

ESTABLISHMENT OF A DISPUTE BOARD FOR ON GOING PROJECT

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Abstract

The construction project has face unique issues and difficulties, which complexity of contractual settlement and sometimes the Contract or Agreement itself have not clear way to solve the problem and lead the parties firmly defend their respective arguments. Upon mobilization to the site the Contractor might submit notification of claims for issues ranging from disruption, to non-availability of access to delayed receipt of any payments and so on. The Contractor is within its rights to notify Claims, and it is often prudent for Contractor's to do so irrespective of whether they will submit detailed particulars or a final claim. Dispute hard to be avoid when it cause directly affecting cost of the project. Some existing conditions of Contract provide for the establishment of a Dispute Board (Dispute Board) after either of the Parties to the Contract give notice of their intention to refer a dispute.

Keyword: *Contract, Dispute, Cost, Resolution, Method*

Abstrak

Proyek konstruksi menghadapi masalah dan kesulitan yang unik, dimana kompleksitas penyelesaian kontrak dan terkadang Kontrak atau Perjanjian itu sendiri tidak memiliki cara yang jelas untuk menyelesaikan masalah dan membuat para pihak bersikeras mempertahankan argumen masing-masing. Pada saat mobilisasi ke lokasi, Kontraktor dapat mengajukan pemberitahuan klaim untuk masalah mulai dari gangguan, tidak tersedianya akses hingga keterlambatan penerimaan pembayaran dan sebagainya. Kontraktor memiliki haknya untuk memberitahukan Klaim, dan sering kali Kontraktor melakukan hal tersebut dengan bijaksana, terlepas dari apakah mereka akan menyerahkan rincian detail atau klaim akhir. Sengketa sulit untuk dihindari jika hal tersebut secara langsung mempengaruhi biaya proyek. Beberapa ketentuan Kontrak yang ada mengatur pembentukan Dewan Sengketa (Dispute Board) setelah salah satu Pihak dalam Kontrak memberikan pemberitahuan tentang niat mereka untuk mengajukan sengketa.

Kata Kunci: *Kontrak, Sengketa, Biaya, Penyelesaian, Metode*

INTRODUCTION

The Construction project has face unique issues and difficulties, which complexity of contractual settlement and sometimes the Contract or Agreement itself have not clear way to solve the problem and lead the parties firmly defend their respective arguments. Dispute hard to be avoid when it cause directly affecting the cost of the project. Some existing conditions of Contract provide for the establishment of a Dispute Board (Dispute Board) after either of the Parties to the Contract give notice of their intention to refer a dispute. But for the conservative Contract mostly aim to the

court whenever Disputes arise and not set any resolution step to get final and binding decision among the Parties. Therefore, establishing Dispute Board could become a useful method for further Contract condition without prejudice the courts or arbitration process which set forth in the Contract.

Almost immediately upon mobilization to the site the Contractor could give notification of claims for issues ranging from disruption, to non-availability of access to delayed receipt of Advance Payments. The Contractor is within its rights to notify Claims, and it is often prudent for Contractor's to do so irrespective of whether they will submit detailed particulars or a final claim. However, the number of claims submitted and the other issues raised during the mobilization phase of the Works indicate that the Contractor is likely to actively pursue a rigid contractual position, with issues being classified as Disputes, requiring the assessment via a Dispute Board.

However, considering the positions being adopted by the Contractor, including several claims where formal determinations might be requested, it may be prudent to establish a Dispute Board in advance of disputes being notified, to allow early warning, obtain expert opinion and soonest resolution of disputes.

METHODS

RESULT AND DISCUSSION

Contractual Requirements

A Dispute Board comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the Dispute Board has issued its decision on that dispute. The FIDIC conditions of Contract for Plant and Design-Build ("Yellow Book") and the FIDIC conditions of Contract for EPC/Turnkey Projects ("Silver Book") include the wording required for *ad-hoc* Dispute Board procedure. Particular conditions of Contract define the procedures and processes for referring any dispute to the Dispute Board and thereafter, if required, to Arbitration.

As previously inform, the contractual provisions provide for the establishment of an *Ad-hoc* Dispute Board for each dispute that either party may seek redress if they are dissatisfied with the Engineer's Determination under the Contract. Some conditions

of Contract define that the Dispute Board shall consist of three members. The Dispute Board shall be appointed by the date of 28 days after one party gives notices to other party.

In general, very difficult to establish the Dispute Board within 28 days as both parties have to agree on the nominees and thereafter a Chairman must be sought and chosen by the nominees. In addition, in order for the Dispute Board to effectively adjudicate on a dispute, it is condition precedent that the Advance Payment is made to the Members, again the processing of such payments by The Parties could take time, even though it is through the contract provisional sum.

A Standing Dispute Board also comprises one or three members and is appointed and convened at the beginning of the project and is obliged to become acquainted with the project, the contract and the parties and to undertake site visits to gain knowledge of matters occurring on the project.

The Standing Dispute Board is available to provide advice and opinions on matters that may otherwise be elevated to disputes. If a dispute is referred to the Dispute Board, the members are well equipped to start work on the matter immediately and should be able to provide a decision within the periods defined in the Contract and the Dispute Board Agreement.

The perceived major disadvantage of a Standing Dispute Board is that there is a chance that no matters will be referred to the Dispute Board. However, even though no disputes are referred both Parties are obliged to pay to retain the Dispute Board Members and for periodic site visits. These regular costs are significant should the contract be of long duration.

Contract Amendment to Establish Dispute Board

Therefore, in order to establish a Dispute Board a Contract Amendment shall be agreed between the Parties, this shall include the following changes:

1. Mechanism for Appointment of Dispute Board, including the time appointment
2. Formulation of Dispute Board Agreement to allow for payment terms including retainer fees and costs for periodic Site visits.
3. Formulation of Procedural Rules to allow for periodic visits.
4. Provision of additional Provisional Sum Amount for payment of retainer fees
5. And Periodic Site visit.

One of the fundamental advantages of a Standing Dispute Board is that the Dispute Board Members are permanently attached to the Contract and undertake periodic visits to the Site to be familiar with the Works and issues arising. Therefore, the terms of payment with the Dispute Board Agreement shall provide for retaining the members, thus allowing early hearing of any referred disputes. In addition, the Procedural Rules shall define the time between Site Visits and the reporting requirements.

The original Contract included a Provisional Sum for the payment to the *Ad-hoc* Dispute Board Members, should any issues be escalated to a dispute and referred to the Dispute Board. The Contractor thus should have included in his Bid Price only the costs related to notified disputes.

The Standing Dispute Board includes additional “Regular Costs” for monthly retainer fees and Site visits, as these Regular Costs were not considered by the Contractor at the time of Bid. Therefore, if a Standing Dispute Board is to be established through a Contract Amendment it is considered that the Employer shall be obliged to pay for these additional Regular Costs. Should any Dispute be referred to the Dispute Board, then the costs for adjudication or provision of opinion shall be shared equally between the Parties.

It is noted that one of the objections to the establishment of a Standing Dispute Board is that the Parties are required to pay a retainer fee to the Dispute Board Members irrespective of whether any disputes are referred to the Board. In order to limit the costs for a Standing Dispute Board, consideration may be given to negotiating with the Dispute Board Members to exclude the retainer fees but retain the periodic visits at the normal 4-month intervals, this may be deemed a Partial Standing Dispute Board.

This Partial Standing Dispute Board mechanism may allow the Dispute Board Members to remain familiar with the project and Works but presents a significant cost saving on the retainer fee. This mechanism also provides for time saving should any dispute be referred to the Dispute Board as the board itself and constituent members will have been agreed and appointed, allowing for the hearing and decision

process to start earlier. It is noted that a similar mechanism was adopted for the Jakarta MRT Project Dispute Board which was also funded by JICA.

Subsequent to discussion with the Contractor and in consideration of the numbers of Claims that may be referred to the Dispute Board, the Employer and Contractor are preferable to establish a full Standing Dispute Board with the Dispute Board Members retained and available throughout the Contract.

CONCLUSIONS

The number of claims submitted and the other issues raised during the mobilisation phase of the Works indicate that the Contractor is likely to actively pursue a rigid contractual position, with issues being classified as Disputes, requiring the assessment via a Dispute Board. The existing conditions of Contract provide for the establishment of a Dispute Board after either of the Parties to the Contract give notice of their intention to refer a dispute on an *Ad-hoc* basis. However, based on the position adopted by the Contractor it is considered prudent to establish a Standing Dispute Board, to allow early warning, obtain expert opinion and soonest resolution of disputes. Based on the discussions with the Contractor and the numbers of claims issued already referred for Engineer's Determination, the establishment of a Full Standing Dispute Board with the associated Retainer Fees is considered to be the most appropriate mechanism.

In order to establish a Standing Dispute Board a Contract Amendment shall be agreed between the Parties, this shall include the changes to the existing terms for the appointment of the Dispute Board Members and their payment, the Procedural Rules and provision of additional Provisional Sum Amounts for periodic visits.

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