

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

Eighth Edition – August 2015

Standing v Ad Hoc DABs

### **GENERAL: DISPUTE ADJUDICATION**

**BOARDS:** How much thought is given to the terms of their appointment?

#### **Introduction**

The recent CIDB proposed regulations<sup>1</sup> introduces a mandatory statutory form of adjudication into all construction contracts in

South Africa. The purpose of this provision is to provide a fair, rapid and inexpensive mechanism for resolving disputes “(the Regulations)”. The Regulations provide that every contract must provide for an adjudication procedure, which must substantially comply with these Regulations.

Currently, the standard form contracts commonly used in South Africa being FIDIC, NEC3, JBCC and GCC 2010 already contain adjudication provisions which provide for disputes to be resolved by way of a standing Dispute Adjudication Board (“DAB”) or an ad hoc DAB. There are some minor amendments, mostly to the time periods for completing the adjudication procedure, which will have to be made to these contracts in order to bring them in line with the Regulations but by and large these contracts are compliant.

<sup>1</sup>Government Gazette NOTICE 482 OF 2015 – Department of Public Works – Construction Industry Development Board Act 2000

Careful consideration must be given to the terms and duration of the DAB's appointment. We recommend seeking professional advice when doing so to ensure the appointment of the DAB reflects your intentions

A standing DAB describes the typical dispute board where the board members are chosen at the inception of the contract by the employer and the contractor.

This is the case as per the FIDIC Red, Gold and Pink books and the NEC3 suite of contracts.

However, there are times when, rather than establishing a DAB at the start of the contract, the DAB is only established when a dispute arises. This is in the case of ad hoc DABS found in the FIDIC Silver and Yellow books.

The GCC 2010 makes provision for both a standing and ad hoc DAB and whilst both could apply to the JBCC, a standing DAB is more likely.

Typically, standing DAB's should be appointed at the start of the project before any dispute arises. FIDIC standing DABs require the appointment of between one or three members. This will be stipulated in the Appendix to tender or Contract Data. The NEC3 provides for the parties to appoint the Adjudicator at the starting date. The number of Adjudicators are stated in the contract data. The World Bank requires three member DABs for projects that exceed the value of US \$50 million.

Despite the practice and recommendation of appointing standing DABs at the commencement of the project, the trend in South Africa has been to

***Disclaimer:*** The contents of this newsletter does not constitute legal advice. If you have a specific problem please contact MDA on 011 648 9500, at our Durban office on 031 764 0811 or by e-mail on [info@mdaconsulting.co.za](mailto:info@mdaconsulting.co.za)

usually wait until a dispute arises before the standing DAB is appointed. This defeats the purpose of a standing DAB and the parties miss out on the benefit of having a standing DAB from the onset of the project. The reason why parties do this is generally down to cost saving reasons as is elaborated on further below.

Ad hoc DABs are constituted when a dispute arises. In terms of FIDIC, the parties jointly appoint the DAB 28 days after a party gives notice to the other party of its intention to refer a dispute to DAB. These boards consist of either one or three members.

According to Chern<sup>2</sup> on *Dispute Boards: Practice and Procedure*, the only benefit of an ad hoc dispute board is its cost savings as the dispute board only acts when and if a dispute arises. The learned author however questions whether having an ad hoc DAB is a cost saving. The cost saving aspect might be a fallacy because whilst the parties will save on the monthly retainer fees and regular site visits, the ad hoc boards will still need time to understand the project, the history and what has been claimed to have happened, which all costs money.

It is apparent however, that a further reason for parties appointing ad hoc DABs is due to the parties being able to control the termination date of the DAB and to terminate the DAB appointment, should they not agree with the DABs findings. The termination of a DAB is discussed in further detail below.

### **The DAB Agreement**

Each of the aforesaid standard form contracts contain a standardised dispute adjudication agreement which is entered into by the parties to the DAB being the Employer, Contract and/or member(s) of the DAB.

Under FIDIC books, the agreements are contained in the Appendix – “General Conditions of Dispute Adjudication Agreement”.

NEC3 contains an Adjudicator’s Contract to be used for the appointment of an Adjudicator to decide disputes under the NEC family of contracts. This contract could conceivably also be used for the appointment of an Adjudicator under other forms of contract.

The appointment of an Adjudicator under the JBCC contract is provided for in the JBCC Adjudication Rules, which set out the rules surrounding the appointment of the Adjudicator as well as an agreement to be entered into by the parties.

The GCC2010 has the Adjudication Board Rules annexed to the contract.

Whilst appointing a DAB is relatively straight forward, the termination thereof is a bit more complicated. For instance, when does the DAB’s mandate come to an end and can DABs be terminated by a unilateral action of one of the parties? We take a closer look.

There are generally four possible ways for the DABs mandate to come to an end:

1. Mutual agreement by the parties – the Employer and Contractor can jointly terminate the DAB by notice to the member or members.

---

<sup>2</sup> Cyril Chern – “Chern on Dispute Boards Practice and Procedure” Third Edition Informa Law from Routledge

2. Termination by the members of DAB – the member of the DAB may terminate the agreement by notice to the parties.
3. Failure of the DAB to proceed in terms of the agreement – if the DAB fails to act in terms of the agreement, the parties can terminate the DAB's appointment.
4. Termination of a specified date – if a termination date is specified in the agreement, the DAB will come to an end on this date.

What is noticeable from the above termination methods is that no provision is made for a unilateral determination by one of the Parties. Is this possible? The short answer is no.

The FIDIC specifically excludes this unilateral act by providing that

*“The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone.”*

This very clearly shuts the door on the possibility of unilateral termination.

The NEC3 Adjudication Agreement provides that

*“The Parties, may by agreement, terminate the appointment of the Adjudicator for any reason.”*

The JBCC Rules for Adjudication provide that

*“The appointment of the adjudicator may be terminated at any time by mutual agreement of the parties.”*

Thus a unilateral termination in the aforesaid contractual agreements is not an option. This makes sense given that, if a party is unhappy with a decision of the DAB, the party has the option to enter a notice of dissatisfaction and refer it to another tribunal, usually arbitration.

Accordingly, it is important for the parties to give proper consideration to the member or members that constitute the DAB. Where a standing DAB is to be appointed and the contract is a lengthy one, the parties to the DAB would be stuck with the members until the duration of the contract unless they mutually agree to terminate its appointment.

If a Party doesn't have a say over who is to be appointed or is concerned with the ability of members of the DAB that are likely to be appointed, it is advisable to limit the duration of DAB's appointment to either a date in the future or to the number of disputes the DAB can determine. These limitations must be specifically written and agreed to in the adjudication agreement.

By placing a termination date or limitation on the number of disputes, you would have some control over the duration of the DAB's appointment. If at the termination date there are still disputes that need to be decided, both parties can then extend the DAB's appointment by mutual agreement.

Careful consideration must therefore be given to the terms and duration of the DAB's appointment when completing the agreement. It is recommended to seek professional advice to make sure that the standard form Adjudication agreement represents your intentions and the duration for which the DAB is appointed.

**Author: Cameron Staude**

***Disclaimer: The contents of this newsletter does not constitute legal advice. If you have a specific problem please contact MDA on 011 648 9500, at our Durban office on 031 764 0811 or by e-mail on [info@mdaconsulting.co.za](mailto:info@mdaconsulting.co.za)***