

**“MAIN OBSTACLES IN RESOLVING DISAGREEMENTS WHILE CONSIDERING TYPICAL ACTIONS WHICH ESCALATE NORMAL DISAGREEMENTS INTO FORMAL DISPUTES”**

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A contract for a new 400 bed hotel is about 80% complete and the mechanical and electrical services are in an advanced state of completion, the fit out works have been progressing well. The project has gone very well so far, there has been a claim for delay by the contractor of one month due to the difficulties in importing certain special bathroom fittings specified by the employer and this was granted by the contract administrator. The contractor has a good reputation and the quality of the works to date has been good. Relations between the contractor and employer and CA have also been good, and the collaborative atmosphere has meant that problems that have inevitably arisen have all been dealt with in the regular site meetings. In fact the DAB has not had much to do, except to keep up to date with the project progress.

As Christmas approaches the CA notices a marked deterioration in the quality of the fit out works and progress appears to be uncharacteristically slow. The CA approaches the main contractor and asks what the problem is, the contracts manager, who has always taken great pride in the project, says there isn't one and that it is the CA's imagination and also that progress has not slowed.

The matter is raised by the CA at a meeting with the DAB held two weeks later. The DAB agrees that things seem to have deteriorated and the CA reports that it is now much worse than it was when he first mentioned it to the contractor's contracts manager.

The DAB asks the contractor what the problem is. Its Contracts Manager says there has been a slight problem in coordinating the fit out works with the M&E services but it is nothing to worry about, but he is clearly uncomfortable at the meeting. At the meeting the CA suggests that the Contractor is now about one month behind programme but again the Contract's Manager vehemently denies this. The Employer says it is happy to rely on the Contract's Managers' assessment of the situation as he had always been right previously.

At an informal meeting the Contract's Manager speaks to the CA and admits they are a bit behind, probably by about two weeks. The CA asks why the Contractor had not mentioned this at the DAB meeting and that by the way his view is that two weeks is very optimistic and thinks the delay is more like five to six weeks.

At a design meeting, not attended by the main contractor, held a day after the DAB has departed, to confirm the final colours and finishes for the bedrooms, the CA hears from the Employer that some of the furniture, being procured outside the main contract, might not be available to meet the main

contract programme, but that he is relaxed about that because he had assumed the Contractor would probably be late in any case and had built an additional six weeks into his own programme and was surprised that this contractor was reporting it was on programme because in his experience contractors always finished late. Nonetheless, the Employer has an important gala dinner for the opening of the hotel already organized just at the end of this six week period and he is concerned this date must be met.

The CA is increasingly concerned about the quality of the fit out works which by now have really deteriorated, to the point where the Employer, who has always demanded (and paid for) the best quality, has complained to him. The CA suggests the Employer approaches the DAB, but the Employer says the DAB is not due to visit for another 3 months so there is no point.

On the way to the airport the DAB discussed the project and all the members agree that there appear to be problems with progress and quality that could seriously affect what up to now had been a very successful project.

#### QUESTIONS

- Q1: What might be the reasons the Contracts Manager does not want to report any delay?
- Q2: What might be the reasons the Employer does not want to push the Contractor to admit it has a problem?
- Q3: What might be the reason the Employer does not want to offer the Contractor more time?
- Q4: What are the benefits to each party of openly discussing the problems?
- Q5: What should the DAB do?
- Q6: Can you think of a solution that might work for both parties?

## QUESTIONS AND AUTHOR'S COMMENTARY

Q1: What might be the reasons the Contracts Manager does not want to report any delay?

The Contactor's Manager is fearful that this might mean LADs would be deducted from its payments. His own managing director had threatened that he might lose his job if that happened and so he could not report any delay, nor accept any extension that might leave the Contractor open to deduction of LADs.

Burying head in sand

Q2: What might be the reasons the Employer does not want to push the Contractor to admit it has a problem?

Burying head in sand, fear of possible claims from the contractor

Q3: What might be the reason the Employer does not want to offer the Contractor more time?

He thought that this one would finish late as well but did not want to offer a time extension because the contractor might take this as a reason to take as long as it wanted to finish and he had an important event early in the year which could not be cancelled.

Q4: What are the benefits to each party of openly discussing the problems?

EMPLOYER: quality building which is what he wants, realistic hand over date

CONTRACTOR: establishment of a realistic date for handover of the works, by easing the programme the ability to carry out the works to the required quality

Q5: What should the DAB do?

DEAL WITH IT NOW: Go back and reconvene the meeting, OR arrange another meeting urgently, OR discuss by telephone conference call

Q6: Can you think of a solution that might work for both parties?

In the real project the CA granted four weeks EOT free of LADs, with the agreement of the Employer. It was agreed that LADs would be deducted for any delay beyond this four period.

RESULT: better quality, problems between fit out and M&E subcontractors resolved, no one got sacked, face saving, Employer still had two weeks to get his furniture in place and open for the gala dinner to which the Contractor's MD was invited!



**The Dispute Resolution Board Foundation**

*Fostering Common Sense Dispute Resolution Worldwide*

# **MAIN OBSTACLES TO RESOLVING DISAGREEMENTS AND ESCALATION INTO DISPUTES**

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## **DISPUTES AND DISAGREEMENTS**

- **Recognize that disagreements always occur**
- **There is always more than one way of looking at something**
- **Two sides to the story**



## **DISPUTES AND DISAGREEMENTS**

- **Conflict can be positive and healthy, results in a new ways of thinking**
- **This is called progress**
- **Dispute avoidance aims to tackle differences before they become formal disputes, requiring a formal process of resolution.**



## **DISPUTES**

- **Disputes arise out of uncertainty**
- **There are always uncertainties in construction projects**
- **A dispute arises when a disagreement impacts on the interests of one or the other of the Parties.**



## **OBSTACLES**

- **Parties traditionally bury heads in sand**
- **An attitude that “there will be no disputes on this project”**
- **Unfounded optimism**
- **An unrealistic view of risk**





## **OBSTACLES**

- **Parties traditionally leave dispute resolution until the end**
- **Any discussion implies an admission of liability**
- **A party representative may not be able to take decisions (e.g. government staff)**



## **OBSTACLES**

- **Poor communications**
- **Cultural differences**
- **Personality clashes (dysfunctional team)**
- **Taking things personally**



## **OBSTACLES**

- **Not establishing own goals**
- **Not understanding other Parties goals**
- **Looking only for contractual solutions**



## **ESCALATION OF PROBLEMS**

- **Inability to talk**
- **Conflicting styles**
- **Resorting to legal methods too quickly**
- **Blame culture**



## **ESCALATION OF PROBLEMS**

- **Resentment about being forced to do something**
- **Fear of the backlash/consequences**
- **The need to save face**
- **Misunderstandings**



## **DISPUTE AVOIDANCE – PRE CONTRACT**

- **Consider unpredictable scenarios before they occur**
- **Learn from other projects**
- **Be realistic about what can go wrong**



## **DISPUTE AVOIDANCE – PRE CONTRACT**

- **Accept that problems will arise**
- **Manage and apportion risks appropriately**
- **Make sure risks are understood**



## **DISPUTE AVOIDANCE – POST CONTRACT**

- **Establish an early collaborative regime between design and construction teams (the role of the DAB?)**
- **Do what the contract requires**
- **Remember that each may have differing aims and aspirations for the project**
- **If in doubt: ask do not proceed without proper documents**





## **DISPUTE AVOIDANCE – POST CONTRACT**

- **Active monitoring of progress and quality (with help of DAB)**
- **Active monitoring of issues which may lead to disputes (with the help of the DAB)**
- **Be aware that “fair” resolution of problems can be found outside the contract terms**