

The Use of DBs in Special Purpose Contracts in Australia and New Zealand

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DB contracts in Australia and New Zealand

- Total no. of DB contracts on record since 1987 = 20
- Range in A\$ value (excl. inflation) = \$22 mill.– \$1.3 bill.
- No. of DB contracts current or completed since 2006 = 15
- Most contract documents have been “purpose written” in lieu of using standard forms such as FIDIC
- Value of DB contracts in progress or completed since 2006
≈ A\$4 billion
- at least A\$1 billion new DRB contracts to start in 2009
- No. of disputes formally referred to DBs since 1987 ≈4
- No. of disputes not resolved within the DB process = NIL

Types of Contracts Utilising DBs

- Construct Only.
- Design & Construct (D&C)
- D & C, with Early Contractor Involvement (ECI)
- Design, Construct and Maintain (DCM)
- Design, Construct, Operate and Maintain (DCOM)
- Alliance Agreements
- Semi or Hybrid Alliances

Selection of Dispute Board Members

Important criteria for the selection of DB members are:

1. Objectivity, independence and impartiality;
2. No conflict of interest;
3. Professional qualifications, e.g. engineer, lawyer, accountant;
4. Experience in the particular type of project and the applicable construction techniques being used;
5. Experience and knowledge of contract documentation and law;
6. Experience with dispute resolution processes, such as arbitration, mediation and adjudication;
7. Well developed oral and written communication skills;
8. Availability, age, language and possible cultural considerations.

Timing of DB Appointment

- Benefits are maximised if the DB is established as early as possible in the life of the project;
- The Australasian experience is that the DB members should be appointed and the DB agreement finalised concurrently with the formation of the primary contract;
- The potential for problems, delays and claims in the early (design) stages of a project is high. The dispute prevention skills of a DB during this phase can be critical to the success of the project.

Common dispute resolution provisions

- most contracts in use within Australasia require senior executive negotiation as a pre-cursor to a DB reference or any other dispute steps.
- A typical sequence of contract provisions is:
- Upon issue of a Notice of Dispute by any party, the senior representatives of the parties must endeavour to resolve the dispute within 4 weeks.
- If negotiations are unsuccessful within 4 weeks, the notifying party may refer the Dispute to the DB.
- If any party is dissatisfied with a DB decision, then it is also common to have a further round of negotiations before reference to arbitration.

Senior Executive Presence at DB Meetings

- A requirement for the attendance of senior executives at DB meetings should be established from the outset.
- Our experience is that the presence of senior “off-site” representatives of the parties at all DB meetings is a key factor in opening up communications and avoiding disputes.
- The benefits of this requirement include the avoidance of misinformation, the airing of views before positions have become entrenched and the early resolution of potential disputes.

Reporting of Potential Dispute Issues

- Early identification of potential issues or differences of opinion is an important part of the pro-active role of a DB in dispute avoidance.
- A procedure for the reporting and discussion of potential issues and matters of concern is an essential requirement for DB meetings.
- The DB acts, in effect, as a facilitator to enable potential ‘dispute’ issues to be resolved between the parties on a “best-for-project” basis.

DB Meeting Procedures

- All communications, discussions and reports tabled at DB meetings, together with the minutes of the meetings are afforded a “without prejudice” status.
- The parties must provide the DB at each meeting with a detailed report on the status of the project, actual and potential delays, variations, claims, potential issues of concern, future opportunities and the like.
- It is common practice to require one or both parties to provide a specific report / paper to the DB on particular issues of concern.

Early Involvement of the DB

A comparison between two examples of projects where:

1. the DB nomination and appointment process took place after contract award.
2. the DB was appointed during the post-tender period and was operational at the time of contract award.

Some Examples of Successful Project Outcomes from DBs

Contract for Design and Construction of Port Botany Expansion Works



Expansion

Existing Port facility



1. Third Party Interfaces

- This example relates to the dredging required for a port expansion project located adjacent to the runway of a large airport.
- Post contract , the airport authority (a third party) sought to impose restrictions on the dredging contractor which would have had a severe impact on the project.
- A dispute as to “whose risk” (as between the contracting parties) was short-circuited by the DB promoting a “best-for – project approach.

Gateway Upgrade Project

Contract type:
Design, Construct & maintain



Project model



Abigroup
Constructing Australia's Future

Leighton Abigroup
Joint Venture



**QUEENSLAND
MOTORWAYS**

Southern Section



Wynnum Road Bridge Works



Early Works - Separable Portlan A1

Bridge Section



Pier 10a - Pier 15



Pier 16 & 17



Piling @ MSL Cavern



Northern Section



Pier 7 & 8 High Ties and Pier 9 on Barrage wall



River T Crossing 3/10/11



Piling - Northern Barrage Section



Earthworks - Zone 4 (Kippin Land)



MSL Bridge



Piling - MSL Bridge over Portman Road Lane

2. Extreme Weather Conditions

- A serious drought in the region led to very severe water restrictions being imposed by the local water authority on a large scale road and bridge infrastructure contract.
- If the situation was left unresolved, the project would be substantially delayed and significant costs would be incurred. However the DB's pro-active involvement resulted in an agreed "reasonable cost" strategy to minimise the cost of avoiding delays, regardless of how this risk fell under the contract.
- This strategy also led to a negotiated outcome on a potential dispute over a "Change of Law" provision in the contract.

3. Modification of Contract Obligations

- The first example involves the adjustment of the separable portions of a project and changes to completion dates. These actions were initiated by the parties after questioning by the DB as to the “best for project” objectives.
- The second example illustrates another significant result of the proactive involvement of the DB, whereby the contracting parties agreed to vary the form of, and the risk allocation in, their existing contract.

Conclusions

- Future development of the Dispute Board concepts in Australia and New Zealand is likely to extend the use of DBs in the following areas:
 - panels of DB members for very large, multi-contract projects
 - one person DBs for smaller value construction projects
 - DBs in Alliance – type agreements