

Letter to the Editor - The International Construction Law Review

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In an article entitled *FIDIC's 1999 Editions of Conditions of Contract for Plant and Design-Build and EPC Turnkey Contract: Is the DAB Still A Star?*, which appeared in your January 2000 issue, W. Gordon Jaynes criticizes FIDIC because the new Yellow and Silver Books (as he calls them (1)) do not provide in their respective General Conditions for a Dispute Adjudication Board ("DAB") to be established at the outset of the contract (this type of DAB being referred to as a permanent or standing DAB). Instead, the General Conditions provide for a DAB which would only be constituted if and when a dispute or disputes arise and which would normally cease to operate once a decision on the dispute or disputes had been issued (this type of DAB being referred to as an *ad hoc* DAB). On the other hand, the "Guidance for the Preparation of Particular Condition" of the new Yellow and Silver Books provides that.

"...for Certain types of project, particularly those involving extensive work on Site, where it would be appropriate for the DAB to visit Site on a regular basis, it may be decided to retain the services of a permanent DAB. In this case, [the relevant provisions of the] General Conditions, and the Dispute Adjudication Agreement, should be amended to comply with the corresponding wording contained in the FIDIC's "Conditions of Contract for Construction" [the new Red Book]."

As Mr. Jaynes notes, the permanent DAB continues to be provided for in the General Conditions of the new Red Book.

In particular, W. Jaynes states that:

1. no explanation for this "script revision" (as compared to the 1998 Test Editions *of the new Books*) has been given publicly yet by FIDIC, and
2. based on discussions "among various persons", Some possible explanations had been suggested as reasons for this change, which Mr. Jaynes then discusses, seeking to refute each one of them.

He then concludes by stating that:

"Obviously, the reader who uses the new Yellow or Silver Books is urged to try to establish the DAB at the outset of the contract..."(p. 46)

As Legal Advisor to the FIDIC Task Group responsible for preparing the new editions, and as an advocate of this change from the Test Editions, I would like briefly to respond to Mr. Jaynes by this letter.

Mr. Jaynes is mistaken when he states *that* no explanation to this "script revision" has been given publicly yet by FIDIC. I gave an explanation of why this change from the Test Editions was made at

public conferences organized by FIDIC to introduce the new editions in The Hague in September 1999 and in London in October and December 1999.

As to the reason for this change, I cannot do better than to refer to my paper which was published, with minor changes as an article entitled "*FIDIC's New Standard Forms of Contract - Force Majeure, Claims, Disputes And Other Causes*" in the April 2000 issue of ICLR. There I explained the basic reason for the change as follows:

"The main reason for a standing (or permanent) DAB is to deal with disputes on or related to the construction site. But, when the contract provides mainly for the design and manufacture of electrical or mechanical equipment in a factory rather than construction work on the site (as is true of many projects for which the new Plant and EPC Contracts would be used), the incidence of disputes should be much less and, hence, it is much more difficult to justify the time and expense of maintaining a standing DAB in such a case. Accordingly, FIDIC has opted for an *ad hoc* DAB in the General Conditions for these types of contracts."

As Messrs. Matyas, Mathews, Smith and Sperry recognized in their book "*Construction Dispute Review Board Manual*", the Dispute Review Board (and *there is no* reason to distinguish a Dispute Adjudication Board in this respect) is "a method for avoiding and resolving disputes at *the job site* (emphasis added). (2) If for much of *the contract period* relatively little work is done at the site, much of the justification for a permanent DRB or DAB falls away. In the case of the new Yellow and Silver Books, FIDIC anticipates that much if not most, of the work under those forms of contract will not be done at the site but at a factory off the site (typically in another country) or elsewhere. Accordingly, it appears inappropriate, in the case of those books, to provide for the use of a permanent DAB as a general rule (by providing for it in the General Conditions of those contracts). Instead an *ad hoc* DAB is provided for in the General Conditions of those Books. On the other hand, the Guidance Note for each such Book makes it clear (as mentioned above) that, where there will be considerable site work, then a permanent DAB may be appropriate instead of an *ad hoc* DAB in the case of those Books.

As an example, take a natural gas-fired power plant which is one of the most popular types of power plants being built these days and which would be a project to which the Silver Book would be particularly suited. In the case of a recent project in Africa that I am familiar with, for at least half of the construction period the turbine units were being built in a factory in Europe and little work was being done on site apart from the construction of foundations and the base plate. Thereafter, the units needed to be installed, equipped and made operational on site, but this work on site was relatively unimportant compared to the equipment supply, as indicated by the price for each type of work. Whereas the price for installation and construction was US\$ 15 million, the price for the equipment supply was US\$ 95 million.. When, during the contract negotiations, a permanent DAB was suggested, it was rejected out of hand as being an unjustified expense, given the relatively small portion (and value) of the work being done on site. Accordingly, the parties opted for an *ad hoc* DAB.

I note that there is precedent in other international forms of contract for the use of a procedure similar to the *ad hoc* DAB. Thus, the forms of contract published by the Engineering Advancement

Association of Japan ("ENAA") for process plants (1992) and power plants (1996) and, hence, for limited work on site, provide (as an option) for disputes to be decided before arbitration by an expert or panel of experts which is appointed if and when a dispute arises. This procedure is similar to the procedure for an ad hoc DAB provided for in the new Yellow or Silver Books.

It is unnecessary to comment on Mr. Jaynes' speculations about the other reasons for the change in the new Books, given that the basic reason is the one I have described above. However, I would like to comment on one point Mr. Jaynes makes. He argues that the use of an ad hoc DAB on the grounds that;

"once disputes have reached the point that negotiations have failed, it is likely to be difficult or impossible to agree to establish a DAB"

The new FIDIC Books provide a solution to this difficulty. Sub-Clause 20.3 provides that if a party fails to participate in establishing a DAB by a specified date, then an appropriate neutral person (the *Guidance Note* provides that this could be the President of FIDIC or a person appointed by the President) will make the appointment in place of the defaulting party. Thus, the refusal of a party to participate in the establishing of a DAB should not prevent the formation of the DAB.

Moreover, a party will be ill-advised, as a practical matter, to refuse to participate in establishing a DAB. If a party should refuse to participate in establishing a DAB, the appointment of the DAB will be made without the defaulting party, placing the defaulting party at a disadvantage as, unlike the other party, it will not have its own candidate on the DAB and may not have had the chance to approve in advance the other members of the DAB. A well advised party would not ordinarily allow itself to be placed at such a disadvantage. Accordingly, I believe this is a false issue.

There is no doubt that, as I have advocated, (3), the standing or permanent DAB represents a great advance over the former system under the PIDIC and other civil engineering contracts whereby disputes were resolved, on an interim basis (at least), by the Engineer. However, at the same time, its undoubted merits should not be exaggerated. It is not suitable for all projects.

No one, to my knowledge, has advocated the use of a standing DAB in a contract purely for the manufacture and/or supply of equipment. Accordingly, why should a standing DAB be advocated as being the preferred procedure for a form of contract that is primarily or largely for the manufacture and supply of equipment rather than for construction on site, as is the case of the new Yellow Book and Silver Book? The additional expense and administrative work may not be justified.

Rather than being criticized, I believe that FIDIC should be congratulated for recognizing that where much of the work on a Construction project is done off-site a different DAB system may be justified from the one that applies to the typical large civil works project with extensive work on site. The need for a different system is one that forms of construction contract should recognize and it is, I believe, one of the numerous contributions to good contract practice made by the new Books. (4)

Mr. Jaynes has by his comments both written and oral, made valuable contributions to the development of international construction contract practice over the years and all of us working in the international construction industry owe him a debt of gratitude. But he is wrong in urging users of the new Yellow and Silver Books to establish permanent DAB regardless of the type of construction project concerned and, in particular, the extent of work involved on site.

Very truly yours,
Christopher R. Seppala

References

1. For convenience, I shall use Mr. Jaynes terms here. Their full names are Conditions of Contract for Plant and Design-Build and Conditions of Contract for EPC Turkey Project
2. Matyas Mathews, Smith and Sperry "Construction Dispute Review Board Manual", McGraw-Hill (New York, 1996), page 3
3. See, Seppala, "The New FIDIC Provision for a Dispute Adjudication Board" (1997, ICLR, 445)
4. By way of anecdotal evidence, a member of the FIDIC Contracts Committee has been appointed by the International Chamber of Commerce on two occasions recently to act as an ad hoc expert to resolve disputes under international turnkey contracts before arbitration. In neither of these cases he was involved with did he consider that he would have been better equipped to deal with disputes if he had been appointed earlier and made regular visits to the site.