

L E X WITNESS

Volume 10 Issue 2 | September 2018

₹65 US \$6 UK £4

■ TechIPedia



Garima Sahney
Partner, Saikrishna & Associates

P16

P08

The e-Commerce Policy Draft:

A Sweet & Sour Mix?



■ Dialogue



Shweta Bharti
Senior Partner,
Hammurabi & Solomon Partners

P28

■ let's arbitrate



S. Ravi Shankar
Sr. Partner, Law Senate

P36

■ Rendezvous



Kirit Javali
Partner,
Jafa & Javali, Advocates

P38

■ tête-à-tête



Parimal Prasad
Head – Retail Litigation,
L&T Finance Holdings

P50

■ expert speak



Karishma Jaiswal
Sr. Associate,
Maheshwari & Co.

P42

expert speak



Sachin Gupta
Partner, Dhir & Dhir Associates
Pragya Khaitan
Senior Associate,
Dhir & Dhir Associates

P20

expert speak



Shishir Kant
Director,
Masin Projects

P57

expert speak



Niraj Singh
Partner,
RNS Associates

P34

expert speak



Mohit Goel
Partner, Sim & San
Sidhant Goel
Partner, Sim & San

P24

Enforcement of Price Escalation in Government Contracts – A Practical Primer

■ Mohit Goel & Sidhant Goel



The construction industry has a major role in the development of the Indian economy. Over the last decade, we have experienced significant spikes in costs of material used in any construction projects. If you ask any contractor involved in the construction industry, the common theme in steel, copper, aluminum, cement, petroleum, natural gas, lumber etc., the answer would be that their price fluctuations are wildly unpredictable. This is what price escalation is. It is the rise or fall of prices/costs of various components of work during the period when the work is being executed.

The effect of increase in prices of these variables leads to major problems in the execution of the contract by the contractor. Having a price escalation clause in the contract is an effective tool to mitigate this fluctuation. Construction contracts, however, are mostly an anomaly in real terms since they are usually written by the government without really negotiating with the contractor. There are several case laws where such contracts do not provide for price escalation clause and neither adopted to the Guidelines of Federation Internationale Des Ingenieurs Conseils (FIDIC); Guidelines of Central Public Work Department (CPWD); and Guidelines of Implementation Infrastructure and Project Monitoring Division (MOSPI).

Courts in India have, however, been cautious of this position, and have provided relief to contractors despite the absence of price escalation clauses. The first judicial precedent that discussed the issue of grant of compensation in case of absence of price

escalation clause was Tarapore and Company vs. Cochin Shipyard Ltd., Cochin and Ors., reported at AIR 1984 SC 1072, where the Apex Court held that if the factual situation, on the basis of which the agreement was entered into by the Parties, ceases to exist, the agreement to that extent will become otiose. If rates initially quoted by the contractor become irrelevant due to subsequent price escalation, and the contractors' claim for compensation for the excess expenditure incurred due to price rise could not be turned down merely on the ground of absence of price escalation clause in the contract.

Similarly, in P. M. Paul vs. Union of India reported at AIR 1989 SC 1034, the Hon'ble Supreme Court granted compensation to a contractor in respect of losses caused due to increase in prices of material and cost of labour and transport during the extended period of contract, even though the contract between the parties did not include any escalation clause in it. The Apex Court laid down the principle that in circumstances of escalation of prices, absence of price escalation clause in the contract will not be fatal when delay in completion has been caused due to reasons not attributable to the contractor.

The same principle was then followed in the case of K.N. Sathyapalan (Dead) by Lrs. vs. State of Kerala and Ors. Reported at 2007 (5) ALT 17 (SC), the Hon'ble Supreme Court was dealing with a situation where (a) the issue of price escalation for losses suffered by the contractor on account of price escalation of materials had taken place during the extended period of completion, (b) such extension of time was necessitated by



176, Ashoka Enclave-III,
Sector-35, Faridabad -121003,
National Capital Region (NCR)
T: +91 0129 4132176
E: admin@simandsan.com



reasons not attributable to the contractor, and (c) there was an absence of a price escalation clause. The Apex Court observed that "...the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations."

The above are some of the landmark Supreme Court judgments, which have changed the landscape of jurisprudence relating to price escalation in contracts where specific clauses to this effect were missing. A number of specialty contractors, who were bound to fixed-price construction contracts, were suffering substantial losses if they would fulfill their contractual obligations, especially when delays occasioned for no fault of the contractors. Through these cases, it is seen that the courts have considered various factors in granting compensation to the contractors i.e., the terms of the contract; intent of the parties; inability of performance due to inevitable circumstance; additional work done by the party; and computation of the claim by the contractor

Without quoting Section 70 of the Contract Act specifically, it is evident that the Hon'ble Supreme Court has applied the principle enshrined in this provision of the Contract

Act, which stipulates that when a party has worked for another party non-gratuitously, then the party who has received benefit from such work must compensate the party that has done such work. Compensation, in this regard, would have to necessarily include price escalation.

Another connected principle in this regard has been laid down by the Hon'ble High Court of Delhi in the case of National Highways Authority v. HCC Ltd., reported at (2014) 211 DLT 656, where the Hon'ble Court, while applying the principle of *contra proferentem*, held that a price escalation clause must be interpreted against the employer, and unless there is a specific exclusion, the clause on price escalation must be interpreted to include all incidences of price escalation.

Keeping the judicial precedents cited above, and the principles of law enunciated therein, it is important for contractors to be aware of their rights in respect of price escalation, even where their contracts are silent on price escalation or where the contracts are silent about what all incidences of price escalation they include. Given that most government contracts are standard form contracts, or are drafted by the government, the above principles are bound to be attracted in most, if not all, cases. Similarly, given that much delay in execution of projects is inevitably linked to issues not attributable to the contractors, the contractors should exercise their rights to claim price escalation. [\[v\]](#)



Mohit Goel is a Partner in the Firm's Dispute Resolution team. Mohit's expertise extends to dispute resolution in the field of Intellectual Property Rights and Arbitration and Conciliation. Mohit has played and continues to play a key role in some of India's biggest Intellectual Property disputes. Mohit is also an active member of the International Trademark Association (INTA).



Sidhant Goel heads the dispute resolution team of the Firm. Specializing in Patents Dispute Resolution, Sidhant has vast experience in conducting trial in civil litigation. He is currently spearheading some of the most contentious Patent Litigations in the Country, including SEP litigation at the Firm. He is also leading several domestic and international Arbitrations at the Firm. Sidhant is a practising Lawyer, and also has an Honours Degree in Physics.