

## DISPUTE REVIEW BOARDS/DISPUTE AVOIDANCE BOARDS

This memo is intended to set out some of the key background to the use of Dispute Review Boards<sup>1</sup> on major projects. A Dispute Review Board is, generally, created by the parties to the Contract, at the start of the Contract, to meet regularly, (irrespective of whether any dispute has been referred to it), to regularly review the progress of the Project, and, where requested, to provide a non-binding indication as to its view of the likely outcome of any dispute referred to it by either of the parties.

1. Background
2. The use of a Dispute Review Board (DRB) on major projects has substantial support on projects worldwide<sup>2</sup> and in Australia<sup>3</sup>.
3. Several major world-wide standard form agreements now include DRB clauses.<sup>4</sup> In the USA, several standard form agreements provide for the use of “project neutrals”; see, for example, AIA Contract Documents “Initial Decision Maker”; ConsensusDocs use of a “Project Neutral” or “dispute review board” as alternative to mediation.
4. The statistics on the minimal number of disputes coming out of projects with a DRB is compelling.<sup>5</sup> A number of academic studies have been published in this area.<sup>6</sup>
5. The substantive conclusion from the above is that DRBs are used widely on major projects, with great success in reducing construction contract disputes.

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<sup>1</sup> The Term “Dispute Review Board” (DRB) is used throughout this note. From time to time, as for example in the FIDIC Contracts, such a panel may be also referred to as “Dispute Adjudication Board” (DAB). The use of the word “adjudication” in this context might be a broad comparison to the fast, interim adjudication process that occurs under the statutory Security of Payment process in the UK, most states of Australia, and Singapore.

<sup>2</sup> For example, the Olympic Delivery Authority (ODA) for the 2012 London Olympic games set up, in 2008, an Independent Dispute Avoidance Panel (IDAP) to help avoid contractual disputes during construction; the Florida Department of Transportation requires DRBs on all projects in excess of \$10M; the Boston Central Artery/Tunnel project has 28 DRBs on various construction projects; in 2002, the New York City Metropolitan Transportation Authority included DRB provisions in its East Side Access Project (Source: Harmon, Kathleen M J "[CONSTRUCTION CONFLICTS AND DISPUTE REVIEW BOARDS: Attitudes and Opinions of Construction Industry Members](#)". Dispute Resolution Journal).

<sup>3</sup> See Attachment A (List of Australian projects with Dispute Review Boards)

<sup>4</sup> eg FIDIC Conditions of Contract for Construction, Clause 20.2; FIDIC Conditions of Contract for Plant and Design-Build; FIDIC Conditions of Contract for EPC/Turnkey Projects; World Bank, Procurement of Works & Users Guide (2007); ConsensusDocs 200 Standard Agreement; ConsensusDocs 300 Tri-Party Agreement for collaborative project delivery; AIA Contract Documents; ConsensusDocs 410 Design-Build Agreement (GMP).

<sup>5</sup> See, for example: The Dispute Board Federation (Geneva) 2008 International Survey, at [www.dbfederation.org](http://www.dbfederation.org); and also (USA- based) Dispute Resolution Board Foundation, at <http://www.drb.org/index.htm>

<sup>6</sup> See, for example: Gerber, P *Construction Dispute Review Boards*, [1999] ADRJ, Vol. 10, No. 1, February 1999; Gerber, P *Dispute Avoidance Procedures (DAPs) – the Changing Face of Construction Dispute Management*, [2001] 18 ICLR 1; Gerber, Paula (2001) ‘Dispute Avoidance Procedures (“DAPs”) – The Changing Face of Construction Dispute Management’ *International Construction Law Review* 122; Gerber, Paula (1999) ‘Construction Dispute Review Boards’ *Australasian Dispute Resolution Journal* 10(1), 9; Maxwell-Smith, Shelley (2004 - Feb) ‘Dispute Resolution Boards: Coming to a Project Near You?’ *Australian Construction Law Bulletin*, 16(1), 1; Jaynes, Gordon (2000) ‘FIDIC’s 1999 Edition of Conditions of Contract: Is the DAB Still a Star?’ *International Construction Law Review* 42; Bryan .M. Seifert, (2005) ‘International construction dispute adjudication under international federation of consulting engineers conditions of contract and the dispute adjudication board’ *Journal of Professional Issues in Engineering Education and Practice*, ASCE, 131(2) 149–157;

6. The Process

7. The process, generally, is as follows:

1. Board members are selected by and approved by both parties (usually 1 board member from the Principal, 1 board member from the Contractor, the third chosen by those 2 board members) soon after award of the Contract.
2. Board members are provided with all contract documents and copies of construction progress reports and minutes of weekly project meetings
3. Brief status meetings and site tours are held periodically (monthly) at the job site, board members confer with the Principal's and the Contractor's representatives, become familiar with project procedures and participants, and are informed of progress and potential disputes.
4. Disputes may be referred to the DRB by either party for a hearing (informal) and written report, then the DRB makes a fast, non-binding recommendation, including reasons.
5. Parties may proceed to the dispute resolution procedures if still dissatisfied,

8. The Perceived Benefit

9. The argued benefit of using the DRB is that it reduces disputes on major projects.

10. The (USA- based) Dispute Resolution Board Foundation reports, for example, the following estimates on USA projects (as at 2007):<sup>7</sup>

1. Project values have ranged from: one over \$1 billion; a hundred under \$5 million; six projects under \$1 million; and have averaged \$42 million each.
2. 58% of the projects were "dispute free" - no disputes requiring hearings were brought to the DRB.
3. 98.7% of the projects were completed without resorting to subsequent dispute resolution methods.

11. Typical DAB Clause12. Clause 20.2-20.4 of the *FIDIC Conditions of Contract for Construction* provides, so far as relevant, as follows:**20.2 Appointment of the DAB**

*Disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4 [Obtaining DAB's Decision]. The parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.*

- *DAB comprises 1 or 3 members (default 3).*
- *Appointment process for 3 person DAB.*
- *Selection from list of potential members if included in the Contract.*
- *Tripartite Agreement(s) to incorporate by reference General Conditions of Dispute Adjudication Agreement [Appendix].*
- *Remuneration of DB member(s).*
- *Matter can be referred to DB for opinion only if parties agree.*
- *Appointment of replacement DB member.*

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<sup>7</sup> See at: [http://www.drb.org/manual/1.2\\_final\\_12-06.pdf](http://www.drb.org/manual/1.2_final_12-06.pdf)

– Termination of DB member's appointment by mutual agreement of parties.

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**20.4 Obtaining DAB's decision**

*If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.*

13. The FIDIC Conditions provide for:
1. Time of receipt for 3 person DAB.
  2. Parties to make available information, site access and facilities requested
  3. by DAB.
  4. DAB not acting as Arbitrators.
  5. DAB to give reasoned decision within 84 days.
  6. Decision binding on both parties unless and until revised in amicable
  7. settlement or arbitral award.
  8. Either Party may give notice of dissatisfaction (with reasons) of DAB
  9. decision within 28 days of receiving decision.
  10. Notice of dissatisfaction condition precedent to entitlement to commence
  11. arbitration.
  12. Decision is final and binding unless notice of dissatisfaction given within 28 days

J McMullan  
2 June 2011

**ATTACHMENT A****LIST OF AUSTRALIAN PROJECTS WITH DISPUTE REVIEW BOARDS**

1. Sydney Ocean Outfall Tunnels (3 No.) Construct only Sydney NSW 1987 1991 Sydney Metropolitan Water, Sewerage & Drainage Board Phillip Holzman- John Holland JV, \$320m
2. Warragamba Dam Upgrade Construct only Sydney vicinity NSW 1988 1990 Sydney Metropolitan Water, Sewerage & Drainage Board Concrete Constructions \$22m
3. Sydney Airport, Third / Parallel Runway D & C Sydney NSW 1988 1991 Federal Airports Corporation Bilfinger+Berger- Baulderstone Hornibrook JV \$100m approx
4. Dandelup Dam Construct only Perth vicinity WA 1991 1993 WA Water Authority McMahon Construction \$35m
5. Sydney International Terminal Upgrade (SA2000) D & C Sydney NSW 1998 2000 Sydney Airports Corporation Ltd Bovis Lend Lease \$105M
6. Harvey Dam Construct only Perth vicinity WA 2000 2002 Water Corporation of WA Leighton Contractors \$50m
7. Burrup Fertilisers Liquid Anhydrous Ammonia Production Plant Project EPC Burrup Peninsular WA 2002 2003 Burrup Fertilisers Pty Limited SNC – Lavalin (S.A.) Inc \$unknown
8. Ross River Dam Semi Alliance / Construct only Townsville QLD 2006 2008 North Queensland Water John Holland / McMahon Joint Venture \$94M
9. Ipswich Road / Logan Motorway Interchange D & C Brisbane QLD 2006 2009 Queensland Main Roads Leighton Contractor \$240M
10. Gateway Arterial Upgrade D,C&M Brisbane QLD Nov-06 Dec-10 Queensland Motorways Ltd Leighton Contractors / Abigroup Joint Venture \$1,500M
11. City West Cable Tunnel Construct only Sydney NSW 2007 2009 Energy Australia Thiess Contractors Pty Ltd \$70M
12. Sydney Desalination Plant DBOM Sydney NSW 2007 Mar-10 Sydney Water Corporation Blue Water Joint Venture \$1,003 M
13. Sydney Port Upgrade D & C Sydney NSW 2008 Mar-11 Sydney Ports Corporation Baulderstone Hornibrook~jan de Nul JV \$560M
14. DBOM Plant, AdelaideAqua Consortium, Plant D & C, Transfer Pipeline System MDBE jv, Transfer Pipeline
15. Townsville Waste Water Upgrade Program stage 2 Competitive ECI, Construct only Townsville Qld Sep-09 Dec-10 Townsville City Council Baulderstone Pty Ltd \$180m
16. Flinders Street Mall, Competitive ECI, Construct only Townsville Qld Mar-10 Jun-11 Townsville City Council Watpac Pty Ltd \$35m
17. Pacific Motorway Upgrade - Section B Competitive ECI, D & C Qld Gold Coast Qld Oct-09 Dec-11 Dept Transport & Main Roads Bielby Hull Albern Joint Venture \$200m
18. Bruce Highway - Cooroy to Curra Section B Competitive ECI, Construct only Qld country Qld Nov-09 Dec-10 Dept Transport & Main Roads Abigroup Pty Ltd \$100m
19. Digital Train Radio System Design, supply, Install, Commission; ECI converted to Lump sum NSW Electified NSW Jan-10 Oct-12 Rail Corporation of NSW United Group Infrastructure Pty Ltd \$180m
20. New Outer Suburban Rail Cars, Stage 3 Design, Build & Commission: Cost Reimbursable, Target price with Sydney NSW Sep-09 Apr-12 Rail Corporation of NSW United Group Rail Services Limited \$320m
21. Liverpool Turnback Project Managing Contract Sydney NSW Jun-10 Jan-12 Transport Infrastructure Development Corporation John Holland Pty Limited \$120m

(Ref: Dispute Resolution Board Australasia Inc [www.drba.com.au](http://www.drba.com.au) )