

# 2<sup>nd</sup> Bucharest DRBF Regional Conference

## **Informal Advice and Opinions**

## **-Dispute Prevention in Practice -**

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Bucharest, Romania

10-11 June 2010

# Types of Dispute Board under FIDIC

## □ 1999 Red Book & 2006 MDB Harmonised Edition:

- Requires a full-term standing Dispute Adjudication Board (DAB) appointed at the start of the project. Part of the role of the DAB is dispute avoidance.

## □ 1999 Yellow Book and Silver Book:

- Provides for an adhoc DAB appointed after a dispute has arisen, and whose role is purely to decide the referred dispute. No jurisdiction for dispute prevention.

# Dispute Avoidance by the DB

- Providing advice or opinion:
  - Can be informally within the usual business of a routine DB site meeting; or
  - More formally at a separate hearing or meeting convened for that purpose
  - Submissions can be oral and/or in writing
  
- Informal assistance with disagreements; eg:
  - Discussions between the DB and parties of potential problems and claims;
  - “Airing” of grievances by the parties at the DB site visits of matters of concern;

# Informal advice/opinions compared to a DB decision

- ❑ Decision by a DB relates to a matter which is already a dispute, and has been referred to the DB
- ❑ An opinion would be for something less than a full dispute; eg. a misunderstanding or disagreement
- ❑ Opinion of the DB is essentially a statement representing the point of view of the DB at that time based upon a limited presentation of information
- ❑ Brief procedure and timescale for obtaining informal advice and opinion

# Examples of matters referred to a DB for informal advice or opinion

Typically suited for:

- Interpretation of a contract condition
- An opinion as to a contractual right or obligation of a party
- Considering the merits of a particular issue
- Programming issues; eg. criticality of work activities

# Contractual basis for the DB providing advice and opinions

The powers of a DB arise from the contract.

Under FIDIC Red Book and MDB Harmonised Edition:

- Clause 20.2 ... “If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.”

General Conditions of Dispute Adjudication Agreement:

- Clause 4(k) ... The DB member shall be available to give advice and opinions when requested by both parties, and subject to the agreement of the other DB members.

# Procedure for obtaining informal advice or opinion from a DB

- ❑ FIDIC conditions contain no procedural rules for obtaining advice and opinion from the DB
- ❑ Suitable procedures to be established by the DB
- ❑ Normally a relatively simple and flexible procedure which allows for oral and/or written submissions
- ❑ Presentations should be brief, with a minimum amount of supporting particulars
- ❑ Short timescales for submissions and opinion

## Procedures (cont'd)

Request for opinion should preferably state:

- Exactly what DB should give its opinion on
- Nature/background of the issue
- Short summary of agreed positions of the parties and where they differ
- Any agreed facts relevant to the issue
- Contract provisions relied upon
- Supporting documentation

# Reaching an Opinion

## **Informal Hearing:**

- ❑ Often held during course of DB site visit but can be specially convened
- ❑ Opinion generally given in very short timescale; ie. same day at end of hearing

## **Documents Only Basis:**

- ❑ After receipt of response, DB should endeavour to reach its opinion in relatively short period of time

# How is the advice/opinion given by the DB?

- Verbally at a hearing or meeting; and/or delivered in writing
- Format is brief, but should include basis and reasoning as to how DB reached its conclusions
- Good practice for the DB to state that its opinion is only based on the submissions and documentation provided to it

# Status of the DB advice or opinion

- Non-binding on either the parties or the DB
- Not final in any form
- No need to issue any notice of dissatisfaction should either party disagree with the DB's opinion
- The opinion is admissible in any future proceedings between the parties

# Make use of the dispute prevention role of Dispute Boards!!

- ❑ Compared to other forms of Alternative Dispute Resolution, the full-term standing DB is the only procedure that provides for dispute resolution, **and** has the facility to endeavour to avoid or prevent problems from escalating into disputes.

# Discuss

- ❑ New Motorway with 6 bridges. FIDIC Red Book. 3 person full term DAB appointed. Next DAB visit in 7 days.
- ❑ In month 4, Contractor encounters problems whilst excavating the first bridge foundations due to late removal of underground cables by Electricity Board. Contractor advises Engineer in writing that unless cables removed in 5 days he will claim for the EOT and additional cost.
- ❑ Engineer says bridge is not a critical activity and believes he has 15 days to resolve the problem.
  - Should the parties refer the matter to the DAB for an opinion as to the critical path at the next DAB site visit?
  - Can the DAB give a decision on the matter at this stage?
  - What happens if both parties agree to refer the issue to the DAB for an advisory opinion, but one party then changes its mind and refuses to participate?
  - What should DAB do if Contractor requests informal opinion during site visit, but Employer objects?
  - If the parties jointly ask the DB to amend its proposed procedure, must the DAB agree?

# Thank You

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