

The Dispute Resolution Board Foundation

Istanbul 2010

Case Study no [.]

Contractor C has signed a Works contract incorporating the conditions of the FIDIC Red Book first edition 1999 with a local authority from country X.

The Contract provided for the rehabilitation and enlargement of a road section of 58 Km of national road and rehabilitation of 6 bridges.

During the contract period the Engineer submits to the Contractor C a completely new design for the construction of the bridges which includes additional items of work not originally included in the contract, determines a significant increase in the quantities of materials and dramatic changes in the sequence and timing of the execution of the Works.

With the same letter the Engineer instructs the Contractor to proceed with the works on this basis, attaching the Employer's approval and all other relevant approvals and authorizations required to that effect under the Applicable law.

The Engineer does not require the Contractor to give its proposal in relation to such works prior to issuing its instruction. The Contractor proceeds and submits a revised Programme of Works procures the materials and executes the works on these basis.

However, some 6 months after the works were finalized and the Taking- Over Certificate has been issued the Contractor has still not received any payment in respect of such works despite its repeated discussions with the Engineer/ Employer.

Additionally, few months after the issuance of the taking over certificate, the Contractor receives a letter from the Employer asking him to execute some remedial work in relation to damages to the respective road section resulting from various accidents and thefts.

The Contractor agrees to do so and submits its price proposal to that effect. The top management of the Employer accepts the proposal and instructs the immediate commencement of the works.

The works have been executed and successfully taken over. However, the Employer refused to make any payment to the Contractor, alleging that the works should not have been executed in the absence of a new contract since these works were not contractual.

The Contractor has included the value of the works which it has executed based on the Employer and Engineer's instructions in its Statement at Completion. However, such values have never been certified by the Engineer as due to the Contractor.

Under such circumstances, in order to avoid supplementary costs, the Contractor asks for the DAB's opinion during a site visit. The DAB does not give any recommendations to the parties on the spot but in its Monthly Visit Report it touches on this subject and suggests that the works instructed by the Employer should be paid to the Contractor under the Contractor following the variation provisions under Clause 13. Nothing is stated in respect of the works instructed by the Engineer.

Given the lack of any success with both the Engineer and the Employer, the Contractor refers to the DAB its first referral seeking decision from the DAB that:

1. The Engineer is obliged to evaluate and determine the price for the works instructed by it under the Contract at the value included in its Statement at completion and provides to that effect explanatory detailed calculations;
2. The Engineer should evaluate and determine the value of the works instructed by the Employer based on the Contractor's proposal based on the provisions of Clause 13 and 12 respectively
3. The Engineer should then certify the amounts included in the Contractor's Statement at Completion in respect of the works instructed by the Engineer and by the Employer
4. The Employer is due to pay such amounts

The Employer however defends itself saying that:

1. No claim has been put forward by the Contractor in relation to the evaluation of the additional and/or remedial works and therefore the Contractor is not entitled to claim any additional costs
2. No dispute has accrued since no claim has been put forward and therefore the DAB would not have jurisdiction to decide on the matters referred to it
3. The DAB has no jurisdiction to deal with the matter of the remedial works anyway because it has given an opinion to the parties based on the request of the Contractor in the absence of any agreement between the parties
4. Under the applicable law the Employer as public authority is forbidden to make payments which are in breach of the provisions regulating the public policy, otherwise it would subject itself to severe penalties following the audit of the relevant authorities. It then suggests that the payment has become impossible and under Sub-Clause 19.7 it is released from further performance.

Because by that time the Engineer was not in place the Employer fails to submit any defense or calculation to argue any reduction of the amounts claimed by the Contractor in its referral.

Questions

1. What should the DAB decide in relation to the four arguments raised by the Contractor?
2. Would this DAB have jurisdiction to deal with the matters referred to it?

3. If the DAB issued a decision would that decision be valid and would that constitute a basis for the parties to settle under Sub-Clause 20.5?
4. What if the DAB issued a decision on the matters referred to it considering each and every of the arguments submitted by the Employer except for that one which referred to the mandatory provisions of the applicable law. For the purpose of this question it shall be considered that the DAB has not considered retaining the services of a local lawyer and he did not submit this matter to the parties for their consideration or agreement.
5. Are DAB's obliged to consider the matters referred to them under the Applicable law or can DABs make decisions based on contract provisions only?
6. Under circumstances where the other party did not submit any defense and any substantiation in an attempt to reduce the amounts claimed by the Contractor, and the only basis for the DAB to decide on the value of the works instructed is the Contractor's submission, would the DAB be allowed to reduce such costs based on its own judgment and consideration ?

Relevant clauses to be considered:

1.1.6.9 [Variation]

3.3. [Instructions of the Engineer]

11.2. [Cost of Remedying the Defects]

12.3. [Evaluation]

Clause 13

19.7

20.1 [Contractor's Claims]

20.2 [Appointment of the Dispute Adjudication Board]

20.4. [Obtaining Dispute Adjudication Board Decision]

General Conditions of Dispute Adjudication Board

Procedural Rules