

**THE DISPUTE SETTLEMENT**  
**AND**  
**THE DISPUTE ADJUDICATION BOARD (DAB)**

By

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**1- The Engineer**

A topic which has been the subject of much discussion in recent years is the role of the Engineer in the **FIDIC** forms of contract. This role has always given rise to some problems particularly for those not familiar with British practice and standard forms, from which the **FIDIC** forms of contract have been developed. Problems in understanding the role stem from the way in which the Engineer's role has developed historically in the British tradition whereby the Engineer may act, on the one hand as the agent of the Employer during the construction of the works, and on the other hand, as an Adjudicator of disputes between that Employer and the Contractor.

Others find it peculiar that in the traditional **FIDIC** forms the Engineer, while not a party to the contract between the Employer and the Contractor, is in fact empowered under various Clauses of the Conditions of Contract to give instructions and to make decisions, determinations or variations which are binding on the Parties to the contract unless subsequently changed by an Arbitrator.

However, it has been equally argued by others that in the **FIDIC** Conditions "The Engineer" is an essential factor and if the power of the Engineer is eroded much of the logical system built up in the conditions will cease to make sense. For example, Clause 13 in the fourth edition of the Red Book states that :

*.... the Contractor shall execute and complete the Works  
.....in strict accordance with the Contract  
to the satisfaction of the Engineer "*

Clause 67 in the same document contains the following wording :

*If any dispute between the Employer and the Contractor arises ..... the matter in dispute shall, in the first place be referred to the Engineer The Engineer shall give notice of his decision to the Employer and the Contractor "*

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The complete text from which these quotations are taken should be read in order to obtain the full picture. However, the quotations give an indication of the powers of the Engineer as stated in the conditions of contract. They also show the importance of the Engineer's integrity and independence as well as the necessity that he be highly qualified and capable of acting as an unbiased solver of disputes on a construction site. **FIDIC** has long believed that an unbiased qualified Engineer, independent of both the Employer and the Contractor, should act to resolve problems arising during construction in the common interest of all Parties involved.

However, while this has been accepted by many Employers and welcomed by a number of Contractors over a long period, there has always been a view from some Employers that the system is unfair. Particularly in certain developing countries there has been a concern that, with the consulting Engineer and the Contractor often both coming from the developed world, there is a risk that the Employer would not be treated fairly. On the other hand some Contractors have argued that as the consulting Engineer is paid by the Employer, he will put the Employer's interests before those of the Contractor.

In the Red Book at present there is a requirement (Clause 2.6) for the Engineer to act impartially when determining values, granting extensions of time and making decisions. In addition in the terms of Clause 67 if a dispute arises between the Parties to the contract the Engineer is required to act in a quasi arbitral role in deciding how such a dispute is to be resolved.

In the Yellow Book there are similar requirements for the Engineer to act impartially.

A departure from the traditional role of the Engineer has been made in the case of the Orange Book. In this case there is no Engineer as such. Many of the Engineer's duties in the Red and Yellow Books are, in the case of the Orange Book, to be carried out by the Employer's representative, who may in fact be a consulting Engineer.

The difference between the earlier forms, that is the Red and Yellow Books, and the Orange Book is that the Orange Book does not explicitly require the Employer's representative to be impartial, only that in matters involving time and money he should act fairly and in accordance with the contract (Clause 3.5).

In the matter of dealing with disputes, in the Orange Book the Engineer's role has been delegated to an independent Dispute Adjudication Board (DAB). This board, which may comprise one or three members, is appointed by the Employer and the Contractor at the beginning of the contract. The Board keeps in touch with the work in progress and can be mobilised at very short notice to adjudicate in the case of a dispute. The DAB is paid for jointly by the Employer and the Contractor.

It is hoped that the arrangement adopted for the Orange Book, particularly the introduction of the DAB, will deal with some of the criticisms of the role of the Engineer which have become evident in recent years.

In carrying out the up-dates of the Red and Yellow Books, **FIDIC** has taken into account the various arguments about the role of the Engineer and recent developments in the field of dispute resolution.

A survey on the use of the Red Book undertaken by Reading University identified nineteen "worst features" of the current Red Book and sixteen "best features". The Engineer's role headed the list of "worst features" and was sixth in that of "best features". These rankings confirmed the conclusion which had been reached from other surveys and enquiries made by **FIDIC** which showed that there would be no single answer likely to meet the wishes of all users. Some still favour the Engineer acting in a



traditional independent role while others prefer to have an Engineer acting solely as the Employer's agent, with dispute resolution being handled by some other body. It has therefore been decided that in the Red and Yellow updates options should be available to enable the Employer to decide when calling for tenders how the Engineer should act. Sub-Clause 3.5 covers general actions by the Engineer including agreeing and determining matters arising in terms of the contract. This sub-Clause requires the Engineer to act fairly and in accordance with the contract taking account of all relevant circumstances.

The general conditions of the updates make provision for disputes to be adjudicated by a Dispute Adjudication Board (DAB) of either one or three persons. However, the particular conditions offer the option of the Engineer acting as the Adjudicator. This is achieved by saying that the Engineer will then be the DAB, although he will be remunerated solely by the Employer as was the case in FIDIC's previous standard forms. When the Engineer is appointed as the DAB, he is required to act impartially.

In the Silver Book there is no Engineer. The Employer may if he so wishes appoint a representative to act on his behalf. Disputes will be handled by a DAB.

## **2- CLAIMS AND THE DISPUTE ADJUDICATION BOARD (DAB)**

For the reasons explained above, there has in recent years been a move away from the Engineer as the party with authority to make decisions in the event of disputes. For example, the World Bank in its Standard Bidding Document for Procurement of Works (January 1995), while generally mandating use of the FIDIC Red Book, has made a few significant changes one of the most important being substitution of a three man Dispute Review Board (DRB) to replace the Engineer's role in Clause 67 for all contracts whose value exceeds \$50 million. For contracts less than this value the Bank permits the Employer to appoint a DRB, or to have a single Disputes Review Expert (DRE) or to follow the Red Book fourth edition and to retain the Engineer to act as arbiter in the first instance. The World Bank requires such an Engineer either to be an independent consulting Engineer or, if part of an otherwise commercial organisation, to demonstrate professional impartiality for the project in question.

In the UK standard forms of contract there have also been changes in the Engineer's traditional role. In an important review of the British construction industry carried out by Sir Michael Latham in 1994, the view was expressed that contracts in which an Engineer acting as contract administrator is also an impartial Adjudicator between the Parties do not relate easily to reality on modern construction projects. In Latham's view modern contract conditions should provide for a pre-determined impartial Adjudicator (sometimes referred to as a referee or expert) to resolve disputes. Latham's view has been the subject of legislation in the "Latham Bill" which gives each party to a construction contract the right to refer a dispute to adjudication.

FIDIC itself in its Orange Book has changed from the concept of an Engineer with a role in solving disputes and has, in that standard form of contract, introduced a DAB instead. In addition, FIDIC has in recent years published supplements to its Red and Yellow Books in which provision is made for DABs to replace the Engineer in determining disputes. With this background FIDIC's updated Red and Yellow Books, together with the new Silver Book, all make provision for a DAB for dealing with disputes.



Adjudication aims to provide a rapid and cheap method of solving construction disputes using informal procedures to be determined by the Adjudicator. By its nature, it may not produce the same degree of legal precision which would result from a lengthy arbitration or litigation. Under **FIDIC's** procedure the decision reached by the DAB is intended to be implemented forthwith and is contractually binding unless or until reversed by one of the subsequent procedures (that is amicable settlement or arbitration). It should be noted that the way in which the decision of the **FIDIC** DAB is to be implemented is similar to that formerly intended for decisions made by the Engineer.

In this respect the **FIDIC** DAB procedure differs from the World Bank DRB. Under the World Bank procedure the Board makes its recommendation but if either party is dissatisfied with the recommendations and decides to commence arbitration, that party is not under any obligation to implement the recommendation.

Turning now to the specific provisions in the **FIDIC** updates (and to the new Silver Book), Clause 20 of the Conditions covers the procedures for claims, for the appointment and operation of the DAB, and for amicable settlement and arbitration. The new documents also contain a form of Agreement for the members of the DAB and Procedural Rules.

Contractors' claims are dealt with in sub-Clause 20.1. The Contractor is required to give notice of a claim event not later than 28 days after the circumstance-giving rise to the claim.

The Contractor is also required to keep contemporary records necessary to substantiate his claim and such records shall be available to the Engineer. Within 42 days of the event-giving rise to the claim, the Contractor is required to provide full-supporting particulars of the claim and of the extension of time and/or additional payment claimed. The Engineer may agree to an extension of this 42-day period if there are good grounds for doing so. If the Contractor fails to comply with the above timetable he will forgo any extension of time or additional payment.

In this respect the new documents are stricter than earlier editions which treated the Contractor more favourably in the event of late notifications and submission of details. However, **FIDIC** feels that the wording in the updates is reasonable and fairer to the Employer in a claims situation. To ensure that Contractors' claims are dealt with timeously, the revised documents impose a time limit on the Engineer within which he must respond to the Contractor. There was no such time limit in the earlier editions.

Sub-Clauses 20.2 and 20.3 in the updates state how the DAB is to be appointed. The Board, as defined by **FIDIC**, may comprise one or three members. The Employer will decide prior to issuing the tender documents how many members are to be appointed and this information will be given in the Appendix to Tender. The Parties may of course agree to change the number prior to contract award. A three-person DAB is suggested where the estimated contract value exceeds US\$25 million, although the types and complexity of the activities to be carried out should also be taken into account. For complex projects involving a number of different disciplines it may be appropriate to appoint a one person board for each major field of expertise. However, the use of such multiple boards may give rise to problems as, when a dispute arises, the Parties may be unable to agree which field is applicable and therefore to which board the dispute should be referred.



It is essential that the members of the DAB are mutually agreed by the Parties and not imposed by one party on the other. For this reason Sub-Clause 20.2 requires that each party nominates one member for the approval of the other party and that the Parties should mutually agree upon the appointment of the third member, who will act as chairman. The members nominated by the Parties must not be regarded, and must not regard themselves, as representatives or advocates of the party nominating them and must act independently and impartially.

For a one person DAB or Chairman of a three-person DAB, it is again essential for to be agreed by both Parties but in the, event that the Parties cannot agree an Appointing Authority is to be named in the Appendix to Tender empowered to make the necessary appointments. It is suggested that the President of **FIDIC** should be made this appointing official. It should also be noted that **FIDIC** maintains a list of qualified professionals who are considered to be suitable to act as DAB members.

The members of a DAB should have appropriate technical or other professional qualifications with experience in the type of work involved in the project and the interpretation of contract documents, as well as being fluent in the language of the contract. While members of the DAB are expected to have reasonable technical knowledge of the work involved, if the dispute is of a specialist technical or legal nature the DAB may consider it needs advice from an expert in order to make its decision. In this event, it is intended that, on the recommendation of the DAB, the Parties should jointly appoint such an expert on an individual basis similar to the appointment of each board member.

**FIDIC** believes that it is important for the members of the DAB to be appointed early in the contract well before any dispute has arisen. It is desirable where possible to agree membership of the DAB before the contract becomes effective although circumstances may prevent this, given that pre-contract discussions may give priority to other matters. It is also important that the DAB commences its regular visits to the site of the construction works as early as possible during the contract period so that, in the event of a dispute arising, the DAB has a good knowledge of the background to the dispute and of the circumstances which have brought it about.

In fact it is through these regular visits that DABs, or similar boards, have been successful on some projects in preventing disputes arising. Although the DAB only has full power to act formally in the event of a dispute, the informal advice of experienced, independent professionals has on some projects been of help in preventing the occurrence of disputes.

An important aspect of DABs is that payment of its members is the joint responsibility of both Parties thus removing one of the objections to the former Engineer's role in resolving disputes, namely that as he was paid by the Employer, he could not be regarded as independent. In order to simplify procedures for the DAB members, it is intended that they should submit their invoices to the Contractor for payment who will in turn recover half the cost from the Employer through the payment provisions of the contract. In the event of non-payment of board members, they may either resign or suspend their services until such time as payment is made.



Sub-Clause 20.4 deals with the procedure for obtaining the DAB's decision. Firstly the DAB only acts if a dispute has arisen and has been referred to it by one party. The DAB is then required to give its decision within 84 days of receiving notice of the dispute. However, as referred to earlier, the Parties should not have disregarded the possibility of jointly seeking an opinion from the DAB on any matter relevant to the avoidance of a potential dispute. The terms of appointment for DAB members prevent either party consulting the DAB independently, but do not prevent the possibility of jointly seeking an opinion from the DAB on any matter relevant to the avoidance of a potential dispute.

However, as stated above no matter can be referred to the DAB for a decision (as distinct from an opinion) unless it is in dispute. Sometimes it may be difficult to determine whether a dispute has in fact arisen, perhaps because discussions are continuing and one party (or the Engineer) has not yet come to a final position in disagreement with that of the other party. Nevertheless, even in such situations, there must come a time when one of the Parties can fairly conclude that agreement cannot be reached.

The procedural rules proposed by **FIDIC** for DAB members leave the DAB wide discretion in how it should proceed in arriving at its decision. The DAB would normally be expected to conduct a hearing and may request written documentation from both Parties to be presented to it prior to or at the hearing. Within the time restrictions under which it is required to operate, the DAB should ensure that each party has a reasonable opportunity to present its case in relation to the dispute referred to the DAB for a decision. The DAB's decision should set out briefly the matter in dispute, the relevant facts, the principles (including contractual provisions) to be applied and the basis for its decision.

There is a preference among some Adjudicators to issue "non-speaking" decisions, that is decisions not disclosing their reasons. This stems from the fact that the less an Adjudicator discloses of his work, the less anyone can find fault with it. The provision of reasons will increase an Adjudicator's vulnerability to claims against him, because the details of the workings and calculations may provide the very evidence that would otherwise be lacking.

However, **FIDIC** believes that if the decision is properly written and well reasoned there is a better likelihood that the Parties will accept that the DAB has fully studied all relevant matters and that, if the dispute were referred to arbitration, the arbitral tribunal would not reach a different decision. It should also be noted that as the DAB should, as a result of its regular visits to the site, have a proper appreciation of the issues leading up to a dispute, provided it presents a properly and well reasoned argument for its decision, it is unlikely that an arbitral tribunal will reverse its decision.

A Form of Agreement is provided in the new **FIDIC** documents to cover both three member and one member DABS. Each DAB member enters into his own agreement with the Parties to the contract. It is envisaged that the agreement should be identical for the three members of a DAB. It is also recommended that the three members should receive identical fees, with the possible exception of the chairman.

In terms of Clause 3 of the Agreement a DAB member is required to be and to remain impartial and independent of the Parties and to notify them of any circumstances which might be such as to call into question his impartiality or independence.



Clause 4 is intended to ensure that a Board member is experienced in the type of work involved in the project and then makes stipulations with regard to the member's availability, familiarity with the project and its progress, confidentiality, and non-assignment.

Remuneration of the DAB member is covered in Clause 6. It is intended that members should negotiate mutually acceptable fees with the Parties. Fees are generally paid partly on the basis of a monthly retainer and partly as a daily fee for time spent travelling, on site visits, preparing for hearings and writing decisions. The retainer is reduced by one half in the month following issue of a taking-over certificate and will cease when the Agreement is terminated.

Wording is provided to permit periodic adjustment of the fees during the period of the appointment. For an appointment which might last for a number of years it is considered that such provision should be made, although a possible objection is that this could give one of the Parties an opportunity, if dissatisfied with the DAB, to obstruct its continuation.

### 3 - DAB PROCEDURAL RULES

The procedural rules for the DAB cover the following aspects of its activities:

1. Visits to the site. Such visits are to be at regular intervals and at times of critical construction events. The Rules set out how the timing and agenda for visits will be established and who shall attend. At the conclusion of each visit and before leaving the site, the DAB is required to prepare a report on activities undertaken during its visit.
2. The Rules provide for the supply to the DAB by the Employer and the Contractor of copies of documentation and information relevant to the project.
3. Procedure for dealing with disputes. It is left to the discretion of the DAB whether or not to conduct a hearing on the dispute. Within the time limitation imposed, it is essential that the DAB affords both Employer and Contractor reasonable opportunity to present its case in relation to each dispute referred to the DAB for a decision.
4. Decisions of the DAB to be given in writing. While it is hoped that the DAB will reach a unanimous decision, it is recognised that there may be occasions when this does not happen and, in this case, the applicable decision will be made by the majority members.

The remainder of the claims and dispute procedures in the updates follow those of the previous editions. If either party is dissatisfied with the DAB's decision, then sub-Clause 20.5 requires the Parties to attempt to settle the dispute amicably. However if amicable settlement is not achieved within a specified period, then the matter in dispute is to be settled by international arbitration.

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*This article is based mainly on the publications issued in the FIDIC Seminars following the GAMA in 1998 (Edmonton/Canada) and 1999 (The Hague / Holland) by the CC and the first edition of the new contracts issued Sept. 1999 by:*

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