

ENHANCING CONTRACTUAL STABILITY: ESTABLISHING STANDING DISPUTE BOARDS UNDER FIDIC CONDITIONS OF CONTRACT

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Abstract

Construction projects are inherently complex undertakings characterized by multifaceted contractual relationships and significant financial stakes. Frequently, contracts or agreements lack sufficiently clear mechanisms for dispute resolution, resulting in parties staunchly defending their respective positions when disagreements arise. Contractors may promptly submit claims for issues such as disruptions, lack of site access, and delayed payments. While contractors are entitled to notify claims, such notifications can escalate into full disputes, particularly when financial impacts are considerable. To mitigate these conflicts, the establishment of a Dispute Board serves as an effective alternative resolution method. This paper discusses the necessity of early Dispute Board formation, contractual frameworks for Dispute Boards, and recommendations for implementing a Standing Dispute Board through contract amendments. The discourse also highlights practical examples and elaborates on cost-benefit considerations.

Key words: *Contract, Dispute, Cost, Resolution, MethodContract, Dispute, Cost, Resolution, Dispute Board, Construction Law*

1. INTRODUCTION

Construction projects often encounter unique challenges and complexities, particularly related to contractual relationships and dispute resolution. The intricacy of project delivery and performance obligations frequently leads to ambiguities within the contract itself, thereby fostering disputes that parties are compelled to defend vigorously. When a dispute materially affects project costs, it becomes almost inevitable, underscoring the importance of clear and proactive mechanisms for conflict resolution.

Traditionally, conservative contracts default to litigation or arbitration only after disputes have escalated, often resulting in protracted and costly proceedings. In contrast, modern contract forms, such as those developed by FIDIC, introduce the option of appointing a Dispute Board early in the project lifecycle to address disagreements swiftly and impartially.

Upon mobilization to the construction site, contractors often issue notifications of claims concerning disruptions, lack of access, and delayed advance payments. Although prudent from the contractor's perspective, such claims foreshadow a rigid contractual stance likely to evolve into formal disputes. Thus, the establishment of a

Dispute Board in advance—even before disputes are formally notified—is prudent for effective dispute management, early warning facilitation, and expert adjudication.

2. CONTRACTUAL REQUIREMENTS

A Dispute Board typically comprises one or three members appointed either for specific disputes (Ad-hoc Dispute Board) or for the duration of a project (Standing Dispute Board). The FIDIC Conditions of Contract for Plant and Design-Build (“Yellow Book”) and the Conditions for EPC/Turnkey Projects (“Silver Book”) incorporate standard provisions for Dispute Board procedures.

Under these contracts, when either party is dissatisfied with an Engineer’s determination, they may initiate the appointment of a Dispute Board within a specified timeframe (typically 28 days). Nevertheless, achieving mutual agreement on nominees and arranging their contractual engagement can be challenging within such a limited window.

Further complicating the process, the Dispute Board members are entitled to advance payments, typically processed through provisional sums specified in the contract. Delays in payments can hinder the prompt establishment of the Dispute Board, thereby defeating the very purpose of early dispute resolution.

A Standing Dispute Board, conversely, is appointed at the outset of the project. Its members continuously familiarize themselves with the site, parties, and project developments through periodic visits and reviews. Consequently, they are well-positioned to address disputes immediately and efficiently, fostering a collaborative project environment and discouraging the escalation of minor disagreements.

Although Standing Dispute Boards incur ongoing costs (retainer fees and site visit expenses), their benefits—swift dispute resolution, enhanced project certainty, and minimized litigation—often outweigh their financial burdens, particularly for large and complex projects.

3. 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:

- Mechanism for Appointment of Dispute Board, including the time appointment
- Formulation of Dispute Board Agreement to allow for payment terms including retainer fees and costs for periodic Site visits.
- Formulation of Procedural Rules to allow for periodic visits.
- Provision of additional Provisional Sum Amount for payment of retainer fees

- 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.

4. CONCLUSIONS

The proliferation of claims during the mobilization phase of construction projects signals the likelihood of entrenched contractual disputes. While the original contract provisions allow for ad-hoc Dispute Board formation upon notification of a dispute, proactive establishment of a Standing Dispute Board ensures faster, more efficient conflict resolution.

Drawing from best practices and real-world examples, the implementation of a Standing Dispute Board provides early expert insights, facilitates preemptive issue resolution, and supports collaborative project management. Despite the associated regular costs, the advantages—including the avoidance of protracted litigation and project delays—are compelling.

A formal Contract Amendment is required to implement a Standing Dispute Board effectively. Such amendments must address procedural rules, appointment mechanisms, financial arrangements, and periodic site visit requirements. In complex projects with substantial claims activity, the full establishment of a Standing Dispute Board is considered the most prudent approach to safeguarding project success and minimizing adversarial disputes.

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