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**The Contractor's
approach
to Dispute Avoidance
and Adjudication
Boards**

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THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

- Is it necessary?
- Is it obligatory?
- What does it do?
- What does it cost?
- Will it be of benefit:
 - During the contract; or
 - At any time?
- Is there a cheaper/better option?



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

Is it necessary?

- Factors to consider:
 - Size and value of the project.
 - Length of the project.
 - Complexity of the structures/equipment to be supplied.
 - Severity of the consequences for the Contractor if a dispute arises.
 - Would the Contractor be amenable to dispute avoidance measures?
 - Is there a real need for early intervention in the case of disputes?
 - Can the Contractor resource the DAAB process?



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

Is it obligatory?

- Under the 1999 Red Book:
- GCOC 20.2: «*the parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.. »*
- GCOC 20.3: default provisions to secure appointment of DAB members and replacement members.
- Under the 2017 Red Book:
- GCOC 21.1: « *The parties shall jointly appoint...DAAB within the time stated in the Contract Data (if not stated 28 days) after the date the Contractor receives the Letter of Acceptance. »*; Also default provisions.



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

Is it obligatory?

- Where there is funding via the World Bank/MDBs?
 - MDB version of Red Book: Obligatory to appoint DB by « *date stated in the Contract Data* »
 - as 1999 Red Book, no default date for appointment;
- Under the 2017 Red Book/MDB Pink Book:
- 20.4 GCCOC: Parties « may » refer dispute to DB.



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

What does it do?

- Under the 1999 Red Book:
- GCOC 20.2 « *Disputes shall be adjudicated by a DAB... »*
- But see Procedural Rules for DAB in 1999, purpose of site visit was to « *enable the DAB to become and remain acquainted with the progress of the works and of any actual or potential problems or claims. »*
- GCOC 20.4: Disputes referred to the DAB; information provided; binding decision rendered within 84 days or such time period as agreed with the parties.



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What does it do?

- Under the 2017 Red Book:
- To decide disputes [21.1] as provided for in COC 21.4.
- If the parties agree [21.3]: the parties may jointly request the DAAB to provide advice and assistance; or
- IF DAAB becomes aware of an issue, it may invite the parties to make a joint request for intervention.
- Request can be at any time, save when Engineer is making a determination [3.7]; and
- Assistance can take place during any meeting, Site Visit or otherwise.
- Both parties are to be present, neither parties nor the DAAB are bound by advice.



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What does it cost?

- Standing DAB
- Anecdotal evidence/suggest costs vary between 0.2-0.6% of the project costs.

- Ad hoc DABs
- Depends on timing and purpose of appointment [size of dispute, duration of appointment]



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

- Will it be of benefit:
 - During the contract;
 - 2017 GCOC 21.3: focus on dispute avoidance; and
 - Traditional role of speedy interim binding decision on disputes.
- On termination of the contract/conclusion of the project:
 - Both dispute avoidance and dispute adjudication functions still available.
 - If no standing DAAB, ad hoc DAB might assist with outstanding issues/disputes at the end of the contract.



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

- Will it be of benefit .../
 - At any time?
- Issues appear to centre on awareness of functions of DAB, how they work in practise; and
- Cost of the DAB/DAAB and the adjudication process.
- Commercial decision for Contractor – what's it worth to avoid or speedily resolve disputes?
- Can it resource the process during the project?
- Will the Employer « buy in » to the DAAB process?



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

- Will it be of benefit: When does the DAAB appointment conclude?
- The appointment of the DAAB expires:
 - On the date the discharge becomes, or is deemed to become, effective under COC 14.12, or
 - 28 days after DAAB has given its decision on ALL disputes referred to it under COC 21.4. [whichever is the later].
 - However, if the contract is terminated, the DAAB's appointment expires 28 days after:
 - The DAAB gives its decision on ALL disputes referred under COC 21.4 within 224 days of the date of termination; or
 - The date the parties reach agreement on all matters.



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Is there a cheaper/better option for the Contractor?

- Guidance Notes to 2017 Red Book: Guidance at page 47-48:
- Use 1999 DAB provisions, limit function to adjudication of disputes;
- Consider ad-hoc DAB rather than standing DAAB to adjudicate disputes on an ad hoc basis.
- Missing logic/thinking: use an ad hoc DAAB, appoint when issues arise, use for conciliation/avoidance of disputes.



THE CONTRACTOR'S VIEW OF DISPUTE AVOIDANCE AND ADJUDICATION BOARDS

Is there a cheaper/better option?

- Strike out the DAAB clause altogether;
- Replace with DB, without dispute avoidance;
- Replace with Dispute Avoidance without adjudication function;
- Make provision for ad hoc mediation/conciliation of disputes – standing mediator/panel of mediators;
- Extend ICC arbitration function, to include agreement for prior conciliation as part of ICC process [med-arb];



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CONCLUSIONS

1. 2017 DAAB provisions are different.
2. They are intended to be mandatory, more prescriptive.
3. If used as drafted, they are more expensive than the 1999 DAB scheme.
4. They will increase the Contractors' bid prices.
4. There are increased risks, opportunities for objection and challenges.
5. In view of the heightened role of the Engineer, are they needed? Are they a proportionate response to the risk of disputes?
6. Will contractors, use, amend/vary, abuse or strike out the DAAB provisions?



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THANK YOU FOR LISTENING

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