

PERIODICAL MEETINGS OF THE DAB

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FIDIC Contracts Committee*

Introduction

John Milton wrote in one of his sonnets in 1673 "They also serve who only stand and wait. " This is very true of the Dispute Adjudication Board.

The DAB is there to make decisions in the event a dispute is referred to them. However, in the interim, they have an important role to play in the smooth running of the project, simply by being there.

So what do they do that is so important?

Although each member is approved and accepted by both parties prior to his appointment, there are certain things he has to remember in the way he acts and behaves which are reflected in his Agreement with the two parties, which is a tripartite agreement signed by the member, the Employer and the Contractor.

Firstly, he is, and must be seen to be, completely independent and impartial. If he has had any professional or personal relationship with either party, he must declare it to the parties and the other members. Provided he has declared such relationships, then the parties may accept or reject his nomination - but if they accept him as a member of the DAB he must carefully exercise his duty of impartiality. Thereafter he must openly declare anything which may arise which could affect his perceived impartiality - for example, if his company became involved in another contract in which the Contractor or Employer were also involved.

Secondly, in the performance of his duties, the member must ensure that everything he does meets the requirements of fairness and impartiality called for in the Agreement - for example, not showing favour or giving advice or consultation to one party without the knowledge and agreement of the other party.

Basic Rules

The DAB must also be aware of, and follow, the Procedural Rules which are published in the 1999 FIDIC documents. The first four of these Rules apply to periodical visits and the remaining nine refer to procedures when a dispute has been referred to the DAB.

However, when it comes to the Rules applying to the visits, I believe they should be used and applied with a good helping of common sense. To best use the rules in a way which is going to be of

benefit to the project and the parties.

So let us look at Rules 1- 4.

1. The DAB shall visit the Site at regular intervals not exceeding 140 days. This means 3 or 4 times per year - but "not less than 70 days" between visits.
2. The timing and agenda for the meetings is agreed by the DAB and all parties. "The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims."
3. Site visits are coordinated by the Employer, but attended by all parties. "At the conclusion of each site visit..... the DAB shall prepare a report on its Activities during the visit....."
4. The parties are required to provide the DAB with requested documentation such as progress reports, variation instructions, etc. relevant to the performance of the Contract.

Rule 1. The frequency of the meetings.

I would suggest that the figures given in the FIDIC documents - between 70 and 140 days - are indicative rather than mandatory. Provided the parties all agree, the Rules can be adapted to suit the needs of the project and the parties involved. Normally visits at say 3 months intervals will give the DAB sufficient opportunity to see significant progress on site. I would not recommend longer intervals (from experience), since one must remember that the DAB is spending the rest of its time doing other work, and does not retain the day-to-day familiarity with the project as the parties. Thus, especially during the early visits, the first half day is spent trying to remember the details of the work and putting names to faces you last saw 3 months ago.

Rule 2. Agreement on timing and Agenda.

This is important, bearing in mind that there will probably be quite a few people involved.

Regarding timings, I would strongly recommend fixing and agreeing the dates for site visits well in advance - for example, the next 3 or 4 visits (i.e. covering the full year). If this is not possible, at least agree on the dates for the next visit before leaving the site.

An Agenda for the visit should be prepared and circulated. This need not be a detailed or formal agenda - more of an outline showing planned meetings, visits around the site and so on. Any specific areas of concern can be highlighted so the parties and the DAB can prepare themselves, but much of the detail will depend on matters which the parties themselves wish to bring up during the visit.

Rule 2 also states that "The purpose of the visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims." This

is of course true, but I would suggest that the first priority of the DAB, if it is to perform its function effectively, is to become an accepted part of the project set up and to gain the trust and respect of the parties.

In practice, this takes time. To a certain extent it will depend on how the DAB has been chosen. If each party has chosen its own nominee, it will take time for the other party to accept that the chosen person (even if they have accepted him on paper) is really independent - someone they can talk to and trust. If the DAB has been chosen from a list of potential members included in the tender documents by the Employer (with the Contractor free to add or delete names), the Contractor may well feel reluctant to change the list, and then when the DAB is selected, there is the feeling that the DAB is based on the Employer's choice. The DAB may then be faced with a certain suspicion by the Contractor - and it is important for the DAB to break down this 'barrier' and quickly establish its independency in order to gain the full trust of the Contractor. Another 'barrier', especially if the members of the DAB tend to be consulting engineers, is that traditionally, consulting engineers are engaged by employers, and contractors may take some time to accept that the DAB is even capable of acting fairly and independently.

Thus it may not be easy, and will certainly take time to break down these barriers.

Rule 3 Site Visits

Rule 3 talks about the parties attending the site visits, and naturally all parties should be involved. If the meetings with the parties during the site visits are joint meetings, it may well be that they take on a 'master/servant' atmosphere with the Contractor frightened to say what he wants or needs to say in the presence of the Employer. Such meetings tend to be counterproductive and the DAB should recognise if such a situation exists and try to overcome it.

Strangely, the duty of independence and fairness can also be a problem for the members of the DAB, especially if they are consulting engineers who traditionally have, and still are in their day-to-day work, working for and with employers - and the DAB member must constantly keep this in mind.

One way to overcome these barriers, with the agreement of both parties, is to hold separate meetings with the parties - for example, a meeting with the Contractor including a visit

around the site, followed by a meeting with the Employer/Engineer. The need for a joint meeting after this can be decided based on the particular circumstances.

Each party then has the opportunity of talking to the DAB about its problems, actual and foreseen, on a face-to-face basis. This helps build up the element of trust and openness, and such discussions often help in clarifying areas of concern and even discussing such concerns with the other party in a neutral atmosphere which might not otherwise be possible.

"Prevention is better than cure", and the ability of the DAB to prevent potential problems in this way can be very effective, and of course beneficial to both the parties and the project.

Rule 3 also requires the DAB to prepare a Report before leaving the site after each visit. Such a Report can be invaluable, not only as a record, but also as a reference document at future meetings when reviewing progress and potential claim/dispute situations.

Rule 4 Provision of documents

Rule 4 requires the parties to furnish the DAB with any documents the DAB may require relating to the performance of the Contract, and goes on to state that any communication must be sent to all parties. This is again stressing the fact that the DAB is expected to act totally independently and not show favour to either side.

In normal circumstances, I would suggest that the most important document for the DAB to receive, in advance of its visit, is a copy of the current/latest progress reports. A well structured progress report should normally contain a complete record of all matters pertaining to the contract - not only progress, but also cash flow records, variations (and their status), claims (and their status), personnel and accident records, photographs etc. The DAB should be able to identify from this report any further documents they wish to see.

There is no point in the DAB receiving a mass of documents which it will never have time to read anyway.

At the Meetings

The job of the DAB at these meetings/visits is basically to Look, Listen and Learn.

Very often, the details of the meeting will depend on what the party/ies want to discuss - their worries and concerns. And the DAB's job is to listen, and where appropriate, give comment.

It is not the DAB's job to tell the parties how to run the job or do the work. However, suggestions on measures or actions to ease a situation or avoid a potential conflict are, I feel, acceptable. Great care must be taken by the DAB not to be seen to be taking sides or expressing opinion which could be used by a party in submitting a dispute to the DAB for decision. For example, the DAB should not give advice on how to formulate a claim - but maybe a clarification of the procedures would be OK.

Also, in the case of joint meetings, the Chairman of the DAB must try to ensure that each party

gets a fair opportunity to speak - if one party is too dominant, the Chairman should try to ensure that the other party has a fair say. Sometimes this is difficult, and is one of the advantages of holding separate meetings.

Another advantage of separate meetings is that the party concerned will tend to be more open - especially if a relationship of trust has been established - and potential concerns can be discussed more effectively.

Opinions, advice, recommendations, and the like, if asked for and if given, must be presented with great care - and the other party must be kept informed of everything said.

The DAB must however avoid being drawn into too much detail or giving solutions to problems - and the party concerned may need reminding that the DAB is impartial.

Using the DAB to Avoid Dispute

Sometimes, when the parties are facing a potential dispute situation, they may call for a joint meeting with the DAB to see whether there are grounds for an amicable solution - with the DAB acting as some form of joint adviser (to both parties), giving such help and guidance as may be asked for.

In such cases the DAB must remember:

- It is not a dispute
- It is not a Hearing
- They are not there to make a decision
- They are there at the request of the parties to advise and, if possible, guide towards an agreement between the parties.
- It is the parties who decide if an agreement can be reached and the terms

However, having the opportunity to discuss the problem openly with a third party can sometimes help in reaching a solution which was not possible in a two-party confrontation.

Apart from matters raised by the parties, very often the site visits and meetings will enable the DAB to identify possible areas of future disagreement - even if such matters have not yet been identified by the parties themselves.

Conclusion

Going back to what John Milton said, the DAB also serves a vital role, even when it is not

involved in resolving disputes which have been formally referred to it.

However, the DAB must remember that it is not on Site as God's gift to the construction industry. It is there as a body, appointed by both parties, as a member of the project team with a role, not only to give decisions on disputes referred to it, but also to help in the prevention of disputes developing. The DAB should base its actions on good engineering common sense - it is unlikely that the members will have the legal knowledge and skills to ensure legal precision and correctness in all they do and say - and certainly they do not often have the time or the *financial* resources to undertake a full legal analysis.

Their job, as an intermediary step between the Engineer's determination and formal arbitration, is to take actions and decisions which will avoid the need to go to arbitration. And to do this, I would suggest, one needs experience and common sense, rather than legal precision. Finally the DAB must remember that, under Clause 20, either party has the right to refer the matter to arbitration if they are not happy with the DAB's decision. If they do so, this is no reflection on the DAB as such, and the DAB should recognise this and not let such a move by one of the parties affect their relation with that party.

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However, in the interim, they have an important role to play in the smooth running of the project, simply by being there.

So what do they do that is so important?

Firstly, they are, and must be seen to be, completely independent and impartial.

If any member has had any professional or personal relationship with either party, he must declare it to the parties and the other members.

Secondly, in the performance of his duties, for example, not showing favour or giving advice or consultation to one party without the knowledge and agreement of the other party.

Basic Rules

The DAB must also be aware of, and follow, the Procedural Rules which are published in the 1999 FIDIC documents.

However, the Rules applying to the visits, should be applied with a good helping of common sense. (Rules 1- 4)

To best use the rules in a way which is going to be of benefit to the project and the parties.

Rules 1- 4.

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"The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims."**

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Rule 1.

The Frequency of the Meetings

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- Provided the parties all agree, the Rules can be adapted to suit the needs of the project and the parties involved.**
- Normally visits at say 3 months intervals will give the DAB sufficient opportunity to see significant progress on site.**
- I would not recommend longer intervals (the DAB does not retain the**

day-to-day familiarity with the project as the parties.)

Rule 2.

Agreement on Timing and Agenda

Fix and agree the dates for site visits well in advance

An Agenda for the visit should be prepared and circulated.

Rule 2 also states that "The purpose of the visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims."

However the first priority of the DAB, if it is to perform its function effectively, is to become an accepted part of the project set up and to gain the trust and respect of the parties.

Breakdown the barriers of suspicion.

Contractors may take some time to accept that the DAB is even capable of acting fairly and independently.

Rule 3.

Site Visits

All parties should be involved in the Site Visits.

Joint meetings may well take on a 'master/servant' atmosphere with the Contractor frightened to say what he wants or needs to say in the presence of the Employer.

Such meetings tend to be counter-productive and the DAB should recognise if such a situation exists and try to overcome it.

The duty of independence and fairness can also be a problem for the DAB, especially if they are consulting engineers who traditionally work for employers - and the DAB member must keep this in mind.

Overcoming the Barriers

One way to overcome these barriers, with the agreement of both parties, is to hold separate meetings with the parties

Each party then has the opportunity of talking to the DAB about its problems on a face-to-face basis.

This helps build up the element of trust and openness, and often helps in clarifying areas of concern.

"Prevention is better than cure", and the ability of the DAB to prevent potential problems in this way can be both effective, and beneficial to the parties and the project.

Rule 3 also requires the DAB to prepare a Report before leaving the site after each visit. Such a Report can be invaluable, not only as a record, but also as a reference document at future meetings.

Rule 4.

Provision of Documents

The parties shall furnish the DAB with any documents the DAB may require relating to the performance of the Contract.

Any communication must be sent to all parties.

This is again stressing the fact that the DAB is expected to act totally independently and not show favour to either side.

In normal circumstances, the most important document for the DAB to receive, in advance of its visit, is a copy of the current/latest Progress Reports.

A well structured Progress Report should contain a complete record of all matters pertaining to the contract –

- **Progress**
- **Cash flow records**

- **Variations (and their status)**
- **Claims (and their status)**
- **Personnel and accident records**
- **Photographs etc.**

The DAB should be able to identify from this report any further documents they wish to see.

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The job of the DAB at these meetings/visits is basically to Look, Listen and Learn.

The details of the meeting will often depend on what the party/ies want to discuss - their worries and concerns.

It is not the DAB's job to tell the parties how to run the job or do the work.

Great care must be taken by the DAB not to be seen to be taking sides or expressing opinion which could be used by a party in submitting a dispute to the DAB for decision.

Each party must be given a fair opportunity to speak (one of the advantages of holding separate meetings.)

Separate meetings will tend to be more open - especially if a relationship of trust has been established.

Opinions, advice, recommendations, if asked for and if given, must be presented with great care - and the other party must be kept informed of everything said

The DAB must avoid being drawn into too much detail or giving solutions to problems.

Using the DAB to Avoid Dispute

Prevention is better than Cure”

If the parties are facing a potential dispute situation, they may call for a joint meeting with the DAB to see whether there are grounds for an amicable solution.

The DAB acts as some form of joint adviser (to both parties), giving such help and guidance as may be asked for.

In such cases the DAB must remember:

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