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DAB Use of Experts and Time Limits under the FIDIC Rules: A Case History

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Synopsis

The time allowed under the FIDIC Rules for a Dispute Board to give its decision or recommendation is 84 days¹ from the date that the Presiding Member receives a referral from a Party. The Parties invest in the Dispute Board wide discretionary powers under the Rules² to adopt inquisitorial methods and to establish procedures including (i) conduct any hearing as it thinks fit, not being bound by any rules or procedures, (ii) take the initiative in ascertaining the facts. Depending on the nature of the referral the DAB must determine if it is able to decide the issue using its own expertise or whether it requires the use of experts for that purpose. It must adopt procedures suitable to the dispute and avoid any unnecessary delay.³

Subject to the time allowed to deliver its decision the Dispute Board must adopt procedures suitable to the dispute and avoiding unnecessary delay or expense. This requirement often raises questions in the mind of the Dispute Board when the amount or time involved in the dispute becomes a significant proportion of the Contract Amount or of the Time for Completion. It must weigh the significance of any decision it renders against what each party has at stake.

This article deals with an infrastructure project in an industrially developed country where the Contractor contracted with a public entity under the FIDIC Red Book. The dispute arose out of unforeseeable physical conditions in respect of the source of embankment fill. The Employer eventually varied the work to allow for the use of off-site borrows located at a significant distance from the Site. The variation order paid the costs of the extra work, but in the mind of Contractor did not compensate for what it alleged to be significant additional delay and disruption costs, approximately 15% of the original Contract amount. The Parties were not able to resolve the dispute which was finally referred to the Dispute Board for a decision.

The Dispute Board weighed the significance of the amount claimed against the time and costs for giving its decision and decided to avail itself of expert advice for delay analysis and quantum determination. The Board took significantly longer than 84 days to issue its decision, but the decision ended the dispute.

This significance of this case history is compared with that of the PGN v CRW JV Singapore case that currently is so popular amongst the dispute resolution community.

The Parties have kindly allowed their case history to be used for this article but preferred that it be done in a way that would not identify the Project.

¹ Sub-Clause 20.4 [*Obtaining a Dispute Adjudication Board Decision*], paragraph 4.

² Articles 7 and 8 of the Procedural Rules; Annex to the General Conditions of Contract

³ Article 5 (b) of the Procedures.



The Contract.

The Contract was for transport infrastructure construction and involved earthmoving and significant structural work. It was an important project ⁴ based on the FIDIC General Conditions Contract for Construction for Building and Engineering Work Designed by the Employer (the Red Book). The works were to have been completed in 36 months and the Defects Notification Period was 24 months. Four months of time extension was granted extending the Contract period to 40 months.

The Employer, a public entity prepared the detailed design and carried out pre-contract ground investigations in order to identify sources of borrows for embankment material. The Contract allocated responsibility to the Contractor to decide how, if at all, it would use designated sources and required excavations. The Contractor relied on the pre-contract information that suitable materials for embankment work would be available from on near the Site.

The Dispute.

It became apparent early in the Contract that material coming from required excavation and designated borrow pits near the Site did not satisfy the technical requirements for permanent embankment work. It was also evident that suitable embankment material was available only at distances in the order of 40 km. Moreover, the nature of those materials was such to require different compaction methods for the permanent embankment. The impact on the economy of Contract caused by this change was significant and there was delay in giving instructions to the Contractor for the change.

The Contractor duly noticed a claim both for the additional cost to supply material from the more distant source and place it in the permanent embankment work and for the time it would require to carry out the varied work. The Employer agreed that there was additional cost of doing the work and negotiated a variation order over time with the Contractor that was based on the actual costs incurred.

The Parties did not agree on the additional time requested and the Employer issued an instruction to the Contractor to submit a revised programme that described the methods it proposed to adopt in order to expedite progress and comply with the Time for Completion. The Contractor's claim for an extension of the Time for Completion was thereby rejected.

The Contractor reacted to that instruction with a request for reimbursement for additional costs arising out of that instruction. The Contractor claimed for the additional costs of equipment, material and human resources that were incurred because of the expedited work. As it turned out the Employer later granted an extension of the Time for Completion for other concurrent varied work. The Contractor completed the allegedly disputed work within the extended period but pursued its claim for additional costs.

The DRB was in place early for this the Project. It conducted more than 13 regular visits to the Site at about 5 month intervals. It witnessed the problems caused by non-availability of suitable fill materials as well as the difficulty to identify alternative sources. It assisted the Parties through discussions and informal advice to reach the agreement on the variation order. It also

⁴ The Contract Price revalued to 2012 value was about €75 million (US\$100 million)



assisted the parties through the use of advisory opinions and recommendations to set aside some 35 other disputes that arose on the Contract. The completed Contract Amount increased by about 30% through additional work, variations and finally, claims that were settled amicably.

The Contractor's claim for delay and disruption was another matter.

The Procedure Adopted by the Dispute Board.

The Development of the Dispute

The Employer's issued the instruction to expedite the Works just before the seventh periodic site visit, about two years into the Project. The Dispute Board raised the matter of the instruction and expressed its concern that it was likely to give rise to a significant claim from the Contractor and urged the Parties and the Engineer (i) to conclude the outstanding issue of entitlements to an extension of the Time for Completion and (ii) to agree the method of analysis by which the as-built critical path could be determined along with other concurrent Employer and Contractor delays. It cautioned that without an agreed delay analysis it would be difficult to determine any cost or time entitlements if any that might accrue to the Contractor.

The Dispute Board went on to say that if such agreement could not be reached, then the Parties should consider the alternative to appoint a neutral delay expert to produce that analysis. If the Parties could not agree on an expert the Dispute Board offered to recommend one to them. Given the potential significant amounts involved it also issued a cautionary warning to the Parties; should the dispute be given to the Board as a formal referral it would likely use its authority to appoint its own expert (or experts) to determine the facts.

Despite repeated appeals by the Dispute Board during ensuing site visits, the Parties refused to involve the Board in the claim and thereby allowed the dispute to drift forward until well into the Defects Notification Period.

The Referral

The Contractor referred the dispute to the Board during its last visit to the Site and after the Work was substantially completed. The relief sought by the Contractor with this claim alone exceeded 15% of the original Contract Price.

The Dispute Board considered its obligation to (i) issue a decision on the referral within 84 days of the date on which the referral was received by the presiding member of the Board and (ii) limit the time and the costs to the Parties in making its decision.

The Dispute Board recognized that it would not be able to render a suitably reasoned decision within the 84 days stipulated by the Contract and it obtained written consent from the Parties to extend that period as would be required by the procedures established by the Dispute Board. To have complied with the restrictive time allowed by FIDIC procedures meant that the Board would utilize its own costly and time consuming expertise to (i) analyse the Contractor delay analysis and (ii) separate the costs related to the contractor delay events. The work was done more effectively, with greater certainty and at less cost by its experts.

The sums involved in this dispute were important both to the Contractor and the Employer. The Board decided to appoint two experts, a delay analyst and a quantum surveyor to review the



Claims. It obtained agreement from the Parties to appoint experts and under its inquisitorial authority instructed that its experts meet with the Parties in order to establish the facts.

It then conducted a hearing during which the Parties gave oral and written submissions in support and in defence of their respective positions and responded to questions from the Board and its experts. At the hearing the Board issued instructions to the Parties in respect of additional information and to conduct further consultations with the experts.

The Decision

The Time taken by the Dispute Board

The decision was issued by the Dispute Board just over a year after the referral was made. During that period the Parties (i) submitted two written submissions, (ii) conducted consultations with the Board's experts, (iii) participated in two days of oral hearings, and (iv) exchanged further written consultations with the Board experts.

The Parties let this matter drift during the contract period and were in no hurry to expedite the inquisitorial process led by the Board experts. The time taken to reach a decision was essentially driven by the Parties having asked and received several extensions for the presenting written submissions.

The decision was to award the Contractor less than half of the amount it sought.

The Cost of the Procedure

The cost of the Dispute Board to review the submissions, conduct the hearings and issue its decision was 1.2 percent of the amount sought by the Contractor with its referral and 2.6 percent of the amount awarded.

The cost for the experts was 1.5 percent of the amount claimed and 3.4 percent of the amount awarded.

The decision

The decision was to award the Contractor less than half of the amount it sought.

Conclusion

The Parties accepted the Board decision and the amount awarded was certified by the Engineer and paid in the next IPC.

Each year the ICC publishes statistics concerning the numbers and values of disputes that are submitted to its Court of Arbitration. The amount claimed in this example exceeds the average value of arbitration requests submitted to that body by several orders of magnitude. Had this dispute gone forward to international arbitration the Parties would have incurred costs (and risk) in the order of magnitude of the referral amount and it would have taken more than three years to obtain an award.

Strong arguments can be made that the Dispute Board process is "rough justice" and that the Board should not exceed the 84 days allowed to it for issuing its decision.



The “rough justice” approach was apparently used by a sole-member Dispute Board in connection with a decision it gave in connection with the Contract that gave rise to the PT Perusahaan Gas Negara v CRW Joint Operation⁵ case that is object of considerable commentary that is circulating in the dispute resolution community these days. In that decision, the Board awarded US\$17,298,834.57 to the Contractor. In the notice of dissatisfaction in the PGN case the Employer observed amongst others that the decision, “was excessive in that it was for an amount greater than that claimed”. The Dispute Board decision is not available and it is not known whether it relied on expert advice in make the decision. If it did not, then this may well be an instance where the use of expert(s) might have led to a decision that would have led to a settlement. It did not and the Parties resorted to arbitration and subsequent appeals where (i) the arbitral award enforcing the DAB decision was overturned and (ii) the entitlement determined by the DAB for reimbursement of costs was eventually lost; all at probably considerable loss of time and money for the Parties and probable damage to the contractor Party.

In this case history example the entitlements were also a substantial proportion of the amount claimed by the Contractor and the Dispute Board would not have been in a position to give a “reasoned” decision without the aid of the expert advice that it ordered and finally received. The Parties apparently agreed with this assessment because the dispute was extinguished with immediate effect by the decision.

⁵ PT Perusahaan Gas Negara v CRW Joint Operation, SGHC 202 [2010].