



# Forum

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MAY 2008

## Best Practice DB Processes For Offshore Wind Power Projects Under A Multi Contracting Project Delivery Method – A Primer



By Guenther Raberger

### (A) PROBLEM BACKGROUND

In *The Winds of Change - EPC contracts for offshore wind farms* Keith Hartley, partner in the International Construction & Energy Group at Pinsent Masons, writes:

*From the outset utilities and energy companies who wished to develop offshore wind farms ... assumed that the EPC contract (Engineering Procurement Construction) would work in this arena too. But those assumptions overlooked fundamental differences between the emerging wind sector and traditional process contracting ... Happily, a more realistic model of contracting (**multi contracting**) is emerging which takes account of both the underlying commercial realities and the growing sophistication and maturity of the offshore wind market.*

*In essence multi contracting intends to capture 3 themes:*

- *to allocate ultimate contractual responsibility for project specific and interface risks to the developer, recognizing the market reality that the developer is not only the most appropriate party to bear these risks but in present market conditions, the only one that can*
- *to employ directly and separately the turbine supplier, civil and electrical contractors, typically on a target cost model*
- *to “over-lay” these arrangements with mutual alliance obligations to drive better management of technical interfaces, construction schedules and construction risks on a project wide basis.*

While undoubtedly more complicated than traditional EPC arrangements, multi contracting seems to offer a pragmatic way forward. In the U. S. “multiple-prime projects” comes most likely closest to the concept of  
*(continued on page 10)*

“Effective communication can help build trust on a project, and, conversely, a breakdown in communication can lead to a breakdown in trust.”

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## President's Page

Here is my third "President's Page" and hopefully many of you will be reading this whilst attending the Foundations' International Conference in Cape Town, South Africa. From the President's desk I report that we have been very active in putting the final touches to the extensive administration necessary for the re-structuring of the Foundation and also to the establishment of the Provisional President's List and training materials. Other activities have been planning for the creation of a uniform set of rules for the establishment of new chapters and the planning of the mentoring programme.

Within a few weeks of reading this edition of the Forum you will all be asked to vote for the new officers of the Foundation both in Region 1 (basically within the US) and Region 2 (currently all those areas outside the US). After the election process is over, and most probably in the fall, we will be launching the new look Foundation whose individual regions will have full and autonomous control over all the activities and organisation relevant to them. This geographical divide we hope will enable the DRBF to be more regionally focussed and be in a better position to provide relevant local support where needed. We all hope that you will be able to take an active part in your individual regions and we hope that over the next few years Region 2 will again sub-divide into further more localised regions. If you have any particular views on these issues please contact Hal McKittrick ([hmckittr@cox.net](mailto:hmckittr@cox.net)) or Romano Allione ([romano.allione@tiscali.it](mailto:romano.allione@tiscali.it)) who have both put a huge personal effort into getting this process finalised.

The first Provisional President's List is now also finalised and the committee led by Jack Woolf and Nick Gould have completed their work in forming the list. All listed members will have been recently contacted to confirm their membership of the list which consists of some 50 names from all parts of the world. Any further applications received from now on will be considered whenever the list is updated – a process to be undertaken probably on a once a year basis. At the time of writing we have been asked for two nominations for members to serve on Boards, both of which have been successfully made from the list. We have also been asked by some owners and contractors to provide a list of three names from which they can make their own choice. To try to generate user interest in the list and to streamline the process, we are planning to include a new page on our web site in order that both owners and employers, and if necessary their advisors, can make a direct application for nomination from the list.

We have now also started the mentoring programme. I wish to thank all the people who have expressed an interest in joining the programme. We are currently working on putting mentors in place within as many regions within the US as we can and also to mirror this on an international scale so that they can join up with mentorees on a local basis. Mentors are short – so if you are willing to volunteer please let me know. The required input can be as little or as much as you want – but we need to provide a sufficiently robust programme in order that as many DRBF members as possible are able to participate if they wish to do so.

I am delighted to report that regional conferences are taking place in both the Northeast and Northwest regions of the US and see that training packages are available in each. I can only hope to see this trend expanding all over the world. Certainly training in Africa is now being organised by Dick Apphun ([d.appuhn@gmail.com](mailto:d.appuhn@gmail.com)) with a new workshop for the African Development Bank in Tunis, in Eastern Europe by Alina Oprea ([alina.oprea.v@gmail.com](mailto:alina.oprea.v@gmail.com)), in Australia by Graeme Peck ([gmp@gmpeck.com.au](mailto:gmp@gmpeck.com.au)) and in the Philippines by Salvador Castro ([spcjr@spcastro.com](mailto:spcjr@spcastro.com)) who runs his own very successful consultancy business out in Manila. Please contact these people who are all very active and dedicated DRBF prime movers if you need more details. If you need to organise your own training course then contact Kerry Lawrence ([kerryclaw@aol.com](mailto:kerryclaw@aol.com)) who can give you advice on the availability of training materials and how to get started.

While you are soaking in the sun in Cape Town do not forget to mark your diary with the dates for the DRBF's 12<sup>th</sup> Annual Conference in Washington on 04 and 05 October - where it will also be sunny I am sure. As I close out here is just a quick reminder to use the DRBF's web site and why not update your library with a new copy of the DRBF's "*DRBF Practices and Procedures Manual*" which you can obtain in either a hard back or electronic version – for further details contact the DRBF office at [info@drb.org](mailto:info@drb.org). Hardback versions will also be available for purchase at the Cape Town conference.

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# Board of Directors

## Board of Directors 2008 Meeting Schedule:

**Executive Committee:** June 13, July 11 and August 15, 2008 by conference call

**Board of Directors:** May 2, 2008 in Cape Town, South Africa

All DRBF members are encouraged to submit any comments or suggestions to Gwyn Owen, president of the Board of Directors.



## CALL FOR NOMINATIONS FOR THE AL MATTHEWS AWARD

The Dispute Resolution Board Foundation presents the prestigious Al Matthews Award each year to one or more DRBF members who have given exemplary service in advancing the use of the dispute resolution board concepts and the DRBF.

Nominations are solicited from the membership and by the president of the Board of Directors. A framed proclamation and trophy will be presented to the recipient at the Dispute Resolution Board Foundation Annual Meeting and Conference October 4, 2008 in Washington, DC.

### SEND YOUR NOMINATION, INCLUDING AN EXPLANATION OF WHY THE NOMINEE IS DESERVING OF THE AWARD, TO:

**Award Nominations/DRBF**

**19550 International Blvd. So Suite 314**

**Seattle, WA 98188 USA**

**Or e-mail to [home@drb.org](mailto:home@drb.org) Re: Al Matthews Award Nomination**

**Entries should be postmarked no later than 7/15/07**

### THE DISTINGUISHED LIST OF PAST WINNERS INCLUDES:

**Al Matthews**

**Robert Matyas**

**Robert Smith**

**Joe Sperry**

**Jimmy Lairscey**

**Carlos Ospina**

**Pete Douglass**

**Jim Donaldson**

**Steve Fox**

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**John Nichols**

**Peter H.J. Chapman**

**Bill Baker**

# DRBF Committee Reports

## Education and Training

The Committee has been working to establish “standard” training programs based on the DRBF Practices & Procedure Manual, 2007 Edition. The concept is that these “generic” programs will be used to educate and train users and candidates for service as board members in the fundamentals of the DRB process, without regard to the specific variations on the DRBF Practices & Procedures Manual that may be utilized by a specific agency or entity.

We currently have created:

1. A standard half-day “Administration & Practice” training
2. A standard half-day “Chairman Training”
3. A standard half-day “Practice & Proficiency Update Training”

In response to requests from both users and our own membership, we are in the process of creating a 3-4 hour training, “How to Prepare Position Papers and Present to a DRB.” As the body that trains DRB members and Chairs, we are especially sensitive to the need for the DRBF to avoid any implication that we are pitting one side against the other: no “How to Present Winning Claims” or “How to Defeat Contractor Claims.”

We ARE preparing to train users on how to better organize and present their disputes so that DRBs can effectively and efficiently provide clear, cogent and convincing reports and recommendations that are most helpful to the users of the process.

Kurt Dettman and Blase Reardon have organized a DRBF “NE Regional Conference” set for May 14, 2008, and will present the Administration & Practice

Training in conjunction with that conference. Roger Brown and Jim Donaldson have organized the annual “NW Regional Conference” for May 22, 2008 where Roger Brown will present the “How to Prepare Position Papers and Present to a DRB.” If any members would like to organize regional, state or local conferences and present trainings using the DRBF approved trainers, please let us know.

We would like to thank the many members who have volunteered their time to prepare training materials and present programs for the benefit of the DRBF and the construction industry. The sudden loss of Larry Delmore as Executive Director and lead trainer early in 2007 put a significant strain on our Foundation, and we owe a great deal to the volunteers who agreed to be trained to present programs in their local area, and develop trainings that met the needs of specific agencies and organizations.

- Submitted by Kerry Lawrence

## Provisional Presidents List

The Committee has solicited interest from DRBF members, and has now individually reviewed 100+ written applications for the list.

The committee is in the process of notifying each individual of their status, i. e. being part of the initial listing for DRB Presidential appointment, if the DRBF is asked to do so by a user or a contractor.

The indemnification is being drafted, and we will present the process/procedure at the May Board Meeting.

- Submitted by Jack Woolf

## Forum Editor: Ann McGough

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The *Forum* is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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**Ten Year Plan**

The Ten Year Plan was overwhelmingly approved by the DRBF membership on Jan. 15, 2008 with 158 members voting yes to one negative vote.

Subsequent to that, President Gwyn Owen established a nominating committee to review proposed and other potential candidates and propose a slate of officers and directors for the new Executive Board, North American Board and Region 2 Board. The timing of the vote on the Ten Year plan was such that it made it impossible to issue a call for interested candidates in the February issue of the Forum. As a consequence an “email blast” was sent out to all DRBF members interested in candidacy or proposing other parties for candidacy on February 29, 2008. The nominating committee will report its recommended slate of candidates to the Board of Directors in Cape Town on May 2, 2008. As always a member can write in the names of candidates not already on the ballot. Election ballots will be sent to members by July, 1, with voting to be completed by July 8, 2008.

The Region 2 “shadow Board” has been active and has drafted and discussed its organization, activities, composition and funding internally, and will discuss its preliminary proposals at the May Board of Directors meeting. An important part of Region 2’s activities will be organizing regional chapters in areas that, in the future, will be stand alone regions. Funding of the Regional and Executive Boards is a major issue to be discussed at the May 2 Board meeting.

The establishment of a “shadow” North American Board also will be discussed on May 2<sup>nd</sup>. This is necessary to begin to set up the framework, organization and

objectives of the new region and its physical set up prior to the July elections. This action will allow five months of preparatory time for the North American Board in lieu of only three months it would have had without the shadow committee.

- Submitted by Hal McKittrick

***DRBF Practices and Procedures  
Dispute Review Boards  
Dispute Resolution Boards  
Dispute Adjudication Boards***

***New options available to secure  
your copy of the DRBF Practices  
and Procedures Manual***

The Dispute Resolution Board Foundation published the revised *Practices and Procedures Manual*, making it available for download free of charge on the web site. Some members have expressed an interest in securing a bound version, so the DRBF has printed a first run of Manuals for purchase online through an eStore. Copies are \$40 for DRBF members and \$60 for non-members. Visit the Manual section of the DRBF web site to learn more.

***Have an idea or question  
for the Manual?***

The DRBF Practices and Procedures Manual is an authoritative and up to date explanation of the dispute board process. Since this process is continuously developing, the format has been tailored to allow it to be updated as necessary. Frequent updates are planned. Help the Manual expand by sharing your ideas and input with the committee: [info@drb.org](mailto:info@drb.org).

# Ethics in Today's World of DRBs: *Ex Parte* Communications and "Side" Transactions with a Party



By Jim Phillips Ph. D.

The question posed in the last edition of the Forum involved an *ex parte* communication between a DRB member and a party during a site tour of the project and a subsequent admission by that Board member to another member of the Board that he had entered into an agreement with the party for an "outside consulting" engagement.

Allen J. Thompson, a reader from Miami, Florida wrote in and commented that there is a responsibility on the part of the DRB member to whom the admission was made regarding the conflict to request that the Board member disclose the agreement for consulting services to all parties. He also suggests that the Chair of the DRB should be made aware of the conflict and disclose it if the Board member does not. Finally, Mr. Thompson suggests that if those efforts fail, the Board member to whom the admission was made has a responsibility to disclose this "side" arrangement as it poses a serious conflict.

Another reader, Brian Totterdill, also wrote in and commented on this question. His view is that this is a very serious development that should be handled appropriately. Mr. Totterdill suggests that the Board member should advise the chairman of the DRB who in turn, should disclose it to the parties. He goes on to note that such a commercial agreement is very serious and if this situation arose under a FIDIC contract, the

General Conditions of the DAA, Clause 4(d) requires the fact of the agreement be approved by all of the parties and the DRB members. Moreover, if the DRB member did not disclose the agreement himself, that omission could lead to an accusation of bad faith.

Thanks to both of these gentlemen for writing in and commenting on this very important question. I have discussed the issue of *ex parte* communications in several previous issues of the *Forum* because of its critical nature. As I have previously pointed out, Canon 2 of the DRBF Code of Ethics specifically prohibits *ex parte* communications as follows "...[e]ven the appearance of a conflict of interest should be avoided. There shall be no *ex parte* communications with the parties except as provided in the DRB's Operating Procedures."

Those Operating Procedures allow for *ex parte* conversations between the DRB Chair and the parties for scheduling and administrative matters, not for discussions on the merits of a dispute, or in this case, for the economic benefit of a Board member. Generally *ex parte* conversations should be avoided if for no other reason than they create an appearance of bias and favoritism.

For purposes of this discussion in this column, I would like to focus on the issue of the "side" commercial agreement between the DRB member and one of the parties. The question posed suggests that a conversation about this

**DRBF U.S.  
Regional  
Representatives**

**New England**  
Kurt Dettman and  
Blase Reardon

**Northeast**  
Kathleen Harmon

**Mid-Atlantic**  
Adrian Bastinelli

**Southeast**  
Jim Brady

**Florida**  
Ralph Ellis

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Larry Lenahan

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Ed Wheeler

**Northwest**  
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**Northern  
California**  
John Jacobs

**Southern  
California**  
Bill Carlson

“side “ agreement occurred on the site tour where other DRB members and the other party and its representatives were present. The conversation appeared improper because it occurred in hushed voices and came to an abrupt end when someone else approached. In my opinion this as about as suspicious as it gets in terms of the Board member and the party realizing this was an improper discussion and, by whispering and acting suspicious, they portrayed an even greater appearance of impropriety.

Canon 1 of the DRBF Code of Ethics provides in command language that all DRB members have an affirmative duty to disclose any interest or relationship that could be viewed as creating impartiality or bias and that this obligation is not only required at the beginning of the DRB process as members are being seated on the board, but is continuing throughout the life of the project.

Canon 3 of the Code of Ethics further provides that Board members should not use information acquired during their service on the Board to their own personal advantage. It may be in that our question, these two individuals knew each other, and quite possibly, worked with each other prior to this construction project. Or, they may have met on this project.

The critical point is that this “side” agreement may not affect the impartiality of the DRB member due to long standing relationships or due to the nature of the engagement. The point is that it needs to be fully disclosed so the other party and the other DRB members have full knowledge and can reach a conclusion as to whether it is prejudicial.

I have served on several DRBs where a Board member disclosed an interest or

relationship with one or both of the parties and the determination was reached that the interest would not have an impact on that Board member’s ability to serve as a neutral and unbiased DRB member. The key here, as both readers point out, is disclosure. I would add that good rule of thumb is: “If in doubt, get it out.”

I think the key fact of this case is the suspicious nature of the conversation on the site tour. Typically, individuals do not act suspiciously when there is nothing to hide. Again, full and ongoing disclosure of ANY interest that creates an appearance of bias should be followed and enforced by all DRB members. This will minimize any doubts or concerns by the parties to the agreement.

I want to thank Allen and Brian for writing in to me and posting their comments about this issue in this *Forum*. The DRBF is encouraging an interactive dialogue to give the membership a resource to bring ethical issues and questions forward for discussion and I would encourage any reader who has a question to call or email it in.

**Next Ethics Challenge**

Assume that you are member of a DRB and that there have been 4-5 regularly scheduled DRB meetings so far during the Project. Assume also that at each of the meetings, neither party is bringing forward issues or disputes for discussion, despite the Board’s inquiries regarding the progress of the work, and advising the DRB that the construction progress is going very well. Also assume that in the correspondence between the contractor and the owner, with which the Board is regularly copied, there are allegations that each party is taking actions that are

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negatively affecting the progress of the work and that there are a multitude of disputes that are continuing to go unresolved.

**At the next regularly scheduled DRB meeting, what should the DRB do?**

**Ethics Column**

The DRBF’s Ethics Committee invites all readers to submit comments or reactions to the articles that appear in this column. Please feel free to email Committee Chair Jim Phillips at [jphillip@richmond.edu](mailto:jphillip@richmond.edu) if you have any comments about this article.

Also, the DRBF has established an interactive ethics advice process that allows members and interested parties to call in or email their ethics questions/concerns for the Foundation’s advisory opinion. Members are encouraged to take advantage of this opportunity should the need arise.

Please send your thoughts on this issue, or problems you have faced with a DRB, to the DRBF:

Email: [home@drb.org](mailto:home@drb.org)

Phone: 888-523-5208 or 206-878-3336



**Forum  
Editorial  
Deadline**

Forum readers love to hear Dispute Resolution Board success stories, challenges facing the process, and the latest industry news and events. If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at [amcgough@drb.org](mailto:amcgough@drb.org).

*Deadline for the August issue is*

**July 1, 2008**

# WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS JANUARY 2008 THROUGH MARCH 2008

## Major Membership Contributors to the DRBF

### Platinum

Gwyn Owen

### Gold

Roger Brown  
Pete Douglass

### Silver

Forum for International Conciliation & Arbitrations CIC  
Romano Allione  
William B. Baker  
Jim Brady  
James Donaldson  
Volker Jurowich  
Kerry Lawrence  
Harold McKittrick P.E.  
Robert Smith P.E., Esq.

## Do you know someone who might be interested in joining the DRBF?

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues.

Complete membership information, as well as conference and training details, can be found on our web site or contact the main office for details.

Ben Beaumont  
Forum for Int'l Conciliation & Arbitration CIC  
Oxford, Oxfordshire UK

Jean-Francois Boucly  
Paris, FRANCE

Ronald Brunauer  
City of Windhoek  
Windhoek, NAMIBIA

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Crowborough, E. Sussex UK

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Nevada DOT  
Carson City, NV USA

Richard Touroude  
Vinci Construction Grands Projets  
Rueil-Malmaison Cedex, FRANCE □

(continued from page 1)

“multi-contracting.” With so many prime contractors in the mix, no single main contractor or consortium will be responsible – and accountable – for the entire project, so a lack of coordination by the project owner can lead to delays and excessive cost.

**Therefore, what keeps the “project flywheel spinning”?**

We think that *Effective Team Interaction*, ensured by melding proven and time-tested Dispute Board processes with innovative Shared Relationship & Risk (Attitude) Management Services, can properly take care of **mutual alliance obligations** and **effective interface management**.

**(B) RECENT DISPUTE PREVENTION AND RESOLUTION RELATED OFFSHORE ACTIVITIES**

To better understand the offshore wind industry’s need for cost effective, real-time, relationship preserving and out-of-court conflict management processes, I was awarded three contracts to conduct feasibility studies: first one in 2001 (German EVU/utility), second one in 2005 (German project management service provider), and the third and rather comprehensive study, inclusive of some initial marketing activities, in 2006 and 2007 (CEDR Solve, London).

Back in May 2005, Volker Jurowich, delegated by Larry Delmore, the DRBF’s executive director, joined me in making a presentation on DB-processes to members of the Offshore Finance Circle, Hamburg, Germany. Volker also represented the DRBF during the Hamburg Offshore Dialogue (*Mediation and Project Mediation – helping to keep projects on track, March 2007*). This dialogue, hosted by the Wind Energy division of Germanischer Lloyd Industrial Services GmbH, attracted some 40 top-notch managers and stakeholders from the industry. Over the years and in the course of these recurring studies, I met and did interviews with a significant number of project participants and affected offshore stakeholders.

Preparing me for offshore wind activities are my years in and around the oil / steam / gas power business (since 1989), mainly being employed with ABB and Alstom Power Generation (Switzerland), as well as my years with the Atomic Energy Board, South Africa (1967 to 1974) employed as a Principal Designer. My “ADR-career” started in 1994 when I participated in the landmark DART-conference in Lexington, Kentucky, then as a member of the CIB Working Commission *Construction Conflict: Management and Resolution*, Rotterdam, The Netherlands.

**(C) WHAT IS ALREADY UP AND RUNNING?**

**DRBF’s contribution to the fledgling offshore wind farm industry**

A working commission for *Best-practice DB-processes for Offshore Wind Power Projects under a multi contracting project delivery method* was launched by the DRBF Executive Committee at the end of January 2008. Members of this working commission presently are Guenther Raberger (CH), Nigel Lowe (UK) and Kerry Lawrence (USA).

At the end of 2007, the Energy Technologies Institute and the Carbon Trust (UK) have joined forces and announced plans for an ambitious initiative to cut the costs of offshore wind power and accelerate its deployment around the UK. During February 2008, the DRBF expressed an interest in participating in this initiative.

**(D) WHAT RESEARCH FINDINGS DID WE CONSIDER RELEVANT?**

**The dynamic nature of a relationship is of relevance to offshore wind farm projects?**

*There are two problems with a deal orientation.<sup>1</sup> The first is the practical difficulty of crafting, interpreting, and enforcing a legal agreement across multiple legal and governmental jurisdictions. The other more significant problem is the dynamic nature of the (offshore project) world. A deal orientation is essentially static in nature, while a relationship orientation is*

*dynamic in nature. For both these reasons, working on developing a solid, mutually beneficial relationship is a better approach to a dynamic project environment than trying to craft a series of 'air-tight' agreements reflecting interests at a single static point in time.*

**Avoidance of surprises! Maintain the project owner's/banker's comfort level and build cooperation.<sup>2</sup>**

To be comfortable with the essential information (effective formal and informal communication) during the entire course of a project, the project owner, and consequently the bankers, want to feel confident that the contractors' project managers have ensured at least that:

- the end deliverable will meet their functional requirements, also ensuring that changes found necessary are adequately considered
- the right project process is being followed to successfully deliver the required end deliverables in the optimum way, and generate the expected benefits
- the project will meet the required quality, budget and schedule requirements
- the project manager is behaving in a professional and trustworthy manner, and
- **appropriate control mechanisms are in place to achieve the above!**

**Effective communication<sup>3</sup> is essential to the project owner's comfort level.**

The project owner in a multi contracting set up favors a communication structure that gives him information about what the project manager is doing, that their objectives are aligned, and that the project owner's own objectives will be successfully delivered. The project owner needs information to be comfortable that any residual loss will be small (agency dilemma: people will not act in the interest of others to the exclusion of their own preferences). It is therefore in the project manager's interest to provide the project owner with relevant information to keep the project owner comfortable and committed to the project.

However, there is reciprocity! For some time people have said the project owner should empower the project managers and strive to have a cooperative working relationship with them. There is quantitative evidence that this is true. Unfortunately, many project owners continue to impose high level of structure and a culture of conflict on projects.

**Effective Communication can help build trust on a project, and, conversely, a breakdown in communication can lead to a breakdown in trust.<sup>4</sup>**

J. R. Turner and R. Müller have reinforced the requirement for project owners to stay actively involved in their projects, and also identified trust and interest as communication-based elements with a positive impact on the project. The implementation of these findings in the day-to-day work in projects is a **shared responsibility of project owners and project managers**, as trust and interest are both built and maintained through appropriate balance in formal (analytical data) and informal (verbal) communication between the parties.

**(E) WHAT QUESTIONS DID WE ASK OURSELVES TO DESIGN AN OFFSHORE-APPROPRIATE DB-PROCESS?**

To begin with, we did not expect that the future necessarily will follow the pattern of the past, but that we would first need to understand some of the perceived needs of the offshore industry. Thus, we tentatively asked ourselves:

- What DB-set up will assist in catering for the needs of one project owner, managing multiple interfaces with up to five main contractors and possibly, say, five subcontractors, as will be the norm in a multi-contracting set up?
- What DB-set up will assist in balancing the need for formal (topic) and informal (relationship) communication?
- What DB-set up will assist in fostering a dynamic and constructive relationship among all project participants?

*(continued on page 12)*

(continued from page 11)

- What DB-set up will assist in unleashing and sharing the combined competence of all the project teams?
- What DB-set up will assist in enabling effective team interaction, thus avoiding breakdown in human interaction and communication. Therefore, what DB-set up will ensure a “fluent human interaction<sup>5</sup>”?
- What DB-set up will assist in sustaining dialogue that produces higher-quality collective thinking, assuming that creativity flows from constructive relationships?
- What DB-set up will assist in “at source reduction” – eliminating problems by redesigning traditional core processes?
- What DB-set up will assist in enabling people to work together in a highly coordinated and creative fashion, without the need for constant heavy-handed external controls? Relying that from shared meaning, shared action arises!
- What DB-set up will assist in getting the entire project system into “one room” - creating an ongoing real-time consulting process that represents the key stake-holders?
- What DB-set up will assist in “human condition/relationship monitoring for early damage detection” (Just as a CMS finds errors in the operation phase, the DB can detect areas for potential conflict in the early stages of the project - DBs as a human Conditioning Monitoring System!
- What DB-set up will assist in promoting an ongoing dialogue instead of just promoting a resolution of disputes? Most people are trained to either avoid dealing with potential disputes until they grow to be unavoidable, or to be adversarial at the outset? Most disputes break down the underlying relationship, because no one is addressing the real core issues of the relationship.

**(F) BEGINNINGS ARE ALWAYS MESSY (John Galsworthy)**

In the DRBF *Forum*, May 2005, Peter Chapman observed “what is quite evident ... is that one size (of DB) does not fit all

and the DRBF needs to approach the promotion and development of dispute boards with a flexible, pragmatic and open mind.” As to offshore wind power, what needs to be accomplished is to create a new DB process, one that does not render moot time-proven Dispute Board processes, but enlarges upon it, adapting traditional DBs to the needs of the Offshore Wind Power industry.

We envisage the following short-term and long-term development:

- Traditional DBs and ad-hoc and contractual mediation (any time soon)
- Innovative Dispute Management Board hybrids, inclusive of elements of Relationship and Risk (Attitude) Management – next step in the offshore DB innovation.

**Why should the DRBF take an interest in this fledgling offshore wind power market?**

The size of the market is substantial and it can be assumed that “crisis management” in project execution will be the norm, rather than the exception! Golfer Gary Player noticed “The harder I practice, the luckier I get.” If we assist in discovering and tackling the roots of “bad luck,” helping to implement innovative yet robust offshore DB processes, we surely can reduce the frequency and severity of “bad luck.”

**We have the tools, we have the talent (Ghostbusters revisited)**

Reducing the frequency and severity of “bad luck” is what will be expected from professional Dispute Management providers – and the DRBF is highly qualified to develop, industry-test and market such services. The market no doubt has a need and is ready for it. □

1 Griffin & Daggatt, *The Global Negotiator*

2 “Project Communication and Emotion,” by Prof. J.R. Turner and Dr. R. Müller

3 “Project Communication and Emotion,” by Prof. J.R. Turner and Dr. R. Müller

4 “Project Communication and Emotion,” by Prof. J.R. Turner and Dr. R. Müller

5 ICLR 2006, *Optimising Contracting for Alliances in Infrastructure Projects*, M. van den Berg & Y.P. Kamminga, p 61

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**About the Author:**

Guenther Raberger is a commercial engineer, contract and claims consultant, conflict engagement practitioner, CEDR registered mediator, and is on the CEDR Solve Panel of Commercial Mediators. He can be reached by email at [info@rabergerconsulting.com](mailto:info@rabergerconsulting.com)

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## **Regional Conferences Address Local Issues and Training Workshops**

### **DRBF Northeast Regional Conference May 14, 2008 Waltham (Boston), MA**

The Dispute Resolution Board Foundation is pleased to present the first Northeast Regional Conference: “Brave New World for ADR? The 2007 AIA Form A201 and the 2007 AGC/Consensus Documents.” The program is packed with information about the practical application of these newest ADR tools, balanced with personal insight from owners and legal professionals who have first-hand experience. The lunch session will include construction ADR success stories from projects in New England. The afternoon program is the popular “DRBF Administration and Practice” training workshop.

### **DRBF Northwest Regional Conference May 22, 2008 Seattle, Washington**

Join the DRBF in Seattle, Washington for an overview of the Dispute Review Board process in the Pacific Northwest, a roundtable discussion from the User’s perspective, and an afternoon training workshop on “How to Prepare Position Papers and Present Your Issues to a DRB in a Formal Hearing.”

## **New Registration Options in 2008**

### **Expanded website and secure online payment processing streamline process for attendees**

The DRBF has upgraded the registration process for all conferences and training workshops with the implementation of a new system for promoting events and processing registrations. The system features an interactive web site easily accessed through email invitations or a link off the DRBF web site. Once on the site, potential attendees can view all conference details and register. Credit card processing is handled through a secure PayPal transaction. Questions? Contact Ann McGough at [amcgough@drb.org](mailto:amcgough@drb.org).

**Visit the Meetings & Conferences page on [www.drb.org](http://www.drb.org) for details!**

# The DRB Landscape in Ethiopia



**Country Rep:**  
**Michael Gunta Gugala**

The concept of Dispute Review Board or Expert (DB) was first introduced into Ethiopia after the year 1998 through the FIDIC 4th – based World Bank Standard Bidding Documents designed for the procurement of works contracts. Although several contracts awarded for the construction or rehabilitation of roads incorporated provisions for the establishment and use of DBs to prevent construction disputes from exploding into arbitration, most of the contracts had been implemented without DBs having been appointed. Owing to the fact that there was no previous project in the country on which DB technique was tested as an effective and practical method of dispute avoidance/resolution, courage was needed to start implementing DB clauses.

Several infrastructure projects financed by The World Bank – roads, power projects, water development projects, etc - were contracted out with express undertakings by the contractor and the employer to establish and utilize the services of DBs. But, it was only the Ethiopian Roads Authority that took the lead in translating the DB clause into action by carefully identifying and appointing Dispute Review Experts from amongst highly reputed professionals around the world. In the majority of cases however, DBs were appointed very late in the contract program or even after the completion of the contract, for the only purpose of resolving disputes.

Appointing DBs without facing any dispute was taken as savings on projects progressing without disputes. Given that existing experience was only to incur costs on arbitration or litigation either to institute or defend an existing dispute, a decision to utilize the services of DB without any imminent dispute was a challenge to any chief executive of a public agency. Since DBs are to prevent potential disputes that may or

may not arise, several contractors and employers opted to wait and see if a dispute actually arises, and, if it does, to refer it to DBs.

As long as there is no body (World Bank, or government) who questions why DB clauses are not implemented, the contracting parties have greatly relaxed to enforce DB clauses. Reluctance to launch DBs from the earliest stage of contract implementation has suppressed the noble mission of DBs to join a project from its commencement, to regularly conduct site visits so as to be acquainted with fresh information on progress of and impediments to the works, and to promptly act upon any dispute that may arise before it explodes into arbitration.

The first disputes referred to DRE in Ethiopia had arisen from the three contracts (lots) of the Awash-Hirna-Qulubi-Dengego-Harar-Diredawa Road Rehabilitation Project located in Eastern Ethiopia, wherein the employer was the Ethiopian Roads Authority and the contractor was China Road and Building Corporation. After detail review of these three references, which were separately made, disputes arisen only from one contract (Awash-Hirna Lot) were accorded a full hearing, following which the DRE made a successful recommendation that was accepted by both contracting parties. Though the parties did not enforce the DRE's recommendation as it stands, they did enforce after having converted it into amicable settlement. Whatever final form it took, the purpose of DB was achieved on this project. The DRE's recommendation in relation to Awash-Hirna Lot had far reaching consequences that transcended beyond the reference made in relation to one particular contract, because such recommendation became the basis for amicable settlement of the disputes arisen from the other two contracts of the same project.

A recent reference to DRE was made in relation to disputes arisen from Addis – Ambo Road Rehabilitation Project located

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in western Ethiopia. The outcome of this reference is yet to be seen.

So far, I am not aware of any challenges made in arbitration or court against DRE's recommendation. But, the Ethiopian context of dispute resolution remains greatly influenced by litigation, which is still the most dominant method, followed by arbitration. Litigation is seen as the most effective and reliable, as it uses the forces of a State court that decides and enforces its judgment. The fact that both litigation and arbitration are initiated only for an existing dispute led most disputants to question the justification of incurring costs on a dispute that may or may not arise. Similar position was taken under Article 2 of the General Condition of Contract issued by the Public Procurement Agency (established January 1, 2006) wherein a contractor is entitled to refer a dispute to adjudication, if he believed that an engineer decided outside his authority or incorrectly.

Added to lack of liability attached for failing to constitute DB at an early stage of contract implementation, and the considerations of potential savings that may result from avoiding expenditures on disputes that might never arise, have obscured the underlying benefit of DBs in avoiding construction disputes in Ethiopia. This background remains a big challenge to take a crucial decision by constituting DBs at the right time.

**About the Author:**

Ethiopian Michael Gunta is a construction lawyer who is currently a member and a Country Representative of the Dispute Resolution Board Foundation. He is also on the DRBF's Provisional President's List.

Michael Gunta graduated with LLB, Addis Ababa University 1791, MSC Degree, Construction Law, University of Wolverhampton, UK, Faculty of Engineering & the Built Environment 1999; attended Development Lawyers' Course at International Development Law Institute, Rome, Italy, International Project Procurement Course at International Development Law Institute,

Washington, DC, International Commercial Arbitration, International Law Institute, Kampala, Uganda and several workshops in adjudication, mediation and arbitration.

Mr. Gunta worked for over 25 years for Government, contractors and consulting engineers. Positions held include Head of Legal and Protection of Rights of Road Division in the Ethiopian Roads Authority, legal adviser at the former Ministry of Construction, general counsel for construction companies, claims expert, arbitrator, advocate and party counsel in construction arbitration and litigation. He can be reached by email at [migunta@ethionet.et](mailto:migunta@ethionet.et). □



**Would you like to be a Country Representative for the DRBF?**

Help give the DRBF a voice in your country by becoming a Country Representative. You may be called upon to act as a spokesperson, and should be interested in raising the profile of DRBs and increasing membership. You may also be asked to help organize DRBF events within the country you represent.

To qualify, you must be a member of the DRBF and live in the country you represent (you need not be a national). Terms of Reference are available on request.

If interested, contact the DRBF office today:

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# Training Programs Expand

## *Recent workshops in Abu Dhabi, Tunis and Washington, DC spread message of Dispute Boards*

### **African Development Bank**

In the course of his efforts to arrange the program for the 2008 DRBF International Conference in South Africa, Conference Organizer Dick Appuhn was in touch with Dr. Ahmed Benbarka, Head of Procurement of the African Development Bank (AfDB). Dr. Benbarka agreed to be a speaker at the conference. From the discussions emerged an invitation to the DRBF to present an in-house training course on Dispute Boards under the MDB Harmonised Conditions of Contract for Construction for key members of AfDB's staff at its Tunis headquarters.

The training course was presented on 13 March, with Dr. Benbarka presiding, and 24 other key staff attended from various departments of the bank, including Projects, Training, Legal, and of course Procurement. The training was delivered in English in the morning, and in French in the afternoon. Both sessions enjoyed obvious interest and many questions, followed by extended discussions, because attendees were aware that use of Dispute Boards on all of their contracts will be mandatory in the future, and most of

the attendees were not acquainted with Dispute Boards. The text of the DRBF presentation was provided to the bank in electronic format for future distribution to other staff members and where desired, to bank borrowers or aid recipients. Co-presenters were Jim Perry, Country Representative for France, and Gordon Jaynes.

### **Abu Dhabi**

In November 2007, a two-day workshop was organized by European Construction Ventures Ltd. (ECV) and co-sponsored by the DRBF and FIDIC. Held at The Club, Abu Dhabi, the workshop was entitled "The Responsibilities and Duties of Dispute Adjudication Boards under FIDIC (1999 Edition) and The 2007 Abu Dhabi Government Conditions of Contract." The two tutors for the workshop were DRBF members David Heslett and Brian Totterdill. The workshop was attended by 35 delegates mainly from the United Arab Emirates but also from other countries in the Middle East and Europe.



*Workshop participants at the Abu Dhabi training session November 21-22, 2007.*

**A Forum at The World Bank**

Thanks to DRBF Board Member Bernard Becq, Head of Procurement Policy for The World Bank, the DRBF was invited to participate in the program for The World Bank’s “Fiduciary Forum.” This Forum is a biennial event, organized by two of the Bank’s groups -- Procurement and Financial Management. Bank staff from its offices throughout the world attend. The Bank also invites other Multilateral Development Banks to send members of their staff to attend. The aim of the Fiduciary Forum is to improve procurement policies and practices and to improve financial management.

It is a week-long event and this year some 500 people attended. The venue this year was the National Conference Center, which is nestled in the beautiful wooded countryside of Leesburg, Virginia, USA, outside Washington, D.C. Among the sessions held was one about “Dispute Resolution under Works Contracts” which focused on the use of Dispute Boards.

Under Multilateral Development Banks (MDB) harmonization efforts pursuant to their Rome Declaration, the “MDB Harmonised Edition” of FIDIC’s 1999 Conditions of Contract for Construction now has been adopted by all of the MDBs. The result is that all contracts with any future financing from any of those banks will require the use of a Dispute Board of either one or three persons. This is expected to cause a dramatic increase in the number of Dispute Boards in use in developing countries. It has become urgent that MDB staff, including those of The World Bank, as well as the staff of their borrowers understand what is required for the successful operation of Dispute Boards. Many of The World Bank’s staff have no experience with Dispute Boards, which is what prompted Bernard to

arrange for the DRBF session at the Fiduciary Forum.

The presentation to the Fiduciary Forum on 28 March was well attended and well received, with extended discussion after the presentation. Bernard Becq led the session, assisted by a presentation of his Co-Chair of the DRBF Committee for Liaison with The World Bank, Gordon Jaynes; fellow member of that committee, Marianne Ramey, assisted in the preparation of the PowerPoint portion of his presentation. □

**DRB Process Update  
Workshop to be  
Offered at North  
American Tunneling  
Conference**

The DRBF is presenting an update workshop as part of the course offerings available at the 2008 North American Tunneling Conference.

Led by former DRBF President Pete Douglass, the workshop will focus on recent updates in the DRB process with emphasis on the *DRBF Practices and Procedures* Manual. In addition, the program will cover how the DRB process differs from other ADR methods in the ability to facilitate dispute avoidance rather than just dispute resolution.

Presented by the Society for Mining, Metallurgy & Exploration (SME), the conference runs June 9-11, 2008 at the Hyatt Regency in San Francisco, California. For more information, visit the SME web site at [www.smenet.org](http://www.smenet.org).



# Dispute Board Presentation Sets the Stage for Expansion in Romania

By Alina Oprea

In August 2007, in the DRBF Forum Newsletter, I was telling you about a wonderful experience six people from Romania (Bogdan Oprea, Alina Valentina Oprea, Emilian Traista, Florin Niculescu, Cristian Becheru, Radu Baruta) had by being the pupils of Mr. Gwyn Owen in the Mentoring Pilot Program, and being trained, this way, in contracts rules and relationships, claims, dispute resolution...

After the formal ending of the program, the pupils remained found of this domain and continued and improved their activity in the field. And something that every mentor dreams is happening: the pupils started to train people in what they've learned!

In December 2007, a document I wrote, called "About DAB and DRB," circulated in all departments of Romanian National Company of Motorways and National Roads (RNCMNR) – the main employer in construction contracts in Romania. The paper was about why and how to use Dispute Boards in preventing and solving disputes in construction contracts.

On 25 January 2008, Bogdan Oprea joined the initiative and we both made a presentation - initially designed for one hour – for all people from RNCMNR interested in this field. About 30 people attended the conference, and, even though it was held after working hours, the programmed duration was exceeded, so that after two and a half hours we were still answering the attendee's questions.

Finally, they let us leave the room expressing their desire to have more such conferences and meetings about FIDIC conditions of contracts, claims, disputes and elegant contractual relationships.

In February 2008, another challenge: more

and more people needed FIDIC training in the Romanian language, as FIDIC Conditions of Contract will soon become the official conditions of contracts in the Romanian construction industry. The Association of Consultant Engineers from Romania was asked to organize training under the umbrella of FIDIC and EFCA and, again, pupils of Mr. Gwyn Owen, already known as connoisseurs in the field, were asked to do the training. The registrations started, but in 3-4 days a second and a third training course were to be organized in a big hurry since the people avid for such guidance were disappointed when the program was full.

On 27 and 28 March 2008, Bogdan Oprea, Emilian Traista and Alina Valentina Oprea faced 50 Romanians, from all kinds of actors in construction contracts, eager to find what FIDIC is about and how to use Dispute Boards in the Romanian construction industry: Bogdan and Emilian as lecturers, and having experience in using FIDIC from the engineer's side since 1997 - 1998, and I as DRBF Country Representative and having experience in using FIDIC since 1998 and Dispute Boards since 2004 in Romanian National Company of Motorways and National Roads.

The trainers were a little nervous at the beginning, but then, seeing the interest of the attendees and their willingness to find and understand more and more about the rules to be followed when implementing a construction contract, they forgot about worries and transmitted their knowledge to the attendees.

Emilian Traista presented the evolution of FIDIC conditions of contract, made compared the various FIDIC books, and exposed the recommendations for using them according to the nature and size of the contract. Also, he presented clauses 8 to 14 from FIDIC 1999 Red Book.

Bogdan Oprea assumed and presented the clauses 1 to 7 and 15 to 20 and procedures for DABs as described by FIDIC.

In my capacity of DRBF Country Representative for Romania, I was the messenger and the voice promoting the use of Dispute Boards. Taking advantage of my experience in RNCMNR and with the Dispute Boards, I presented, apart from the FIDIC theory exposed by Bogdan, the practical way of working with Dispute Boards - in general, and in Romania in particular, as well as the rules to be observed, how the procurement of a DAB is to be done in Romanian law context, how to utilize and better use the DAB, etc... A lot of useful things learned during the mentoring we had with Mr. Gwyn Owen, from working with the Dispute Boards, things found from training courses, from DAB decisions and from the practical experience of using Dispute Boards as RNCMNR's employee.

Of course, we avoid giving names of companies/projects that could breach confidentiality or bother someone. I only mention RNCMNR's name when talking about procedures of working with Dispute Boards when the attendees expressed their concern about the practical way to procure, implement, work with and pay the Dispute Boards in Romania. I've done this in order to demonstrate that it is possible.

The participants were very satisfied with the training and I felt that a lot of their wonderings and fears regarding using both the FIDIC conditions of contract and Dispute Boards were blown up. They expressed their desire that more of their colleagues (they were from contractors, beneficiaries, consulting engineers, etc.) attend this kind of courses, because they've learned a lot. The attendees were enthusiastic about the things found and about the way these things were explained, with the presenters professionally answering their questions, giving examples and completing each other like a team. The attendees showed their interest especially about how to choose between the forms of FIDIC conditions of contract, about paying the works according to FIDIC, and about using and paying for Dispute Boards.

The atmosphere was animated, a lot of questions were asked and when the participants were hesitating to ask, or when one the presenters felt that something of interest is to be said, he or she was asking questions, raising the ball to the other two – firstly, the asked presenter was frightened of a possible difficult question, but, then, all liked the method and the attendees were encouraged to ask the clarifications they were needing.

Indeed, this training, explaining and promoting both FIDIC and Dispute Boards was extremely useful for the attendees, is useful for people involved in construction industry, in general, and in the Romanian one especially, where huge amount of projects are to be developed in the next period using FIDIC conditions of contract.

The representatives of the organizer (The Association of Consultant Engineers from Romania) were surprised about the number of delegates and about the interest shown on this training course, and promised to the attendees to arrange for at least one such training session each month.

The presenters and the delegates enjoyed the training days and gained much knowledge from the course materials, discussions and from the presenters and attendees experience. The presenters also benefited from what was said in the conference room these two days, as the best form of learning is teaching (as our mentor said to us). □ **Alina Oprea can be reached at [alina.oprea.v@gmail.com](mailto:alina.oprea.v@gmail.com)**



*Emilian Trasta, Alina Oprea, and Bogdan Oprea*



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### FOUNDATION FORUM

## Training Workshop Calendar

The Dispute Resolution Board Foundation is offering training  
in conjunction with the following conferences this year:

**May 5-6, 2008 - Training Workshop**  
**Follows International Conference on May 2-3**  
**Cape Town, South Africa**

**May 14, 2008**  
**Administration and Practice Workshop**  
**In conjunction with the Northeast Regional Conference**  
**Waltham (Boston), Massachusetts USA**

**May 22, 2008**  
**How to Prepare Position Papers and Present Your**  
**Issues to a DRB in a Formal Hearing**  
**In conjunction with the Northwest Regional Conference**  
**Seattle, Washington USA**

**October 2-3, 2008 - Training Workshops**  
**In conjunction with Annual Meeting and Conference on October 4-5**

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