

DISPUTE AVOIDANCE – WHAT DOES A DISPUTE BOARD OFFER? Ferdinand Fourie – Kiewit Corporation

We don't consider a Dispute Board (DB) as an alternative to mediation, arbitration or other dispute resolution process. The objective of the DB must be to help the parties communicate in a positive environment so that they avoid a dispute. In our experience the DB process:

1. Is the most objective, informed, unbiased, fair and just forum that either client or contractor will ever face on any dispute.
2. The key is the regular DB meetings, and, if managed well it is instrumental in helping the parties to avoid hearings (formal or informal), claims, mediation, arbitration and litigation.
3. If regular DB meetings are properly implemented from the start and maintained, it will enhance trust and assure good relations between the parties to the project.
4. It saves the project money and emotional capital.

A DB works best in industries where the consequences of unresolved disputes are sizable and issues are complex and intertwined, therefore, requiring DB members to have knowledge of the industry and expert skills. In addition, players to the contract must want to maintain a high moral and ethical standard and should usually be interested in building long term relations.

To prevail with a dispute the party bringing the dispute must successively pass through three gates and prove what caused the situation, secondly it must explain why it is contractually entitled to compensation and, thirdly, it must prove its damages. If the right people have been chosen to serve on the DB, the team of experts that forms the DB is very capable to uncover what the root causes, for the issues that form the potential disputes, are. Using pointed questions they can direct the parties to unravel the intent of their contract themselves. Usually, by that stage, the parties are capable to quantify, negotiate and agree on an appropriate adjustment to the contract themselves.

The main areas of disputes in construction stems, firstly, from potential differences in interpretation of the contract, especially the exact scope of work, duties of the parties and who assumes what risks. Secondly, disputes are caused by changes and extra work, usually scope changes, differing site conditions and delay and other time related issues. A DB, made up of industry experts, is the best body to egg the parties on to implement proper techniques to resolve the issues and adjust the contract before it becomes a dispute.

An effective DB will exploit every regular DB meeting, using pointed questions, to subtly herd the project team through the three gates to success. If the DB documents the meetings well and circulates the minutes speedily the parties will frequently recognize their own weaknesses and settle their issues themselves.

Dispute Boards are successful and avoid disputes because it encourages the parties to the contract to early, at the regular DB meetings, communicate and fully understand each other's position on what the root causes are for the issue. Parties also share contemporaneously their position and interpretation of the intent of the contract. That helps to understand each other. The parties and DB can, without all the trouble involved with discovery, familiarize them with the credibility of the facts and witnesses involved.

The result is that Dispute Boards that use the regular DB meetings efficiently helps to avoid disputes, improve relations and save money for the project.