CHAPTER 8 Conclusions and Suggestions

8.1 Introduction

This being an action research, the conclusions drawn and the suggestions made shall be the most crucial part of the current research as they shall impact the change process. In case these suggestions are adopted, they are definitely help in smooth and timely completion of the infrastructure projects for Indian Defence Forces to help boost their morale. Further, these changes if implemented shall avoid not just the time and cost overrun but save huge amount of public money that is being wasted in litigations.

8.2 Conclusions

From the current study the various conclusions that are drawn are described as under:

16.1 Existing Alternative Dispute Resolution system of MES contracts is ineffective & inefficient:

(a) Unresolved disputes lead to time & cost overrun in many infrastructure projects.
(b) The basic reason for creation of disputes in majority of the cases has been defaults made by the government side during contracting, execution and billing. Thereafter, the approach to rationalize rather than acknowledging the issues aggravates the disputes.

(c) Disputes are not tackled at the inception stage as the contract conditions as well as the MES policies do not encourage resolution of disputes during the contract execution stage. This allows the disputes to blow out of proportion affecting the progress of the project.

(d) The use of Arbitration process to resolve the disputes is required to be deferred till the completion of the project as per arbitration clause and the MES Manual of Contract. In practice, due to the tendency to rationalize the defaults rather than acknowledging the occurrence of dispute, the department officials further delay the initiation of process abnormally (over 4 years in current research). This practice instead of helping has actually hurt the interest of the state the most as seen from the various case studies.

(e) FIDIC conditions, World Bank contracts and ICC provisions for operation of Dispute Review Board (DRB) throughout the contract period have been acclaimed to be a very successful model to not only resolve but avoid disputes specifically in construction contracts. NHAI and CPWD have employed this technique in their contracts with reasonable amount of success. However, MES has stayed away from considering such model which if introduced could usher in an era of successful projects with minimum cost and time overrun.

(f) Even after a decade of its introduction in MES contracts, Conciliation as a mode of dispute resolution has been a non-starter due to impractical restrictions imposed over its use. The power and benefits of conciliation need to be acknowledged from the settlement agreements between NHAI & Larsen & Toubro Limited where claims of over 1800 Cr were settled for just Rs. 241 Cr within a period of 4 months through conciliation.

(g) Strategy of Risk & Cost Contract to finish delayed projects has been a total failure as it neither acts as a deterrent for the contractor to complete the project nor has
benefited the government to recover the additional expenditure from the defaulting contractor. On the contrary, government wastes its money and efforts in litigation for decades without making any recovery but invariably end up paying huge damages.

(h) There are abnormal and unacceptable delays in Arbitration process to resolve the disputes due to an overall unprofessional approach towards dispute resolution through Arbitration by all stakeholders including the arbitrator.

(i) Innocuous but rigid procedures/norms lead to abnormal delay in payment of final bills to the contractor, which ultimately contributes to the development of numerous disputes. With passage of time the new incumbents are not willing to take responsibility or deviate from procedures to regularize the omissions on the part of past officials for fear of watchdog agencies.

(j) Majority of the arbitration awards go in favour of the contractor. Defaults by the department and abnormal delay in initiation of the Arbitration process are the two main reasons for inability of the department to successfully defend majority of the Arbitration cases.

(k) Decision making to challenge the award/judgment is flawed and has turned the department into a compulsive litigant. The policy needs review in line with the policy adopted by CPWD and NHAI.

(l) Post award litigations run for years with detrimental end results for the government in terms of time and money. Nearly 60% of the total dispute span and major portion (57%) of the total award amount paid to contractor is the product of post award litigations.

(m) Majority of judgments in post award litigations go in favour of the contractor. Indiscreet decision to challenge the award and over reliance on the government counsels rather than relying on self professional expertise are the two main reasons for the failures.

(n) With the imminent amendment to section 11 of the Arbitration and conciliation Act 1996, the court shall promptly refer the parties to arbitration without even verifying the existence of a live claim leaving it to be decided by the arbitrator. Thus,
reluctance or delay to appoint the arbitrator shall act against the interest of the department.

(o) The average dispute span from date of cause of action till final resolution of dispute is unacceptable (17 years) and needs drastic reforms to bring it to reasonable levels.

(p) Post award Litigation (7.33 years) has been the most damaging aspect of dispute resolution with department officials playing into the hands of government counsels in the name of legal advice without using their own professional acumen and thus becoming the leading litigant.

(q) It is the interest liability accumulation that has hurt the government much more than the principal amount awarded against it. Interest liability is more than 70% of the final payments made to the contractor in the current research.

(r) The MES GCC clause 11 in respect of “Time, delay and extension” has become obsolete in the sense that now it does not provide any shield to award of damages to the contractor in case of prolongation to the contract for reasons attributable to the department. Thus, it needs to be modified by including that such reason shall entail only extension of time as compensation but no other claim of damages in line with the ONGC clause.

(s) The ill effects of Ad hoc arbitration are clearly evident from the various case studies undertaken. Thus, it is high time that MES switch to institutional arbitration to bring professionalism in the dispute resolution process. The imminent amendment to the Arbitration and Conciliation Act 1996 (as per recommendation of Law Commission) shall bar the serving employees of either party from being appointed as Arbitrators. Thus, the institutional Arbitration shall be forced upon the department. Institutionalization on the lines of NHAI or DMRC could be the beginning point by roping in experienced retired officers from various departments and judiciary.

(t) Policy of delaying the initiation of dispute resolution process, delay in acknowledging the dispute/appointing the arbitrator and postponements/delays during arbitration process are factor contributing towards accumulation of past and pendente lite interest. Compulsive post award litigations under the influence of the redundant legal advice when the award is on technical claims and no ground for challenge exists lead to accumulation of astronomical future interest. The future interest liability to
increase manifolds now with recent judgment in Hyder Case confirming the legality of future interest over past and pendente lite interest.

(u) Interim implementation of award protected by BGB by the winning party has to be implemented immediately as the same is going to be enforced by the proposed legislation amending the Arbitration Act. This shall go a long way in avoiding accumulation of future interest which has been the most damaging issue for the government department.

8.3 Suggestions

STRUCTURAL REFORMS:

The below referred structural changes in the dispute resolution mechanism for contractual disputes are the need of the hour if MES needs to improve the efficiency of the infrastructure building works for the Indian Defence Forces

(a) **Discontinue Risk & Cost strategy:** In this strategy, the contracts of delayed projects are cancelled to conclude fresh contract for completion of the balance work and any extra expenditure incurred by the government is to be recovered from the defaulting contractor. The research has shown that the strategy has failed miserably to deliver the desired results on two counts – it neither acts as deterrent for contractors not to abandon the work nor the government ever succeeds in recovering the risk and cost amount even after decades of litigations. Thus, it is recommended that the strategy needs to be discontinued immediately to be replaced with the contract condition of obtaining a performance guarantee of 5% upfront from the contractor and forfeiture of the same in case of default by the contractor in diligently progressing with the project. The fresh contract to finish the balance work is concluded independently of the defaulting contractor without his risk and cost.

(b) **Introduce Dispute Review Board (DRB):** On the Micro-level, introduce Dispute Review Board (DRB) constituted at the commencement of the contract period comprising of independent members who familiarize with the project site through
regular site visits. The DRB shall give its recommendations on any dispute referred to them which becomes final if not challenged within a brief specified period. Thus, maximum disputes get resolved during the construction period itself paving the way for successful completion of the project.

(c) **Create Dispute Resolution Wing (DRW):** There are several watchdog agencies whose job is to find faults. There is a need to create a wing with a responsibility to resolve contractual disputes whose officials shall visit different parts of the country in the running contracts to offer their expertise and support to resolve the disputes. This will not only create a healthy working atmosphere but help in avoiding litigations and cost and time overrun in projects.

(d) **Liberalize Conciliation:** Lift the restrictions imposed on the use of Conciliation as a means to resolve contractual disputes. The policy of restricting its use in contracts of value over Rs. 1 Cr and individual claim of Rs. 2 Lakh or 1% of contract value whichever is less has made it non-operative from the time it was introduced in MES Contracts a decade back. Over 90% of contracts in MES are below Rs. 1 Cr and majority of claims in contracts valued over Rs. 1 Cr are above Rs. 2 Lakh. Therefore, there is a need to liberalize conciliation from these impractical restrictions to utilize it to its optimum.

(e) **Introduce Institutional Arbitration:** Institutional Arbitration is the outsourcing of the dispute resolution to bring professionalism specifically in government contracts. Supreme Court and Law Commission have strongly recommended for switching to Institutional Arbitration with experienced professional arbitrators rather than Ad hoc Arbitration with serving government officers acting as arbitrators. Proposed amendments to Arbitration and Conciliation Act 1996 shall debar a serving government employee from being appointed as Arbitrator. Therefore, it is better to be prepared and explore institutional arbitration sooner rather than later after being forced through new legislation. Serious consequences of Ad hoc arbitration as
observed in the current research can be avoided through the shift to institutional arbitration.

CURTAIL LITIGATION:

Drive to clear backlog of dispute cases

The current research has shown the detrimental effects of prolonged litigation where court cases run for decades increasing the interest liability to increase the overall liability of government manifold. At present there are close to 2000 disputes pending at various levels in MES where interest liability is increasing each passing day. Thus, there is an urgent need to curtail these litigations for which following measures are suggested:

(a) Independent technical committees may be formed to:

i. To scrutinize and review long pending Court Cases and Arbitration cases in the context of law evolved through recent SC judgments and new (likely) legislation.

ii. On the basis of review the technical committee to segregate the cases into three categories:
   
   - Category A: Cases where chances of success are very bleak
   - Category B: Cases with possibilities of amicable settlement
   - Category C: Cases with strong chances of success

iii. Recommend Category ‘A’ cases to be withdrawn immediately to avoid any further interest accumulation.

iv. Recommend Category ‘B’ cases to be referred to a Settlement Negotiation Committee for an amicable settlement.

v. Recommend Category ‘C’ cases to be continued and pursued vigorously in the courts / arbitral tribunal to expedite decision on merits.
(b) Independent Settlement Negotiation Committees to be formed where cases under category ‘B’ are taken up with the contractor to reach an amicable settlement to resolve the dispute.

These measures are required to be taken up as a drive to clear the entire backlog of close to 2000 dispute cases pending at various stages within a period of 1 year so that no baggage is carried forward once the proposed structural changes and measures as per new legislation are in place.

**AVOIDING INTEREST LIABILITY**

*Add new contract clause to avoid Past and pendente lite interest*

Contract condition similar to that adopted by ONGC, Indian Railways and DMRC pertaining to **interest on arbitration award** should be included in the GCC to clearly debar the arbitrator from awarding any interest on the principal awarded amount till the date of the award. Thus, no past and pendente lite interest shall be allowed on the awarded amount. The said clause in the DMRC GCC reads as under:

*“Interest on Arbitration Award  
17.10 Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period, till the date on which the award is made.”*  

This shall be in line with the clause 31 (7) (a) ACA 96 where the freedom has been given to the parties to agree on such arrangement.

The same has also been upheld by the apex court in various judgments as also seen from the case study No.15 in respect of Indian Railways. Thus, with such clause in operation the Arbitrator shall not award any past or pendente lite interest on any awarded amount.

*Interim implementation of award to avoid Future interest*
Future interest liability is going to take more dangerous proportions in the light of recent split judgment given by a three judge constitution bench of Supreme Court in *Hyder Consulting (UK) Ltd Vs State of Orissa* decided by majority on 25 Nov 2014 where merging of awarded amount and pre-award interest into the ‘sum’ for calculating the future interest was upheld. The judgment without calling this method of calculating the future interest as being interest over interest has virtually legalized the same.

Similarly, the proposed amendment to Arbitration and Conciliation Act 1996 in an explanation 2 to sec 31 (7)(b) makes it very clear that sum over which future interest shall apply includes not only principal awarded amount but past and pendente lite interest up to the date of award as well.

Thus, in case we decide to implement the award, we must act fast so that the awarded amount is paid to the contractor within limitation period of three months to avoid the future interest liability.

However, in case of strong grounds to challenge, a provision to make mandatory award payment (protected by BGB) before challenge in Court by either party as described below may be adopted:

(i) If award being challenged by losing party:-
   - Losing party to make payment of awarded amount to winning party (WP)
   - Winning party to give bank guarantee of awarded amount to losing party (LP)

(ii) On final decision in the litigation:-
   - If no change in award
     - bank guarantee to be released by LP
   - If award set aside
     - bank guarantee may be encashed

This policy shall avoid the fire fighting of the MES officials at every stage of verdict whether the Arbitration award stage or the stage of decision by any of the Courts. At least plethora of execution petitions pending against the UOI and seizure of government accounts by the courts shall be avoided by adopting this policy.
However, during a focus group discussion in a group comprising all stakeholders i.e. MES officials and the contractors, an alternative approach also came up from the discussion. As per this approach, the awarded money in the form of a **Fixed Deposit Receipt** (FDR) to be kept jointly in the name of the Contractor and the department in the custody of the department to be released as per the final verdict. Although, as per CPC there is a similar provision of depositing the awarded amount in the Court who converts the same as an interest bearing Fixed Deposit but as seen from case studies, the amount is mostly transferred to the contractor especially by the district civil courts. There after in case the final verdict is in favour of the government, the recovery from the contractor becomes a problem.

Thus, this approach of either the BGB or joint FDR shall eliminate the future interest liability of the department while fighting the genuinely strong cases in litigation.

**AVOIDING CLAIM OF DAMAGES**

The MES GCC clause 11 in respect of “Time, delay and extension” has become obsolete in the sense that now it does not provide any shield to award of damages to the contractor in case of prolongation to the contract for reasons attributable to the department. Thus, it needs immediate amendment by incorporating the following provisions:

“In the event of project getting delayed for any reason attributable to the department, the contractor will not be entitled to claim damages or compensation but shall be entitled only for extension of time for completion of work. Arbitrator shall not award to the contractor any damages for delay on account of any reason attributable to department where suitable extension of time has been granted.”

**DECISION MAKING ON APPOINTMENT OF ARBITRATOR AND IMPLEMENTATION OF AWARDS/JUDGMENTS:**

(a) To avoid bias, delink the executive team from decision making on appointment of Arbitrator. Decision of going for Arbitration to be based on advice of an independent
technical team. In case the claims are genuine, the same may be agreed or negotiated for amicable settlement.

(b) To avoid bias, delink arbitration defence team from recommendation/decision on implementation or challenge of arbitration award/court judgment; decision to be taken by an Independent Technical Committee.

(c) Advice on technical award from local government counsel and Legal Advisor (Defence) to discontinue, in lieu the technical independent committee to advice on challenge/ implementation of award to avoid delays and improve quality of advice.

The final & binding nature of award should be preserved. Unless the award is highly patently illegal, it should not be challenged.

MODIFY MES ARBITRATION CLAUSE:

Encourage Arbitration during execution stage

The MES Arbitration clause and policy clearly discourages both parties to arbitrate their disputes at an early stage. The dispute resolution through Arbitration starts only after completion of the work/ termination of the contract. Thus, the disagreements are allowed to be blown to full developed disputes during the contract execution period.

The dispute resolution through Arbitration during execution stage is more in favour of the department than contractor as it is the department officers who change frequently which leads to weakening of the defence due to lack of continuity, fading memory and old records becoming untraceable. The chances of proving your stand based on actual circumstances at the site by the very officials getting the work executed are brighter rather than third generation officials trying to defend the decision with antique documentary evidence after lapse of 5-10 years.

The serious implications of these deferments in dispute resolution are to be seen in the case studies where pending disputes increased not only the past and pendente lite interest
liability but even lead to cancelation of contracts which were later declared to be illegal by the Arbitrator. After, decades of Arbitration and litigation, MES lost the cases due to non-production of old records to prove their stand and instead ended up paying damages for delay in making legitimate payment to the contractor. Thus, the policy of delayed initiation of process of Arbitration has actually backfired as seen from the various case studies.

No other organization studied under the current research has put such an embargo or restriction over the use of arbitration during the execution period.

*Improving current Arbitration Culture:*

Although Institutional Arbitration is the need of the hour, however, in case the same is still not adopted at least following changes in the Arbitration process are essential:

(a) For high value claims say above Rs. 1 Crore, the number of Arbitrators shall be three with each party nominating one and the two Arbitrators nominating the third.
(b) To avoid misuse of Arbitration clause, introduce Arbitration Fee based on amount of claims by each party.
(c) To improve the quality of award, prior Scrutiny of award by Independent technical committee before publishing by Arbitrator.
(d) No officer appointed as arbitrator without mandatory legal training.
(e) Include Retired Officers as Arbitrators on all inclusive Fees.
(f) Include Retired Officers as Arbitration Consultants to defend Cases on all inclusive Fees as MES officers are too preoccupied in their routine discharge of duties.
(g) Timely publishing of awards be included in annual targets and performance recorded in Annual Performance Appraisal of Arbitrator Officers
(h) Debar the Arbitrator from future appointments if any of his awards is considered patently illegal by Independent Technical Committee and challenged by Govt. of being against the Public Policy.
(i) No delay in submission of SOC / Pleadings leading to postponements or asking for postponements of hearings to be allowed.
DISPUTE AVOIDANCE:

For dispute avoidance, the following suggestions are made:

(a) *Bonus Clause:* This clause not only works as motivational tool for timely completion but encourages the contractor to avoid litigation and concentrate his energies to earn this bonus.

(b) *Clause for Interest on delayed payments of running bills/final bill:* The delay in payment is considered as a breach of contract by the department and arbitrator has invariably awarded interest at a very high rate of interest in each of the case study. Therefore, introducing a clause with reasonable rate of interest (say 6% per annum) shall not only be equitable for avoiding dispute but shall be favourable to the department. This shall also make the system efficient introducing a sense of urgency to finalize the bills of the contractors.

(c) *Clause for consequences of default by department:* To have an equitable contract, the contractor should be given a right to terminate the contract on default of the department in discharging its contractual obligations.

(d) *Curb the culture of deviations from contract:* A major reason of disputes confirmed from the research is delays in finalization of deviations and special rates. The rationale behind the endeavour to get the additional work or changes executed from the same agency executing the main work was to avoid fresh tender action related delays. However, with E-tendering implemented recently in MES, majority of deviations specifically requiring special rates to be finalized should be executed through a fresh contract where the main contractor may also compete and get the contract. Thus, the delays due to non-finalization of special rates are totally eliminated.

KNOWLEDGE MANAGEMENT
(a) All awards and Court decisions to be uploaded on the MES website (open for only MES officials) and comments solicited.

(b) A technical committee to scrutinize all comments and upload lessons learnt report on each award

All the solutions suggested above if implemented in true spirit can radically reform the entire dispute resolution process. The dispute span shall be drastically reduced and so would be the liability of government. With a sound and efficient dispute resolution mechanism in place, most essential for infrastructure development of a country, public money catered for infrastructure development of the nation shall not be blocked or wasted in litigations.

8.4 Limitations of Study

The study has been carried out with full dedication but still there are several limitations which are described as under:

(a) Limited Time period: The study had to be completed within the constraints of the time. Therefore, more case studies could have been considered if not for the limited time period of the research.

(b) Difficulty in obtaining the relevant data: The theme of the study being very sensitive, there were several restrictions and reluctance shown by several government departments and their information holders even through the channel of RTI Act. Much information was withheld or revealed after much insistence right up to the CIC level. The information sharing was withheld giving reasons of confidentiality citing third party information by some departments whereas others were very transparent in sharing the information. However, there are clear decisions by the CIC that all information concerning public contracts has to be shared. Moreover, the RTI Act has provisions of overriding effect over other law provisions. Thus, there was delay and immense efforts involved in obtaining the information related to various case studies which hampered the progress of
the research. Easy and transparent sharing of data by the public organizations would have enhanced the quality and utility of research even further.

8.5 Areas of Further Research

It is sincerely expected that the current research shall definitely make an impact in improvement of the current system of Alternative dispute resolution in infrastructure projects in Indian Defence Forces leading to successful completion of projects without time and cost overrun. However, after this it is felt that the overall conditions of contract in MES needs to be reviewed and modified to be harmonized with other government departments and international organizations. Therefore, it is recommended that further research in the area of contract conditions other than dispute resolution should also be encouraged for the development of infrastructure in general and Indian Defence Forces in particular.