additional financial burden on the Department against whom claims are raised.

"44. Compensation Events

44.1 The following are Compensation Events unless they are caused by the Contractor :

- (a) The Engineer does not give access to a part of the Site by the Site possession date as stipulated in Clause 21 and as stated in the Contract Data.
- (b) The Employer modifies the schedule of other contractors in a way which affects the work of the Contractor under the Contract.
- (c) The Engineer orders a delay or does not issue/approve drawings, specifications or instructions required for execution of works on time.
- (d) The Engineer instructs the Contractor to uncover or to carry out additional tests upon work which is then found to have no Defects.
- (e) The Engineer does not convey the decision of a sub-contract to be let, within 15 (fifteen) days.
- (f) Ground conditions are substantially more adverse than could reasonably have been assumed before issuance of Letter of Acceptance from the information issued to Bidders (including the Site Investigation Reports), from information available publicly and from a visual inspection of the Site.
- (g) The Engineer gives an instruction for dealing with an unforeseen condition, caused by the Employer, or additional work required for safety or other reasons.
- (h) Other contractors, public authorities, utilities owning authorities or the Employer does not work within the dates and other constraints stated in the Contract, and they cause delay or extra cost to the Contractor.

- (i) The advance payment is delayed, beyond 28 (twenty eight) days after receipt of application complete in all respects and Bank Guarantee.
- (j) The effect on the Contractor of any of the Employer's Risks.
- (k) The Engineer unreasonably delays issuing a Certificate of Completion.
- (l) Other Compensation Events listed in the Contract Data or mentioned in the Contract.

44.2 If a Compensation Event would cause additional cost or would prevent the work being completed before the Intended Completion Date, the Contract Price shall be increased and/or the Intended Completion Date is extended. The Engineer shall decide whether and by how much the Contract Price shall be increased and whether and by how much the Intended Completion Date shall be extended.

44.3 As soon as information demonstrating the effect of each Compensation Event upon the Contractor's forecast cost has been provided by the Contractor, it is to be assessed by the Engineer and the Contract Price shall be adjusted accordingly. If the Contractor's forecast is deemed unreasonable, the Engineer shall adjust the Contract Price based on Engineer's own forecast. The Engineer will assume that the Contractor will react competently and promptly to the event.

44.4 The Contractor shall not be entitled to compensation to the extent that the Employer's interests are adversely affected by the Contractor not having given early warning or not having cooperated with the Engineer."

In the first instance the Contractor has to prove that a Compensation Event has taken place in terms of Clause 44.1 of the Contract.

Under Clause 44.2, on occurrence of a Compensation Event, the Contractor has the option to seek: (i) extension in Intended Completion Date; or (ii) an increase in Contract Price directly related to compensation event; or (iii) both i.e. extension in Intended Completion Date and increase in Contract Price. Under

Clause 44.2, the Engineer has been vested with the authority to determine in the event of a Compensation Event, whether the Contractor is entitled to:

- (i) For an increase in Contract Price, if so by how much; or
- (ii) For extension in Intended Completion Date, and to decide the date in that case; or
- (iii) For both an increase in Contract Price and Extension in Intended Completion Date.

The Clause provides for “**add/or**” and “**whether and by how much**” and it is for the Executive Engineer to decide in this regard i.e. ‘Extension in Intended Completion Date’ and /or ‘an increase of Contract Price’.

In case Contractor seeks for increase in Contract Price, the Clauses 44.2, 44.3. 44.4 read with Clause 32.1 puts an obligation on the Contractor to work out and submit the effect of compensation event in financial terms i.e. an addition to Contract Price (along with supporting documents) and it also casts duty on the Executive Engineer to assess the details of forecast (addition to Contract Price, if any) as provided by the Contractor as regard its reasonability and admissibility. And in case the financial increase as asked for by the Contractor is found by the Executive Engineer to be unreasonable or not based on facts, the Executive Engineer has to work out the effect of compensation event in financial terms and to decide for the increase in the Contract Price, if any.

It is a mandatory obligation of the Contractor to furnish Cost Implication, if any, (i.e. forecast based on its assessment) as a result of Compensation Event (directly connected to the event) and it is for the Engineer to make its assessment and admissibility.

Clauses 44.2 and 44.3 read together vests authority with the Engineer to decide whether and by how much the Contract Price is to be increased in case of an Compensation Event but it is subject to condition precedent in terms of Clause 32.1 and 44.3 that Contractor has to demonstrate and establish for the increase in Contract Price and having given an Early Warning in this regard. The Contractor is bound to submit detailed documentation to demonstrate and establish for an increase in the Contract Price.

The Contractor is entitled to cost compensation within the framework of the Contract and it is for the Engineer to consider and decide the aspect of cost compensation in terms of Clause 44.3. It is not necessary that cost compensation has to be granted, even if any Compensation Event happen and it shall depend on the facts and circumstances, ground realities of the case and Executive Engineer has to make detailed assessment of all the reasons and ground realities.

Clause 44.4 provides that no compensation claim can be granted in favour of the Claimant unless an Early Warning (as per Clause 32.1) of the Contract has been given by the Contractor to the Department and/or Engineer in respect of occurrence of any alleged compensation event/cause of delay.

Waiver and 'doctrine of election': In case the Contractor has not sought for any increase in Contract Price while seeking Extension in Intended Completion Date under Clause 44.2 and 44.3 read with Clause 32.1, this shall amount to Waiver and under 'Doctrine of Election', the Contractor has chosen only for 'Extension in Intended Completion Date'.

"47. Price Adjustment

47.1 Contract Price shall be adjusted for increase or decrease in rates and price of labour, material, fuels and lubricants in accordance with the following principles and procedures and as per formula given in the Contract Data.

- (a) The price adjustment shall apply for the work done from the start date given in the Contract Data up to end of the initial intended completion date or extensions granted by the Engineer and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor.
- (b) The price adjustment shall be determined during each month from the formula given in the Contract Data.
- (c) Following expressions and meanings are assigned to the work done during each month:-

R= Total value of the work done during the month. It would include the amount of secured advance granted, if any, during the month,

less the amount of secured advance recovered, if any during the month. It will exclude value for works executed under variations for which price adjustment will be worked separately based on the terms mutually agreed.

47.2 To the extent that full compensation for any rise or fall in costs to the Contractor is not covered by the provisions of this or other clauses in the Contract, the unit rates and price included in the Contract shall be deemed to include amounts to cover the contingency of such other rise or fall in costs.”

Clause 47.1 provides for price adjustment for increase or decrease in the cost of materials viz Cement, Bitumen, Reinforcing bars and other materials; labour; POL, Machinery spares and parts etc over the stipulated time period and extensions as granted under the Contract as per formulae included in the Contract Data. It need to be observed that cost of compensation on account of various factors due to prolongation of the Contract is already covered for the work done upto the extension in Intended Completion Date granted under provisions of Clause 47.1. Once the Parties to the Contract have agreed on an adjustment formulae (as included in Contract Data) for calculating compensation then no further compensation is admissible in any other form or manner.

Clause 47.2 provides that unit rates and prices included in the Contract shall be deemed to include amounts to cover the contingency of such rise or fall in cost. The Clauses 47.1 and 47.2 make it abundantly clear that price adjustment under the Contract is only a representative and not absolute to fully compensate the Contractor for increase or decrease in rates of specified components that go into the work.

8. It shall be appropriate to understand proposition of law as laid by Hon'ble Delhi High Court High Court in 'Kailash Nath & Associates versus New Delhi Municipal Corporation' reported as 2002(3) Arb.LR 631 (Delhi) (DB) is as under:

“6. Some points need to be immediately emphasized. Firstly that the contractor must apply in writing for an extension of time specifying

*reasons for the delay on the part of the NDMC. To this extent the contract between the parties incorporates a departure from Section 63 of the Contract Act, which would otherwise have made parole evidence admissible on the question of terms, if any, surrounding the grant of extension of time. Secondly, it would also be expected of the contractor at this very stage of seeking an extension, **to specify his claims, if any**, on account of the delay which he attributes to the NDMC. Indubitably, Clause 5 protects the interests of NDMC, as has been opined by the Arbitrator also. If the contractor fails to reserve his right to claim damages, once the extension is granted and acted upon, no claim for damages would be tenable. Thirdly and for the same reasons, if the Authority grants an unconditional extension, it would not be entitled to raise any demands for damages on account of delay upto this stage, on a later date. Fourthly. It is not logical to contend that once an unconditional extension is granted, it amounts to an admission that the authority was responsible for the delay. There is no barrier in the way of the authority to waive its claim for damages. These principles should be strictly adhered to, also for the reason that they ensure that no frivolous or unfair claims are raised later on. Parties must at all time be ad idem and therefore, the terms and conditions of extension to the period for completion of the project should be meticulously spelt out at the relevant and contemporary time.”*

From above proposition of Law laid by the Hon'ble Court:

- (i) It is clear that in case the Contractor has not raised for claiming “damages” at the time of seeking Extension in Intended Completion Date he cannot claim it later. This amounts to Waiver as Contractor has failed to caution/issue of notice for claiming damages at a later date.
- (ii) The Department by grant in extension in Intended Completion Date does not mean that Department is responsible for the delay.

- (iii) If the Department has granted unconditional extension in Intended Completion Date, it will not be entitled to raise the demand of Damages at later date i.e. imposing of liquidated damages.

9. It is to be noted if the Contractor has not claimed Cost Claim or increase in Contract Price under Clauses 44.2, 44.3 and 44.4 read with 32.1 as and when the same were incurred by it, the Contractor led the Department to believe that all it was seeking was Extension in Intended Completion date. The silence on part of the Contractor to seek an increase in Contract Price has created a right in the favour of Department. The Contractor is stopped from raising such like claims later being barred under the **doctrine of Estoppel**.

10. It is to be equally observed that where a Contract that provides for extension in Intended Completion Date and provision for imposing liquidated damages, the time is not the **essence** of the Contract. It has been held by Hon'ble Supreme Court in 'M/s Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.R's versus State of Maharashtra' reported as AIR 1979 SC 720:

If the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the undertaken work remains unfinished on expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.

11. Damages: Many of the Claims are as being raised by the Contractors are in the form of Damages i.e. 'on account of prolongation of stay at site' in form of Damages. Section 73 of the Indian Contract Act, 1872 reads as under:

"73. Compensation for loss or damage caused due to breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the

parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

..... ”

It is admitted that Section 73 confers a right to the Contractor to claim damages but before it becomes an entitlement, certain requirements have to be complied with. Before a Claim for Damages can be raised against a Party to a Contract by the other Party, the requirements of Section 73 of the Indian Contract Act, 1872 have to be fulfilled. These requirements refer to:

- The Contractor should be able to prove that there has been a breach of any of the terms and conditions of the Contract by the other party 'Department'.
- The Contractor should be able to prove that such a breach has resulted in losses incurred by the Contractor.
- The Contractor should be able to prove that such losses have a direct nexus with the alleged breach and have occurred as a direct consequence of the alleged breach.
- The damages being sought are for the purpose of compensating the Contractor and not for its enrichment.
- While ascertaining the damages, it shall be seen that the Contractor had taken all necessary steps to mitigate the losses for which now compensation is being sought.

If none of the above factors exist in a case, nothing is payable to the Contractor by the Department. All these shall have to be proved by the Department based on documents on record. Certain guiding factors in this regard can be;

- o Whether reasons alleged for delay are factually incorrect, and if the reasons are incorrect and not proved, the responsibility cannot be fastened on the Department (This has to be examined from record of each individual case).

- Whether Claims as have been raised by Contractor are in accordance with the Contract, without prejudice to above contention.
- Whether Claims do not survive in view of the specific contractual provisions even if it is presumed that the Claims have been raised in accordance with the Contract.
- Whether there is evidence as record to prove the alleged additional cost as claimed (whether incurred).

12. Application of Hudson Formula- While working out amount of claims under damages, Contractors are invariably relying upon Hudson Formula which was allowed by Hon'ble Supreme Court (in the matter 'Mcdermott International Inc. vs Burn Standard Co Ltd and others' reported as 2006(2) Arb. LR 498 (SC), '*there is nothing in Indian Law to show that any of the formulae adopted in other countries is prohibited in Law or the same would be inconsistent with the law prevailing in India*' when Hudson's 6th Edition was available, however, the scenario has totally changed with publication of Hudson's 11th edition as has been referred to in a judgment of Hon'ble Delhi High Court in RFA(OS) 81/2007 (DB) decided on 19-03-2012 "K.R. Builders Pvt. Ltd versus Delhi Development Authority", whereby it has held as under:

"33. But, at the same time, in another decision penned by one of us (Pradeep Nandrajog, J) after noting the aforesaid paragraphs, it was further noted that the learned Author had, with reference to Hudson's formula, opined further, and this further was noted in paragraph 19 of decision dated February, 2012 in FAO(OS) No.667/2006 'DDA versus Associate Builders' where is as opined :

"16. On the applicability of the Hudson's formula, we are noticing that in many judgment the same is applied mechanically ignoring certain important passages from the commentary and especially para 8.201, 8.209 and 8.211 from the 11th edition of the Book in question. In para 8.201 the learned Author opines that the formula should be applied "provided proper site records have been kept, a total cost

basis claim must be justified, it is submitted; and it is hard to see how a plaintiff, whether owner or contractor, who has failed to keep record should be in a better position to subject the defendant and the Tribunal to the difficulties of assessment and the reversal of the particular onus of proof, which the total cost involves, unless it can be convincingly impractical or impossible? In para 8.209 the learned Author opines "Arbitrator in particular should treat their own ability to insist on particular particularization and to carry out a detail and critical analysis and separation of quantum as a very important part of their role in construction litigation, where the presentation of highly exaggerated or theoretical complaints, by owners and contractors alike, is a common feature. At para 8.211 the learned Author has noted "It seems to be practice in the construction industry to employ consultants to prepare a claim as soon as the ink on the contract is dry."

34. In the instant case we find no evidence led to the number of tools, plant and machinery stationed at site when the work got prolonged. There is no evidence of site overhead expense. Mere statement on oath of the witness of the appellant is of no values. We find in the affidavit by way of examination-in-chief the witness of the appellant has simply parroted the language of para 11(n) of the plaint and has not stated a word about the number of tools, plant and machinery, the capital values or hire charges for the same (if they are taken on hire). The number on non-workmen personnel deployed at site or even at site office.

35. Thus, the claim must fail, not on the reasoning of the learned Single Judge, but due to there being no evidence."

13. Defending the Department: There are three stages at which the Department can defend itself in an arbitration matter, namely:

- (i) In framing of Defence Reply in rebuttal to Claims as filed by the Claimant-Contractor in Statement of Claims;

- (ii) In making oral submissions in rebuttal to Claims during the proceedings/hearings by the Arbitral Tribunal; and
- (iii) In the form of written submissions on the conclusion of arbitral proceedings.

The correspondence between the Parties since the inception of work and contemporary record as maintained in terms of: (i) progress achieved during execution of work; (ii) record of review meetings; (iii) machinery and equipment as mobilized and deployed at site of work; (iv) materials arranged for the work; (v) labour as deployed; (vi) compliance to provisions of Contract can be made use of in framing the defence to the Claims.

In addition detailed scrutiny on the below noted aspects would be useful:

- (i) Whether the Contractor submitted Construction Programm, approval thereof and whether site has been handed over commensurate with the programme?
- (ii) Whether any reference has been made to the Contractor as regarding slow progress of work or Department can prove that delay attributable to the Contractor or delay is attributable to both the Parties? [*Physical and Financial Progress including record of Review Meetings would be a useful tool to defend.*]
- (iii) Whether the 'compensation event' as relied upon by the Contractor is valid under Clause 44.1 of the Contract?
- (iv) Whether the Contractor had given an Early Warning under Clause 32.1 and if any, what the Contractor has sought for in terms of 'extension of Intended Completion Date' and 'increase in Contract Price' ?
- (v) Whether while seeking Extension in Intended Completion Date, the Contractor has sought for extension of Intended Completion Date or/and increase in Contract Price (Clause 28 and 44.2) ?
- (vi) In case the Contractor has asked for increase in Contract Price, whether proper documents in support of increase in Contract Price

were furnished; and in case so, whether any decision was conveyed by the Engineer (Clauses 44.2 and 44.3).

- (vii) Whether the Contractor has made any reference or served notice seeking Damages during prolongation of the Contract i.e. after stipulated date of Completion?
- (viii) Whether the Department has paid Price Adjustment under Clause 47.1 throughout the Contract period including extensions granted, if any.
- (ix) Whether the Contractor submitted Construction Programme showing completion to become entitled to claim 'Bonus' under Clause 50, and whether the said Programme was approved by the Engineer?
- (x) Whether Clause 49 was operated to impose 'liquidated damages'; if so, whether recovery had been affected? If recovery has not been affected, whether Department has raised the same in the form of Counter Claim.
- (xi) Whether the Contractor has put Department to notice for claiming damages at any stage.

14. In the absence of any contemporary record (which the Department don't have in most of the works) it is equally difficult for Department to make a solid defence and only tool available will be to defend on the "interpretation of Clauses of the Contract" and "non-compliance thereto by the Contractor". The important Clauses of the Contract on which the defence has to be based includes: (i) Possession of Site (Clause 21); (ii) Extension in Intended date of Completion (Clause 28); (iii) Early Warning (Clause 32); (iv) Compensation Events (Clause 44); (v) Price Adjustment (Clause 47); (v) Liquidated Damages (Clause 49); (vi) Payments under Sub-Clause 42.5 and Final Payments.

The Arbitrator is bound by Sub-Clause 28(3) of the Arbitration and Conciliation Act, 1996 which states as under :

"(3) While deciding and making any award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction."

Under trade usages the Claimant (Contractor) is bound to maintain complete record of all transactions in respect of the work and details of expenditure. Accordingly, the Contractor-Claimant must put on record the extent of expenditure it has incurred to prove the amount being claimed under "**damages**" as no amount can be claimed by the Contractor-Claimant for its enrichment Or on the basis of a 'Statement in the Statement of Claims' or 'on the basis of evidence of a witness'. Further under Section 73 of Indian Contract Act, 1872 no remote or indirect amount can be paid.

15. It is to be noted that "ADJUDICATION HAS TO BE AS PER CONTRACT & SUBSTANTIVE LAW". Only an experienced legal counsel having adequate knowledge of arbitration matters can defend the Department on the above referred Clauses in proving that:

- (i) "Claims are not as per Contract"; and
- (ii) Further supporting and proving that "Claims are not as per law".

The requirement to engage good and expert legal counsel need to be considered and implemented with as total expenditure on its services shall be a small fraction of amount of Claims. It is to be understood that there has to be close interaction between the Executive Engineer and legal counsel.

Further Chief Engineer's and Superintending Engineer's should be involved in framing of defence reply and monitoring of the arbitration matters on day to day basis. Further it shall be of immense help if the Executive Engineers are instructed to attend all the hearings personally instead of deputing their Divisional Accounts Officers. It shall be equally useful if the Executive Engineer apprise the Chief Engineer after every hearing and where necessary there can be a further interaction between the Chief Engineer and legal counsel.

(Kuldip Singh)