



The Paper Reality

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The role of the adviser

A successful adviser and a member of a DB should have a lot in common:

- experience / knowledge of the type of construction
- experience to comprehend and interpret the contract
- become aware and keep been updated on the progress of the project
- fluent in the language of the contract
- ability to express yourself clearly and write clearly
- no conflict of interest (disclosures if needed) / the requirements in this respect not that harsh as towards the DB members (no employment/contractual relations for 10 years/ 5 years 2022 reprint)
- fluent in the language of the contract
- keeping strict confidentiality

The role of the adviser

- BUT – unlike the DB member the adviser should be agent of the party (main obligation to try and secure compliance with contractual obligations and assisting in avoidance of disputes).
- Last resort – assistance in disputes

First steps of the adviser

- Listen to the client's story
- Make sure you receive all relevant documentation
- Make sure the client is aware what type of contract is signed and documents forming it
- Make sure to give clear instructions on keeping records and minutes
- Make sure the client is aware of the possible pitfalls of the contract

Typical documents prepared by the adviser

Contract phase

- Chart of responsibilities
- Records
- Minutes
- Legal opinions
- Responses to notices
- Correspondence

Typical documents prepared by the adviser

Contract phase

• Notices

- with different legal implications
- some in specific forms and some bespoke
- timely submission and summarizing the facts and evidence in proper manner facilitates avoidance of disputes
- mistakes could trigger serious consequences

FIDIC Yellow book 2017

Sub-Clause 21.4.4 Dissatisfaction with DAAB's decision

“If either Party is dissatisfied with the DAAB's decision such Party may give a NOD to the other Party, with a copy to the DAAB; this NOD shall state that it is a “Notice of Dissatisfaction with the DAAB's Decision” and shall set out the matter in Dispute and the reason(s) for dissatisfaction; and this NOD shall be given within 28 days after receiving the DAAB's decision...

If the DAAB has given its decision as to the matter in Dispute to both Parties, and no NOD under this Sub-Clause 21.4.4 has been given by either Party within 28 days after receiving the DAAB's decision, then the decision shall become final and binding on both Parties...”

Notice of dissatisfaction

To the Employer, copied to DB

Dear Sir,

Road Project: Somewhere – Nowhere 50km

The Contractor disagrees with the DB decision and considers that the claim originally sent to you is still valid.

The DB decision is both unfair and unreasonable.

We remain short of funds and request early payment of the amounts already given in the DB Decision.

Yours faithfully,

Notice of dissatisfaction – version 2

Dear Sir,
Notice of Dissatisfaction with the DAAB's Decision
Road Project: Somewhere – Nowhere 50 km

The Employer gives notice of its dissatisfaction with the DB decision. The matter in dispute is whether the Contractor is entitled to additional money for steeper slopes. Employer considers that the DAAB has failed to grasp the Contractor's contractual responsibility towards the full design of the project, which includes being aware of the land available for construction of the cutting.

The Employer denies any financial liability towards the Contractor and will seek redress in arbitration.

Notices under Emerald Book

- **Notices must be in writing and identified as a notice.**
- **They must be delivered to the appropriate party following the contract's communication provisions.**
- **The recipient's details and addresses for notices are usually specified in the Contract Data**

Key Notices under Emerald Book

- **Notice of a Claim (Sub-Clause 20.2.1)**
- **Notice of Unforeseeable Ground Conditions (Sub-Clause 4.12.2)**
- **Notice of Completion of Sections or Works (Sub-Clause 9.1)**
- **Notice of Defects (Sub-Clause 11.1)**
- **Notice of Termination (Sub-Clause 15.2 & 16.2)**

Typical documents prepared by the adviser

Dispute phase before DB

1. Referral/submission
2. Answers
3. Open hearing scenarios
4. Supporting documents to the above – notices, responses to notices (careful selection sometimes which supports the thesis); delay analysis; quantum analysis(if needed) ; official interpretation of the local courts on specific legal matters relevant to the dispute

Referral

IN THE MATTER OF AN ADJUDICATION PURSUANT TO CLAUSE 20.4 OF THE CONTRACT

BROUGHT BEFORE THE DISPUTE ADJUDICATION BOARD

• STATEMENT OF CLAIM

-Contractor and Referring Party
-Employer and Responding Party

• STATEMENT OF CLAIM

Referral

An aerial photograph of a large bridge under construction in a mountainous region. The bridge spans a deep valley with a river below. Several yellow cranes are visible on the bridge deck, and the surrounding landscape is hazy and green.

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A. INTRODUCTION

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F. RELIEF SOUGHT

A. Introduction

1. The parties to this dispute are:
 - The Contractor -
 - The Employer -
1. On 5 September 20...the parties.. entered into a contract (the "Contract") for the upgrading of alignment / track formation / infrastructure and electrification of approximately 117km of existing single line railway.
2. The Project name is Bulgaria
3. The Contract number is Europe
4. Sub-clause 20.4 of the GCC provides that disputes may be referred to a Dispute Adjudication Board ("DAB") and pursuant to sub-clause 20.2 the parties appointed .Mr. X as the sole DAB member.
5. Mr X agreed to serve as the sole DAB member in a DAB Agreement signed by the parties and Mr X in January 20....

B. The Dispute

The disputes referred to the DAB by the contractor in this Statement of Claim are:

- (a) the quantification of the additional costs (including prolongation costs) attributable to sub-claim AI-07; and
- (b) contractor's entitlement to an additional 40 days extension of time (in addition to the 102 days already determined by the Engineer) attributable to sub-claim AI-07.

On 4 October the contractor issued a Notice of Dispute in respect of a dispute as to the final account to be paid to the contractor.

On 7 October the contractor issued a Notice of Intention to refer the dispute set out in its letter dated 4 October to a DAB in accordance with sub-clause 20.4 of the GCC.

On the same day, 7 October, the Engineer wrote in response to contractor's Notice of Intention to refer the dispute to DAB dated 4 October 2 requesting clarification of the dispute.

C.The Claims

1.	AI-04 - construction permits	Claim 1 "Lyubenovo claim"	Compendium claim
2.	AI-07 - closure of a private industrial line at L village		
3.	AI-09 - construction permit for the north ramp of the underpass		
4.	AI-05 - construction permit for the noise barriers	Claim 2	

B. The Claims

- In this Statement of Claim contractor seeks the additional costs (including prolongation costs) attributable to sub-claim AI-07 and an additional 40 days extension of time (in addition to the 102 days already determined by the Engineer) attributable to subclaim AI-07. The facts are well known to the parties and are summarised below for the benefit of the DAB.
- Sub-claims AI-09 and AI-05 have been determined by the Engineer to be concurrent with and subordinate to sub-claim AI-07. Sub-claims AI-04, AI-11 and AI-03 have been rejected by the Engineer. The sub-claims are referred to for background purposes only and are not pursued in this Statement of Claim

Particulars of breach to follow for each claim

D. Delay

- It is contractor's current position that it was in fact entitled to 142 calendar days' extension of time from to the date of Taking-over on See Appendix I.
- Accordingly, contractor seeks an additional 40 days extension of time up to It also seeks the additional costs (including prolongation costs) for the entire 142 days of delay.
- Further, contractor will strongly deny any assertion by the Ministry in their Response that there is any concurrency with the catenary design, procurement and installation or with any other alleged Contractor risk events of greater causative potency during the relevant impact periods for that 142 calendar days of delay.

E. Quantum

For the delay and disruption caused by the Ministry's failure to close the private industrial line and give contractor *"right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender"* (sub-claim AI-07) Contractor is entitled to Cost plus reasonable profit under sub-clause 2.1 of the GCC.

Reasonable profit includes all reasonable profit which would have been earned had it not been for the Employer risk event

The total sum is calculated as €2,613,817.50 plus interest and costs. See Appendix 2.

The Costs are calculated during the impact periods at the date of the delay when they were actually incurred and not during the prolongation period.

E. Relief sought

The Referring Party claims:

- **An extension of time of 40 days from 9 November to 20 December**
- **Payment of €2,613,817.50**
- **Interest at 10% over the European Central Bank rate in accordance with Decree No. 100 of the Council of Ministers dated 29 May 2012**
- **Costs, fees and expenses of these proceedings, including all reasonable legal fees and other related costs and expenses.**
- **Such other sums or such other relief as the DAB considers due**