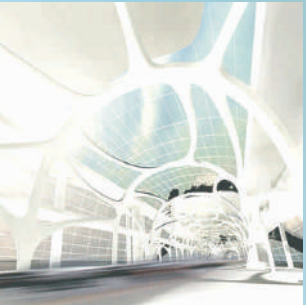


DISPUTE BOARDS - A CONTRACTOR'S PERSPECTIVE



Giovanni Di Folco



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The views and opinions expressed in this paper are those of the author and do not necessarily represent any specific Contractor's views or opinions.



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PREFACE

This brief paper is based upon the personal experience of the author with Dispute Boards (DB) gained over the past years as a defense attorney for various international Contractors during eight individual dispute referrals using the DAB procedure from 2004 to 2007.

The aim of the paper is to share the author's experience which has been acquired exclusively from the Contractor's side, with those involved in DBs.

The various separate Contractors' aspirations, doubts, experiences and views on the use of DBs have been collected, personalized and expressed herein in an effort to communicate the message of the author, to those in this sector, that Dispute Boards are not restricted to a means to an end but are an

invaluable developing contract management mechanism which revisits and continues to improve the manner in which projects in any industry are managed and controlled.

While it is essential that Contractors obtain good contracts with a minimum of risk provisions, it is equally important that contract and project management alike, be effective in order to achieve optimum results. Under current competitive and

demanding conditions, it is recommended that all modern techniques of contract and project management be initiated and applied.

Most significantly, the more recent use of Dispute Boards from the outset of projects has proved to be one of the most efficient and innovative new contract and project management techniques available to the parties.

Nine topics have been chosen for discussion in this regard:

1.	WHEN CONTRACTORS OPT FOR DB
2.	STANDING DB OR <i>AD HOC</i> DB
3.	WHAT ARE THE CONTRACTOR'S ASPIRATIONS FROM DB
4.	WHAT CONTRACTORS WISH TO GET OUT OF DB
5.	WHAT CONTRACTORS WANT THE DB TO DO FOR THEM
6.	HOW CONTRACTORS WOULD LIKE DB TO WORK
7.	MOST RELIABLE METHOD OF USING DB
8.	WHAT THE DB SHOULD BE
9.	HOW THE DB COULD HELP THE PROJECT

1. WHEN CONTRACTORS OPT FOR DB

As a matter of background, European Contractors during the years 1999 to 2004 have not readily sought the use of Dispute Boards. It was during the period 2004 to 2006 that the use of DBs became more prolific. This is easily assessed by comparing the number of DBs held during the former period with the latter.

Generally, Contractors have left the option of referring disputes to the Boards to the very end of a project, when all other efforts have been tried in the sense of discussions with the Engineer and when



negotiations with the Employer have failed at Contract and political level. Essentially, disputes have been referred to the Boards

towards the end of the Project Time for Completion and beyond.

More recently, about 10 % of Contractors have opted to refer disputes to the Boards from the outset of a dispute, no matter at what stage of the project the dispute arises. The current trend is showing that Contractors are appreciating more and more the benefits deriving from early referrals during the earlier stages of a project.

However, this percentage is minimal and much convincing and educating is yet to be done to encourage a change in Contractors' mentality toward a better use of the DB system.

2. STANDING DB OR AD HOC DB

Contractors are now realizing that standing DBs are more advantageous than *ad hoc* DBs.

This realization stems primarily from the facilitation of receiving DB's opinions before a dispute is referred to the Board, indeed on occasions even before a dispute has actually materialized.

Favoring standing DBs over *ad hoc* DBs is further augmented by the numerous

benefits deriving from DB's regular Site Visits. These offer an occasion for the parties to express their accumulated frustrations in controlled conditions and assist in the cooling down of contentious and litigious situations which have arisen between the Contractor and the Engineer / Employer.

In most cases, the intimate project knowledge that is usually gained by standing DBs helps to avoid disputes arising, or in the event being referred to the Board, through the mitigating effect of DB's recommendations following DB regular site visits.

Unfortunately when compared with the number of *ad hoc* DBs, the number of standing DBs is minimal. This is due predominantly to the Employers' lack of understanding of the usefulness of standing DBs. Alternatively, it could not be explained why Employers avoid allocating funds towards standing DBs under the illusion of keeping the budgets of their projects to a minimum in this way.

The FIDIC Yellow Book does not assist in this matter either. Actually, nowadays most of the damage is instigated by the use of the Yellow book, which specifies *ad*

hoc DBs, whilst at the same time it is becoming the preferred Form of Contract.

In the Design-build project environment the need for a standing DB is crucial due predominantly to the majority of Engineers and Employers unfortunate lack of understanding or misunderstanding of how Performance Specification contracts should be handled.

3. WHAT ARE THE CONTRACTOR'S ASPIRATIONS FROM DB

To obtain fair and timely justice at a minimal expense of time, money and project resources, in order to progress the Works in the most expeditious and cost effective manner.

Contractors have no interest whatsoever in being involved with a project for a longer period than that required by the project. Unresolved disputes slow down the Contractor's progress and enthusiasm in the project and directly affect work performance and inevitably the cash flow.

4. WHAT CONTRACTORS WISH TO GET OUT OF DB

Adequate advice and opinions during construction on contractual and construction matters and clear, unambiguous decisions during dispute resolution stages.



This may sound like an old cliché, yet in reality the role of the DB is to gain the trust of the parties to a contract to the extent that the parties will then willingly take the DB's advice on construction and contractual matters into serious consideration, make the DB's opinions their own and uphold DB decisions professionally, in a proactive manner and without malicious intent.

5. WHAT CONTRACTORS WANT THE DB TO DO FOR THEM

For Contractors it is a sacrosanct must that DBs also assume the role of referee during construction. A standing DB that maintains a too neutral approach during construction and regular site visits, would inevitably be ineffective as it would give the impression that the DB would only be effective or interested when a dispute is referred to them, which obviously offers a more rewarding monetary incentive to the DB.

During dispute resolution, the Contractor is interested in having the matter resolved by the DB's decision in a full and final manner.

Contractors are not interested and they are reluctant to obtaining DB decisions only on the merits of a dispute. Although in some circumstances there is no other way but for the DB to issue a decision on the merit of the dispute before them, there could be more education passed onto the Parties by the DBs on how to successfully refer a dispute to the Board in order to avoid a matter in dispute requiring more than one DB decision until resolved.

6. HOW CONTRACTORS WOULD LIKE THE DB TO WORK

In practice, while using the FIDIC suite of Contract Conditions, whereby the role of the Engineer is that of an Employer's agent, the standing DB could assume the role of independent contract / project managers too.



The standing DB could be more involved in providing independent constructive criticisms in respect of the parties' and the Engineer's modus operandi. As an example, the DB could strongly advise the parties and the Engineer from the onset of the project, to adopt the Society of Construction Law Protocol for the management of delays and changes.

It could persuade the parties to use network logic and time impact analysis as the most reliable means of preparation and updating the programme of works.

Advise on the best planning software to be used in respect of project scheduling, etc., all of these would assist the parties and the Engineer, especially in respect of projects with poorly structured contract documents.

During dispute resolution, Contractors would wish to see more use of external independent experts appointed by the DB as an aid to the DB decision making effort. This is most apparent when dealing with scheduling issues that require specialties that not all DBs have, in order to avoid the static and inadequate approach that may be used by the DB while determining / deciding an entitlement for Extension of Time for Completion.

Again, during dispute resolutions, Contractors would appreciate that the DB be more familiar with the Law of the Contract and less entrenched in what the FIDIC contract or what UK Common law states. This, obviously can only occur when the standing DB is formed by three persons and at least one of them is an experienced construction lawyer.

7. MOST RELIABLE METHOD OF USING DB

During the Contract Period

It has proven to be the most reliable method of using DBs when both the Contractor and the Employer appreciate the usefulness of one of the standing DB services in respect of providing opinions during construction.

DB opinions clarify issues and defuse confrontational situations which have arisen between Contractor and Engineer / Employer.

During Dispute Resolution

When matters are referred to the DB for their decision, grouping numerous and complex disputed items into one referral in order to save on DB costs, has demonstrated to be the wrong approach. Even if dealing with a standing DB, the 84 days period is often insufficient time even for a panel of three DB persons, to decide on numerous complex disputed items in one referral.

The best and most reliable practice is to refer fewer and more inter-related disputed matters to the DB. This allows the DB to maximize their efforts during the

84 days period, by providing adequate time to the study of the case before them and to the formulation of a well balanced decision.

8. WHAT DB SHOULD BE

Standing Dispute Boards should be taking the active role of independent Contract / Project Managers who would provide experienced, unbiased and much needed advice during construction.

Standing DB should play the role of referee during construction. This should be done in a more authoritative fashion than has been experienced, in order to minimize the occurrence of disputes and hence their referral to DB to obtain their binding decisions thereof.

When DBs deal with referrals, they should provide decisions that would have the same finite substance of arbitral awards.

9. HOW DB COULD HELP THE PROJECT

The way Standing Dispute Boards operate could be significantly improved by the implementation of the following:

- i. Providing a pro-active contract /

project management assistance approach between standing DB's quarterly site visits by issuing monthly voluntary opinions and/or guidance based upon the DB reviews of Minutes of Monthly Meetings, Project Monthly Reports and of course the findings of the DB's site visit reports.

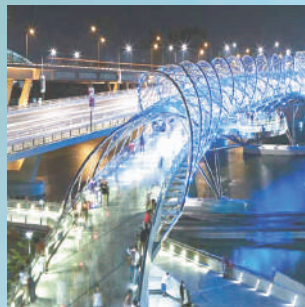
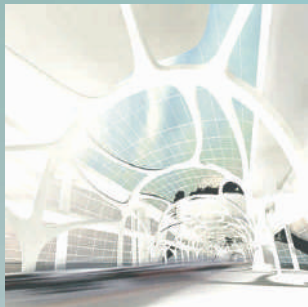
- ii. Providing a referee approach during quarterly site visit meetings in order to mitigate disputes in the making or that have arisen during the previous visiting period, which could be clearly

identifiable from Minutes of Monthly Meetings, Project Monthly Reports and previous DB site visits.

- iii. Educating the Parties on adequate methods of dispute referrals, which would improve the way forward on disputed matters when all else has failed and only the DB decision remains as the ultimate means to resolve confrontational attitudes, antagonism and in some cases stalemate situations which become even more difficult to resolve.



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