



भारतीय राष्ट्रीय राजमार्ग प्राधिकरण

(सड़क परिवहन और राजमार्ग मंत्रालय)

National Highways Authority of India

(Ministry of Road Transport & Highways)

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No.11041/21/2002/Admn-III

May 20, 2004

POLICY MATTERS – ADMINISTRATION/FINANCE (85/2004)

[Decision taken on CK Division File No.NHAI/12013/16/2000/Tech./GM (E)-I]

Sub: Payment in respect of Price Escalation

Kindly refer to Policy Circulars (49/2003) and (57/2003) of even number dated June 26, 2003 and September 25, 2003 vide which the procedure was prescribed for payment in respect of price escalation under those contracts (in particular, contracts in respect of projects falling under Kolkata-Chennai section of GQ) where the provisions had been worded differently in respect of payment of price escalation on all components of works except variations evaluated at present day rate.

2. The opinion of the Law Ministry has since been received vide MoRT&H letter no. RW/NH-37011/59/2003-PIC dated April 22, 2004. The Law Ministry has advised that price variation is not available in those agreements where it is not found in the express language.

3. In view of the above, it has been decided that-

- (i) No further payment on account of price escalation may be made under these contracts.
- (ii) As regards the projects where payments in excess of 75% of the contract value have already been released, it was decided to immediately recover the payments already released on account of price escalation, which are not secured against the Bank Guarantees, along with interest at SBI PLR as stipulated in the policy circular (49/2003).
- (iii) As regards recovery of payments on account of price escalation released in case of the projects that have been completed, it was decided that the recovery may be made immediately along with interest at SBI PLR as stipulated in the policy circular (49/2003).

This issues with the approval of the Chairman.

[VK Sharma]

General Manager [Admn.]

To

All Members
All CGMs/GMs
All DGMs/Managers
All PIUs/CMUs/SPVs

Copy for information to-

PS to Chairman
Director (Audit), RAP, NHAI
Library/Hindi Officer

**Government of India
Ministry of Road Transport & Highways
PIC Zone**

*Transport Bhawan,
1, Parliament Street,
New Delhi – 110001.*

RW/NH-37011/59/2003-PIC

Dated: 22nd April 2004

To

**The Chairman,
National Highways Authority of India
5 & 6 Sector 10, Dwarka,
New Delhi – 110045.**

Subject: Interpretation of contract clauses pertaining to price adjustment in different civil works contract packages in Chennai-Kolkatta section of NH-5.

Sir,

I am directed to refer to File No.NHAI-12013/16/2000/Tech/GM (E-I) and letter No. NHAI-12013/16/2000/TECH/GM (E-1)-292 dated 19.11.2003 and to forward herewith the opinion/views of M/o Law and Justice (Deptt. of Legal Affairs) on the above subject for necessary action (enclosed at Annexure I). The File No. NHAI-12013/16/2000/TECH/GM (E-I) is also returned herewith.

Further, Ministry of Law & Justice (Department of Legal Affairs) has submitted a fee bill for Rs. 5,000/- for payment to learned Additional Solicitor General of India (Shri. Altaf Ahmed) for rendering his opinion on the above subject. The same is forwarded herewith (enclosed at Annexure II) for making payment to learned Additional Solicitor General of India under intimation to the Ministry.

Yours faithfully,


(Jeetender Chadha)
Section Officer-PIC

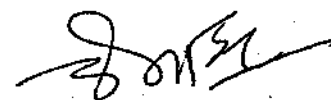
Encl: As above

MINISTRY OF LAW & JUSTICE
(Department of Legal Affairs)

The Ministry of Road Transport & Highways had sent this reference for tendering advice on the interpretation of different agreements entered by National Highways Authority of India and Private Contractors. These agreements are worded differently and in some the language does not permit price variation but the National Highways Builders' Federation contended otherwise. The matter was referred for obtaining legal opinion of learned Law Officer.

2. Learned Additional Solicitor General Shri Altaf Ahmed has tendered Legal Opinion dated 25.3.2004 and same is placed on the file as flagged. It is stated in the Legal Opinion that intention of the parties is required to be gathered from the language employed in the contract and no different intention can be imputed. The contrary evidence cannot be given by the parties that their intention was at variance. Every word in the contract has to be ascribed a meaning. Similarly, an agreement cannot be re-written by addition of any word and nothing more can be added to the agreement. According to the Legal Opinion price variation is not available in those agreements where it is not found in the express language.)

Submitted for kind perusal/approval please.



(O.P. NAHAR)
Legal Adviser & Ex Officio
Addl. Secretary (Conveyancing)
6th April, 2004

Law Secretary

OPINION

... Ex Parte

Subject: Interpretation of Contract Clauses pertaining to Price Adjustment in different Civil Works Contract Packages in Chennai Kolkata section of NH-5.

Reference File No. RW/NH-37011/59/2003 - PIC (Dy. No. 10290/ 04-Adv.A. dt. 17.3.2004)

This reference from the Ministry of Road Transport and Highways has arisen as a result of conflict of views on the interpretation of the contractual provisions as to the scope of applicability of price adjustment formula provided differently in different contracts. In the note dt. 18.12.2003 of Shri Alok Dipankar, EE (PIC), Ministry of Road Transport & Highways, it has been stated that there are 28 contracts, which are under implementation in Chennai – Kolkata corridor of Golden Quadrilateral. It has been noted that under clause 70.1 amount payable to the contractor is valued in base rates and prices in Interim Payment Certificates issued by Engineer pursuant to clause 60.1 shall be adjusted in respect of rise or fall in indexed clause of labour, material and other inputs to the other works, by the addition or subtraction of the amount determined by the formula prescribed in clause 70.3.

In the last column of the tabulated form in para 4 of the said note, the difference in the language of different contracts has been brought out and it has been finally concluded that "...the contracts at Sl. No.6 do not include 'Permanent Works' and 'Dayworks' in price adjustment formula. In case of packages AP-19 & AP-20 escalation is not payable on 'Dayworks'. NHAI

had initially paid price adjustment, amounts on all components of works but has now stopped making payments until final decision is taken.”


Legal opinion obtained by NHAI from M/s. M.V. Kini & Co. concludes that “...each Civil Construction Package has to be interpreted strictly in accordance with its terms and that being so the price adjustment formula as given in a particular package has to be applied as such and not otherwise”.

The National Highways Builders Federation (NHBF) have obtained a legal opinion from Shri P. Chidambaram, Senior Advocate, who has opined that “The correct view is to take the price adjustment formula and apply it to the works included in the original scope of work and to such ‘variations’ and ‘daywork’ which are not otherwise subject to adjustment”.

Quite plainly, the opinion of Mr. Chidambaram clearly finds that some ‘variations’ and ‘day work’ would not be subject to adjustment in terms of the express language of the contracts. In his opinion, he has referred to clause 70.7 under the caption “Exemption from Price adjustment” and noticed that under clause (d) the value of any additional or varied work valued at current prices stand exempted from price adjustment.

On the other hand, M/s. M.V. Kini & Co., Advocates, in their opinion state and conclude —

“The contention of the Consultant that when clauses 14.4, 70.1 and 70.7 speak of adjustment of price of all inputs with certain exemptions, it may not be correct to apply the price adjustment factor (Pn) to a particular input only leaving aside all other inputs of having the benefit of price adjustment clause, does not, in our view, have much force. No doubt clause 14.4 of instructions to bidders and clauses 70.1 and 70.7 of COPA provide for adjustment of price of inputs of IPC's without exception, yet the adjustment can only be in accordance with the price adjustment formula and if the price adjustment formula itself provides for price adjustment for a particular input only, the said price adjustment factor cannot be applied to other inputs not covered by it.



"From the corrigendum issued in regard to the Instructions to the Bidders in Civil Construction Package OR-II, it appears that price adjustment factor was modified to cover only permanent works leaving aside variation and day work items thereby clearly showing the intention of the Employer that price adjustment factor in package OR-II was applicable to permanent item of work and not to variation and day work items. Such an amendment to the Instructions to the Bidders does not appear to be an accidental but as a result of a conscious decision. The prospective bidders were aware even before bidding, the extent and scope of the adjust formula. This amendment to the Instructions to the Bidders also illustrates that the price adjustment formula given in other Civil Construction Packages did not suffer from any unintentional mistake. The price adjust formula in each package was amended after taking a conscious decision.

"For the reasons above stated we are of the view that each Civil Construction Package has to be interpreted strictly in accordance with its terms and that being so the price adjustment formula as given in a particular package has to be applied as such and not otherwise."

The perception on which it has been felt necessary to seek my opinion is forthcoming from the following words recorded in para 5 of the note dated 18.12.2003: —

"The legal opinion, however, does not answer the basic question whether the price adjustment clause worded differently in different package was accidental or by design. It appears that they have given their opinion on the assumption that the price adjustment has been worded differently as a result of conscious decision. This may not be correct as has been discussed in para 6, 7, 8 & 9 below."

I find this perspective utterly misconceived in law. The basic principle, which governs the construction of the terms of a contract which has been reduced to writing is to construe it by ascertaining the intention from the document itself from the words in which its stipulations are expressed. It is to be borne in mind that parties cannot themselves give direct evidence to show that their real intentions were at variance with the provisions of the document. (See *British Movietonecos, Ltd. v. London and District Cinemas, Ltd.* [1952] A.C. 166 heard in Court of Appeal at [1951] 1 K.B. 190.) It is the duty of the court to ascertain the intention of the parties from the document itself, and not to rewrite it in the light of what the parties might or might not have had in mind at the time they made the contract.

When the words of contract are clear and unequivocal, the parties are bound by them.

It is the admitted position that price adjustment clause is worded differently in different packages. Whether that was by design or not, amounts to going behind the written contract and allowing the parties to give direct evidence to show that their real intentions were at variance with the language employed in the contract.

M/s. M.V. Kini & Co. have considered the factual matrix, in which the parties have made the contract, which have led to the price adjustment clause to be worded differently in different packages. In this background there is no escape from the conclusion that the variance is conscious and deliberate. This cannot be wished away as "*assumptions*". Far from that, the note itself refers to five factors, which influenced the opinion of M/s. M.V. Kini & Co to conclude that the variance in wording of price adjustment clauses in different packages could only be regarded as a conscious decision. To characterise that as an *assumption* would be erroneous and to seek a contrary conclusion would entail rewriting the terms of the contract involving addition and deletion of the words in the contracts.

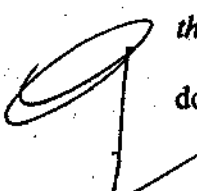
The views expressed by NHBF and dealt with at para 7 of the note dated 18.12.2003; views expressed by Consultants dealt with at para 8 of the note; different wordings in contract whether by accident or by design dealt with at para 9 of the note; and, pre-bid meetings dealt with at para 10 of the note, would be matters, which are not available to be considered against the express terms of a written contract. Each one of them is an invitation to show that the real intentions were at variance with the words of the document, which is contrary to the settled law stated in *British Movietonecos* (ibid). It is

neither desirable nor permissible in law to allow a contract to be rewritten including on the ground that "*the consultants have admitted that there was drafting error which has been overlooked by all concerned*".

The point to remember is that the parties in this case are at a stage where they are not negotiating for entering into a contract. Contract has already been entered into between them. The terms have been reduced to writing, which bind them on the language in which they have been couched.


I am, therefore, in agreement with the conclusions of M/s. Kini & Co. and with due deference unable to agree with the opinion of Shri P. Chidambaram, Ld. Senior Counsel, who also in his opinion has noted that 'variations' and 'dayworks' are not otherwise subject to adjustment, but seeks application of price adjustment formula on the basis of reasonableness in order to avoid arbitrariness. Contracts are in the field of private law. The principles of administrative law, although are applicable to government bodies before the stage of entering into the contract, they cease to apply after the contracts have been made. Thereafter the parties are bound by the terms of the contract.

Settled principle, which governs construing of a contract document, is that the document is to be construed as a whole, which necessarily involve giving effect to each part of it in relation to all other parts of it. Accordingly as a corollary that the principle that the document must be construed as a whole, effect must be given to each part of the document. *This in turn means that in general each part of the document is taken to have been deliberately inserted, having regard to all other parts of the document with the result that there is a presumption against redundant words. Just as the words in a document ought not to be regarded as surplusage, similarly, words should*



not be added in a clause, which have been deliberately omitted. If the view expressed by Mr. Chidambaram were to be accepted, it would necessarily involve ignoring/deleting the words in sub-clause (d) of clause 70.7, which exempts additional or varied work at current prices from price adjustment and would further involve including permanent works and day works in packages in which it is not provided. Supplying or deleting words of a contract document cannot be done by applying the principle of harmonious construction. That principle is used to harmonize the meaning of words used in a contract and not for supply or deletion of words, which amounts to rewriting the existing contract.

The fact that certain amounts have been released on the assumption of application of price variation for some time based on misconstruction of the terms of the contract would not be the ground to continue to make those payments when the words of the contract did not permit those payments to be made.


(ALTAF AHMED)
Additional Solicitor General of India
25 March 2004

The Law Secretary
Ministry of Law and Justice,
Department of Legal Affairs.