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Session 2 “Practical Application of Dispute Boards”

“SITE VISITS & DECISIONS”

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This paper is limited to discussion of the Dispute Board which is established at the outset of work on the Contract, sometimes referred to as a “standing Board”, which has as a primary objective the prevention of formal disputes. The paper does not focus on the so-called “*ad hoc* Board” which is not created unless and until the parties are involved in a dispute which they have been unable to resolve by negotiation.

SITE VISITS

There is no more important activity for a Dispute Board than its Site visits. It is the best opportunity a Board has to prevent the inevitable disagreements which arise in engineering and construction projects from becoming formal disputes. A famous criterion for a successful Board is “The successful Board never has to make a formal Recommendation or Decision.” The absence of formal disputes evidences a Board which has succeeded in its task of helping the Contract parties to avoid formal disputes and resolve disagreements amicably, often with the informal guidance of the Board.

Most contracts which have Boards foresee two kinds of Site visits. The first is the regularly scheduled Site visit, planned well in advance of the actual time of the Site visit. The other is an unscheduled Site visit, typically occurring because of some unanticipated event on Site where one or more of the parties to the Contract consider that the Board should see for itself what has happened. Examples are a tunnel collapse, or an excavated foundation which proves to be problematical. Action must be taken in order to progress construction but it is desired that the Board members see for themselves the situation before adaptations are made to progress construction because dealing with the event may involve disagreements between the parties regarding the allocation of contractual responsibilities arising from the unanticipated event. The availability of Board members for Site visits on short notice is one major reason given for the use of Monthly Retainer fees to be paid to Board members.

It is important that regularly scheduled Site visits begin as soon as construction begins on Site. If the contract is one where the Contractor is to create significant design before construction commences, it is important that the Board meet with the parties and commence its work *before* construction begins on the construction Site.

Such early start of Site visits facilitates the Board's integration as a member of the Project Team. It helps create a sense that the Employer, Engineer (or Employer's Representative, or Architect, all of which now will be referred to in this paper as the "Engineer"), Contractor, and the Board all are aiming for the same target -- a successful project. Early start of Site visits also enable the Board to help establish the written records which will be maintained and used as the work proceeds. Examples are the contents of the Contractor's monthly progress reports, the forms of daily records to be kept by the Contractor of resources it uses in the various locations of the work, showing quantities and durations of the individual types of manpower and equipment at each location, and any unusual events occurring during the day. It enables the Board to gain early understanding of what information is being reported separately to the Employer by the Engineer, and what procedures are expected to be applied for issue of Variation Orders (sometimes called Change Orders). Further, it is the most convenient time to establish what information will be sent regularly to the Board members during performance of the Contract. Also, an early initial visit assists in understanding and agreement about the scheduling or programming of both design and construction work, its review by or for the Employer, including the computer software to be used, and the frequency of planned updates of the programme or schedule. A shared understanding on these matters relating to cost and timing of the work will assist greatly all members of the Project Team in dealing with any future disagreements among them regarding additional cost or additional time for Completion.

The initial Site visit of the Board is the ideal time to discuss and establish the timing for future scheduled Site visits. Guidelines for frequency of Board Site visits can be found from published guidelines such as those in the FIDIC "Guide" to its major forms of Conditions of Contract, and in the Dispute Board Rules of the International Chamber of Commerce (the "ICC Rules").

FIDIC's editorial advice at the Annex "Procedural Rules" (annexed to the Appendix to Clause 20 of the 1999 Edition of the Conditions for Construction ("Red Book") is "typically every three or four months, but the Parties may agree otherwise." [Page 332 of the 2000 edition of The FIDIC Contracts Guide"] Unfortunately, sometimes the Parties believe that it will save money to have the Board visit the Site less often than FIDIC suggests: experience has demonstrated that such restrictions on Site visits (and the concomitant opportunities for the Board to perform its function of preventing formal disputes) typically leads to *increased* cost in dealing with disagreements, especially if the disagreements become so fixed as to lead to formal disputes.

The ICC Rules state "The frequency of scheduled meetings and site visits shall be sufficient to the keep the DB informed of the performance of the Contract and of any disagreements. Unless otherwise agreed by the Parties and the DB, when site visits are relevant to the Contract, there shall be a minimum of three such visits per year." [Article 12(1)]

One Board technique which has proved helpful is to include in the initial Site visit a review with the rest of the Project Team, led by the Board, of the details of the Contract provisions regarding the Board and its operations. This may seem redundant, but it fact it often is not; often those of the Project Team who are assigned to the Site are not already familiar with the Contract details of the Board's role and the duties of the Board. Also, even if all have read the Contract provisions relevant to the Board, such a review "reinforces recollection".

Board conduct during Site visits

Just as it is important that written communications from and to the Board be through the Chairperson of the Board, so it is important that during the Site visit, the activities of the Board be coordinated and under the guidance of the Chairperson. Often Boards establish in advance of the Site visit and in coordination with the parties and the Engineer an "agenda" for the Site visit, and such agenda should be the responsibility of the Chairperson.

Typically (but not necessarily), the logistics of the Board's Site visit are dealt with by the Contractor, as it typically has a larger organization on Site than either the Employer or the Engineer. The cost of the logistics typically are shared equally between Employer and Contractor. Usually it is helpful to begin the Site visit with a tour of the Site by the Board in company with the parties and the Engineer. Such a tour should occur not only during the initial Site visit but also each subsequent Site visit. This enables the Board to gather its own impressions of progress and of any problems which are visible. Often Board members carry personal cameras to take photos for their own future reference. In touring a Site, Board members may travel in more than one vehicle, and even if in a single vehicle the driver likely will be an employee of a party or the Engineer. This should be kept in mind when talking within the vehicle. Similarly if the Board members are in different vehicles, any conversations during travel should be governed by discretion. When out of vehicles, the members should stay together as a group, so that all hear the same comments or explanations by the parties or the Engineers as the tour examines progress in the various areas of the Site.

Usually the Board is extended social courtesies during a Site visit, and Board members' socialising should be as a group, not individually. Also, the Chairperson should assure that any social occasions at which the Board is present include both parties and the Engineer, unless one or more of the parties or the Engineer elect to excuse themselves from attendance. As it is natural that Board members will be mingling individually with many people during social occasions, it is essential that discussions should be social and not related to the Project problems or Board members views regarding any Project problems. At social occasions, the Board members should strive to arrive and leave as nearly as possible simultaneously. These points of social conduct of Board members are for the purpose of being perceived as impartial, and to avoid any risk of subsequent challenge by a party to a Board member's continued service on the Board.

The above suggestions regarding Board member conduct may seem obvious but they merit mention. Similarly, while it is obvious it is worth noting that during Site visits, including social events, the Board members should be alert and sensitive to the culture and customs of the location of the Site, lest Board member conduct create embarrass or offend other members of the Project Team.

Site Visit Report

This document is a feature of both the FIDIC procedures and the ICC Rules. FIDIC procedures include a requirement that the Report be provided to the parties and the Engineer *before* the Board departs the Site. Unfortunately, there are many instances in which Board members have failed to comply with this requirement. It is this author's experience that provision of the Site Visit report before the Board departs the Site is greatly preferable to deferring submission of the Report until some later date, for several reasons:

- It facilitates completion and publication of the Report because it is done before the Board members separate and go their individual ways to their respective destinations and their other commitments;
- It addresses issues which arose during the Site visit while recollections of all of the Project Team are fresh;
- It allows the Board to review the Report in draft with the parties and the Engineer and assure that the Board's Report is factually correct;
- It assures that the parties and the Engineer understand what has been written in the draft. This is important where the language of the Contract may not be the first language of one or more of the parties and the Engineer;
- I allows the Board the opportunity to clarify any point which the Board thought would be clear to the parties and the Engineer but in fact is not clear to one or more of them;
- It assures that the parties and the Engineer focus their attention on what the Board is saying, and do so contemporaneously with the issue of the Report, not at some undetermined future date.

The above advantages are very important with respect to any informal opinions the Board may be including in the Report.

Good practice on preparation of Site Visit Reports includes (and under the ICC Rules, a specific Rule requires) that the Report include a list of the persons in attendance on each day of the Site visit. Carefully prepared Site Visit Reports also are a very useful reference tool for the Board with respect to any problems discussed during the Site visits which later become the subject of formal disputes.

DECISIONS

In discussing this topic, the author's intention is to use the word "Decision" to refer to a Board determination, whether it is a Recommendation or a Decision.

What is the function of a Board Decision in the context of the overall Contract dispute resolution scheme? First, it should be a *persuasive* document which has the capability to enable the parties to accept it either (i) as conclusive of the dispute or (ii) as forming the basis from which the parties can "re-negotiate" and reach an amicable settlement without resorting to arbitration or litigation. Second, typically the document has been stipulated by the Contract to be a document which will be admissible in any future arbitration or litigation over the dispute: thus even though the arbitral tribunal or the court likely can "open up" the Board's Decision, it would be unusual for an arbitral tribunal or a court to fail to give significant attention and weight to the document. This is because the document represents the views (usually unanimous) of a highly experienced independent and impartial group of experts, each selected by agreement by both parties and having extensive experience in the type of work covered by the Contract, and who have been involved on a continuous and intimate basis with the performance of the Contract, including the dispute presented to the arbitral tribunal or the court.

The above function of the Board Decision virtually dictates what the Decision should contain:

- A clear and "stand alone" description of the dispute;
- A concise reiteration of the arguments presented to the Board by the parties in the written submissions and during the hearing;
- A discussion of each issue raised in the parties' arguments, to show that the Board understood and considered those issues;
- A clear and orderly analysis of the issues involved in the dispute, including appropriate references to the relevant provisions of the Contract, and any applicable law – in short, a full exposition of the Board's reasoning;
- A carefully worded Decision (unanimous, if possible) on each significant issue in the dispute.

In the text of the Decision, use should be made of the Site Visit Reports where relevant, either by quotations or by citing appropriate portions of appended Site Visit Reports. In complex disputes, it is not unusual for the Board to arrange a verbatim transcript of the hearing on the dispute. As with Site Visit Reports, use the transcript in the Board Decision often is helpful, either by quotations from the transcript or by citations to an appended copy of the transcript. This is useful to the parties in considering the Board Decision, and if the dispute is arbitrated or litigated, then to the arbitral tribunal or the court.

Preparation of the Board Decision

Different Boards adopt different approaches to this task. Some Boards prefer to divide the task so that each Board member drafts part of the Decision; other Boards prefer that the Chairperson prepare the initial draft of the entire Decision. Either way of course the entire Decision draft is the subject of further review by all Board members. However experience suggests that before drafting starts, the issues should have been discussed fully among the Board members. Often such discussion occurs in stages: for example, after written submissions have been received and read, and later during and immediately after the conclusion of the hearing.

The drafting and later review of the draft often leads to changes in the Board's initial assessment of the appropriate Decision, and neither part of the preparation should be "rushed". In complex disputes, the Board should consider the possibility of persuading the parties to agree a written revision to any time limit for the issue of the Decision. For example, the parties may be persuaded to adopt a time limit which starts to run at the conclusion of the hearing and the receipt by the Board of any post-hearing written submissions allowed by the Board or requested by the Board, instead of a time limit which starts to run from the date of a party's Request for Decision.

Often it is necessary and ultimately economic for the Board members to convene privately after the hearing in order to achieve a final version of the Decision. Usually such a meeting is held at a location which is most convenient and economic, but it is not unknown for the parties to insist that the Board hold such meeting at the Site.

Procedural requirements

The Decision is the outcome of a procedure that typically is governed by the Contract provisions, or by a set of Rules which have been adopted by the Contract parties, such as the ICC Rules. The FIDIC Conditions provide an admirably brief and flexible set of Procedural Rules, annexed to the Appendix to Clause 20 of the Conditions. The ICC Rules are more lengthy and less flexible, in part because they are intended for use in a broader spectrum of contracts than solely engineering and construction contracts.

Also, uniquely the ICC Rules give the parties the option to have the ICC Dispute Board Centre review the Board's Decision while in draft form; see, Article 21 of the ICC Rules. Also, the ICC Rules contain specific requirements for the contents of a Board Decision; see, Article 22. Further, the ICC Rules also have specific provisions relating to dissents by Board members; see, Article 23. The FIDIC approach does not specifically provide for dissents, but the previously cited Guide does offer the following at p. 337:

"*If the three Members fail to reach a unanimous decision, it shall be made by the majority two Members, who may require the minority Member to prepare his/her own report. Although there is no necessity for the minority report to repeat much of the text contained in*

the majority decision, the majority Members may require the report to specify any aspects of the decision with which the minority Member agrees, and his/her detailed analysis of all other aspects, including the details of the decision which the minority Member would have made if he/she had been acting as sole Member (adjudicator).

"The Procedural Rules make no mention of the consequences of a failure of a three-person DAB to reach a majority decision. If it cannot reach a majority decision, the DAB should notify the Parties of the extent to which the DAB is in agreement, and may also wish to notify the Parties of each Member's views on the matters on which they have failed to reach agreement. The Procedural Rules do not empower the chairman to make a decision alone, because such a decision should not be binding and may not even be persuasive."

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