

# FIDIC Latin America Contract Users' Conference



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International Federation of Consulting Engineers  
The Global Voice of Consulting Engineers





# **Contract Administration and Dispute Avoidance**

An International Contractor's Perspective

Why did FIDIC chose those two topics for one session?

What is the link between the two?





**What about:**

**Contract Administration and successful Litigation?**

Would a contractor's performance in his  
contract administration department differ?



## Contract Administration

Condition Precedent



**Dispute Avoidance**

Not about: “quick and dirty...”

But: Persuasive Documentation

**Successful Litigation**

Burden of documentation/proof



**Apply same Level of Care!**



**Do the Investment on day 1!**





## Contract Administration in all Phases

Phase 0 => Pre-Contract (i.e. When is day 1?)

Early Involvement in risk analysis during review of contract conditions

=> Create awareness of inherent risks

=> Create thorough understanding of contractually agreed scope of work

Tools in Phase 0

- Contract Review
- Project Analysis
- Chances and Risks Analysis



## Contract Administration:

Phase 1 => Execution Phase (Notices and Claims Management) on day one on the Project

CA is core center for pursuing Contractor's entitlement to time and money  
Provide continuous briefing to Contract Admin on issues beyond its domain

- Risks that have materialized
- Changes in the Scope of Work (VO)
- Any other issues that crop up during execution

➡ Enable Contract Administration to give NOTICES! Timely!!!

Phase 2 => Pursuit of Claims      - in DAAB  
   - in Arbitration (support)



## Chronology: Avoidance of Disputes in FIDIC

First appearance of this Concept: FIDIC 1999 Clause 20.2. (Red Book only)

“If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.”

Appendix General Conditions of DAB Agreement (Red Book only)

“The Members shall...

...lit (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor.....”





## Chronology

More elaborate wording: FIDIC 2008 Clause 20.5. Gold Book

HOCHTIEF in 2009

Additional lit (I) To Appendix General Conditions of Dispute Adjudication Agreement

“Upon the request of either Party and with the agreement of the other Party, the DAB may informally assist the Parties in resolving any disagreements that may arise during the performance of the contract. Such informal assistance may occur during any meeting or site visit. A Party proposing the informal assistance of the DAB shall endeavor to inform the DAB and get the written approval of the other Party well in advance of the meeting or site visit during which such informal assistance would occur. The informal assistance of the DAB may take the form of a conversation among the DAB and the Parties, separate meetings between the DAB and any Party with the prior written approval of the other Party, informal views given by the DAB to the Parties, or any other form of assistance which may help the Parties resolve the disagreement.”







## Chronology

### HOCHTIEF in 2009

- + Standing DAB (within 28 days from Contract signature)
- + Regular Site Visits
- + Regular, interim updates on crucial developments, with copy to the other Party



## HOCHTIEF Experience

- Many claims on valuations, in particular stemming from Variation Orders  
Outcome: All resolved with the informal assistance of the DAB
- On Issue of Taking-over Certificate: against minor defects and incomplete works  
i.e. issue on “Substantial Completion” => Main exposure to related Liquidated Damages  
Outcome: Informal opinion by DAB (against the Employer) – Employer followed
- Defects in the Basement (leakages)  
Outcome: Informal opinion (against HOCHTIEF) => HOCHTIEF performed the related work
- Severe disagreement on the Contents of a close-out agreement  
Outcome: Settled with the informal assistance of the DAB



## HOCHTIEF Experience

Only one dispute resolved through a formal DAB-decision

### Conclusion:

Extremely successful settlement of claims or disagreements

- at little cost
- at very short notice

### Advantages:

- Avoidance of lengthy and hostile DAB proceedings
- Avoidance of extremely costly ICC-arbitration proceedings
- Good working relation throughout the execution phase of the works





## For Discussion

“Any agreement reached between the parties with the assistance of the board will not be binding.” N. Rutkowska 08.03.2018 under “Dispute avoidance and adjudication board under the new FIDIC contract conditions (2017)”



### FIDIC 2017 language :

#### Sub-Clause 21.3

“The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing.”



## Key Factors for Success

### On the DAB

- Instal standing DAB from day 1 – on any FIDIC color
- Seek DAB-members with standing => you need a lot of respect for the DAB-members from both Parties
- Have different disciplines on the Board: Lawyers, Engineers, QS, etc.....
- Agree contractually on regular Site visits – DAB-members need to know the Project and understand the disagreements in light of the development of the Project
- Agree at the tripartite DAB agreement phase what documents will be sent to the DAB (example: monthly progress reports, major claims, disputes etc.)





## Key Factors for Success

### On the DAB

- Maintain regular site visits – even if “no problems” and thus not necessary => save cost?  
If the DAB is not familiar and kept up to date with the project aspects it becomes more like an ad-hoc DAB
- Ensure presence of Project Director/Senior Management at DAB visits, meetings, and matters – The DAB has to deal with the decision makers
- Ensure that Contractor and Employer attend and deal with the DAB
- Do not leave the Employer's representation to the Engineer!
- Treat the DAB-members with respect



## Key Factors for Success

### On the Contractor

- Instal proper Contract Administration on day 1
- Compile project CA procedures as part of project procedures manual
- Ensure subcontractors and designers have contracts which ensure proper contract administration
- Ensure Back-to-back subcontracts => important principles in claims management and avoidance
- Endeavour to join subcontractors in outcome of main contract claims/disputes







## Key Factors for Success

### On the Contractor

- Maintain a proper record of facts/documentation
- Implement a proper correspondence system
- Establish good internal communication line with Contract Administration
- Give notices – timely!
- Keep the DAB informed – agree at the tripartite DAB agreement phase what documents will be sent to the DAB (example: monthly progress reports, major claims, disputes etc.)



## Key Factors for Success

### On the Contractor

- Prepare and submit highly detailed position papers to the DAB (and at good standard/quality – the DAB members will be used to receiving documents in adjudication/arbitration standard, namely: properly pleaded and supported, orderly exhibits and annexes.  
=> the DAB needs to understand your position/your arguments
- Do **not** send piles of documents/electronic files of correspondence, information – and expect the DAB to fight its way through. It happens and the DAB gets annoyed!
- Have proper tools available to visualize technical issues in the DAB-meeting



## Key Factors for Success

On you:

- Fight the up-hill battle for cost
- Defend in-house the cost for fully installed Contract Administration
- Defend in-house the cost for permanent DAB – incl. retainer fee - with regular Site visits
- Convince/persuade the Employer/Engineer in contract discussions  
(The Employer ultimately pays the bill!)
- Be well prepared for any DAAB-meeting  
=> informal meeting does not mean that the meeting is informal!

