Dispute Avoidance: FIDIC 2017
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Construction disputes; Contract terms; Dispute boards; FIDIC forms of contract

Talk to any dispute board member and they will tell you that their primary function should be to assist parties to avoid issues turning into disputes. Although settlement of issues by agreement is always more palatable than having decisions imposed by a third party, contracting parties have not, in my experience, generally embraced the concept of using the skills, experience and expertise of dispute board members to resolve issues by dialogue, discussion and informed opinion. But is all that soon to change?

The 2017 editions of the FIDIC Red, Yellow and Silver Book forms of contract incorporate for the first-time provisions that expressly address the avoidance of disputes.

Subclause 21.3 of the new forms provides a process under which the Parties (but not the Engineer), and provided they so agree, may jointly request the Dispute Avoidance and Adjudication Board (“DAAB”) to “provide assistance and/or informally discuss and attempt to resolve any issue or disagreement” that may have arisen between the parties, prior to that issue turning into a formal dispute. The provision also permits the DAAB to invite the Parties to make such a joint request, should it become aware of any such issue or disagreement existing between the parties. The only constraints to the process are that the Parties must agree to a joint request being made, and that a request cannot be made during the period when the Engineer is acting under sub-clause 3.7 of the conditions to agree or determine the relevant issue.

Although this second constraint would not preclude the parties from making a joint request to the DAAB after the issue of a subcl.3.7 determination, given that a dispute is to be referred to the DAAB within 42 days of the date of issue of a notice of dissatisfaction or otherwise that notice will be deemed to have lapsed (subcl.21.4), in practical terms any joint request for DAAB informal assistance can be expected to be made before the subcl.3.7 process starts. This itself raises the question as to whether an Employer in particular would be agreeable to making a joint request to the DAAB for assistance without first having received the Engineer’s determination. In practice, these considerations may preclude the intents of dispute avoidance from being realised.

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What is clear is that dispute avoidance is not a mandatory procedural requirement or a condition precedent to dispute adjudication under the FIDIC 2017 books. What the written request to the DAAB should contain or set out is not indicated. Nor is it clear what the DAAB should do with the request, other than provide “informal assistance”. However, it is likely that the intent is for the DAAB to give non-binding advice and opinion to the parties, on matters such as the potential merits of the issue, the interpretation of provisions or requirements, the strengths and weaknesses of each party’s position, and so on. What it presumably would not extend to is the DAAB adopting a mediation type role between the parties, as this would not only go beyond offering “informal assistance”, it could usurp the Engineer’s role and duty under subcl. 3.7 to endeavour to seek party agreement or otherwise determine issues, and could later compromise the DAAB’s ability to decide any subsequent referral of the issue as a dispute for decision independently and impartially.

In practical terms, issues of principle would appear to be most suitable for parties to engage subcl.21.3 of the new conditions. Early views/advice on issues such as time-bars, contractual interpretation, technical requirements and so on, could provide parties with guidance on the way forward, providing certainty at an early stage and mitigating costs and time being incurred in potentially pursuing unmeritorious claims or commencing a formal dispute referral process. Less suitable for informal assistance would be issues relating to the evaluation of extension of time and cost entitlements, unless this was limited to evaluation methodologies and principles.

Whether the new provision will encourage parties to engage the dispute avoidance procedure to potentially head off referrals to the DAAB remains to be seen. In my experience, rather than proactively seek to resolve issues, Employer’s and their representatives often

1) delay and frustrate the prompt resolution of issues, using tactics such as delaying (or not issuing at all) required contractual responses and/or rejecting claims for weak reasons, to seek to delay or avoid making additional payments to contractors; or

2) prefer a third-party decision to be made in order to transfer responsibility and accountability for recognising additional entitlement away from an employee or representative of the Employer.

Including an express provision for dispute avoidance in the 2017 editions of the FIDIC Forms cannot be faulted since it should at least encourage parties to actively consider engaging the DAAB to assist with issues before they crystallise into formal disputes. But on the other hand, there will undoubtedly be concerns regarding how the DAAB can truly remain objectively independent and impartial should a dispute later be referred to them for decision which the DAAB has previously been engaged to provide informal assistance.

Although subcl. 21.3 makes clear that the DAAB is not bound by any views or advice it may have given in relation to an issue, in reality it may be difficult for the DAAB to go against its earlier opinion, unless new evidence or arguments are presented under the referral. In addition, the absence of any clear guidance or
procedure with respect to dispute avoidance, together with the fact that parties are not bound to follow or comply with any views or advice given by the DAAB, may result in parties being reluctant to pursue dispute avoidance for fear of potentially compromising their position or delaying a referral to the DAAB for decision at the earliest opportunity. It also cannot be ignored that a recalcitrant or unwilling party intent on delaying the resolution of an issue may simply refuse to agree to make a joint request for DAAB assistance and instead force initiation of a dispute referral with attendant time and cost implications.

Given the well-known frequency, cost and time implications of construction industry disputes, FIDIC’s inclusion of express provisions for dispute avoidance must be applauded.

It is to be hoped that contracting parties will look to embrace the new subcl. 21.3 avoidance of disputes provision of the 2017 editions of the FIDIC Red, Yellow and Silver Books and use it positively to facilitate amicable resolution of issues. Given the well-known frequency, cost and time implications of construction industry disputes, FIDIC’s inclusion of express provisions for dispute avoidance must be applauded. It now falls to contracting parties to change their mindsets, take a step back, and look to resolve issues promptly and by agreement.