



Forum

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“END OF THE CONTRACT” CLAIMS: TIPS FOR HANDLING COMPLEX CLAIMS BEFORE DRBs



By Kurt Dettman

In these claims the stakes are higher, the parties are more polarized in their positions, and the DRB’s case management and decisional challenges are more difficult.

DRBs generally are set up to handle “typical” construction disputes that arise during the course of a project. Less typically, DRBs are asked to decide complex “end of the contract” delay, impact and

inefficiency claims. In these claims the stakes are higher, the parties are more polarized in their positions, and the DRB’s case management and decisional challenges are more difficult. This article explores some of the considerations that DRBs need to take into account in handling these complex claims.

Complex Claims

DRBs are established for, and are well-equipped to handle, stand alone construction disputes over discrete issues or claims. These “typical” claims include whether certain work is an extra, whether a particular delay event is the responsibility of the owner or the contractor, and whether particular directed work fully compensates the contractor. Sometimes, however, contractors bring claims at the end of the contract involving literally hundreds of claims

and issues, hundreds of delay days, and tens of millions of dollars in claimed cost overruns. Such claims usually include all of the following elements:

- delay (extended field and general conditions)
- constructive acceleration
- impact/inefficiency
- material (vs. incidental) owner directed work
- design related issues
- cardinal change claims

Contractors may claim, for example, that the cumulative impact of small changes (the “death by a thousand cuts” claim) delayed the work or made the contractor less efficient than planned. Such claims often involve hundreds of issues and events that give rise to an overall impact claim. Contractors also may claim delays arising from multiple critical and subcritical paths that shifted numerous times during the course of the project. Finally, there may be significant (and equally complex) subcontractor claims that are embedded in a contractor’s overall claim.

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Dispute Board Member Pupilage

Mentoring Provides Practical Experience to New Board Member Candidates

By Gwyn Owen

How do you become a Dispute Board (DB) member when you have no experience and in reality are unaware of how to get that first appointment? With no experience and your name an unknown quantity to most employers and contractors, getting nominated is an uphill struggle. You may decide you should get your name onto certain panels, such as the FIDIC President's List or an in-house list at Caltrans, but that involves significant effort normally away from your home and office and could also involve some form of study, examination and cost. Being on the list will also only make you available to users of that particular list. You may decide the best approach is to undertake some "networking" at conferences and seminars, which always helps, but it's a little like throwing "wanabee seeds" into the desert and hoping that they will grow in time and then someone will pick your name - that is if they happen to be crossing the same desert. There appear to be so many unknowns and uncertainties and it is always a wonder to me that anyone gets there at all in the end.

So what other routes do you have to being on a Board, possibly a more certain route? May I suggest pupilage. Pupilage is a system of "mentoring" where an experienced DB member takes you under his wing for a fixed period of time and provides you with a structured course of learning while giving you hands-on practical guidance and experience. During the process your name becomes known to all the practitioners involved and after the pupilage period is over you will have beaten the "chicken and egg" syndrome and you will have some practical experience and will be ready to go!

I am sure that with the experience gained under mentoring you will be more attractive to a prospective DB user than someone new on the shelf looking for his first post.

In order to make a start with this system and to open it up to all potential users I have created a basic program which is currently operating under the FIDIC organisation. Details of this system may be obtained from the FIDIC web site at: <http://www1.fidic.org/resources/adjudicators/pupilage.html>. I hope that eventually the use of the system will become widespread and globally adopted, and new DBs being created in emerging countries will incorporate at least one member who has completed a recognized pupilage program. This concept and type of program is not new and the system of pupilage has been widely used in the legal profession in many jurisdictions throughout time. Furthermore, craftsmen have successfully used a similar system of apprenticeship for years. Either way, such a system of guardianship whilst building up practical experience post qualification has been successful, and those completing the course end up with the respect of their industry and peers.

So what's pupilage all about? The objective is to provide training and mentoring support in order that the pupil may become a DB member or Adjudicator, or and where applicable may apply for FIDIC National Member Association listing. Governments and contractors in a particular country will then have an opportunity to select someone from their own national list. Also if the president of that national association is asked to nominate a DB member of a particular nationality he will nominate from that specific list. However the pupil will not necessarily need to become part of any particular listing as he or she will have the practical experience necessary to launch independently. It is hoped that the mentoring experience will enable a person to become sufficiently knowledgeable to become nominated in his or her own right to DBs. After completing pupilage he or she will certainly know how and where to look for nominations and what is required to

successfully complete the nomination process.

The mentoring system requires at the start that a prospective pupil makes contact with a willing mentor who will undertake the task of pupilage and who will be willing to set aside the time required for the process. Before selecting your mentor you must consider if you are willing to travel and in which jurisdiction you wish to work. Such further considerations as the type of work you wish to become involved with and the scale of the projects may also be primary considerations. When selecting your mentor find someone who fits the bill for your aspirations and who is already busy with DB work. The mentor must also be willing to give you a mentoring assessment report at the end of the pupilage procedure.

There are no set "entry qualifications" for mentoring, but in order to be industry acceptable as a DB member you will need to have at least the standard professional qualifications. Clearly if you're going to adjudicate disputes between parties then you will also need some dispute resolution qualifications or experience and knowledge of the law. In some jurisdictions where the system of adjudication is already sophisticated and advanced you will need significantly more training in the basic skills of adjudication and dispute resolution procedure and have a considerable knowledge of case law.

In order to be eligible for undertaking a FIDIC pupilage program there are certain basic entry criteria. There is no rocket science involved in the selection of requirements for eligibility but it is a logical necessity that the prospective pupil must have the following:

1. Be available and committed to the time and input requirements of a pupilage mentoring program
2. Be a member of or be eligible for membership in a National FIDIC Member Association
3. Be in possession of basic professional qualifications at university first degree level

4. Have a minimum of 15 years post graduate experience
5. Supply a CV
6. Enter into a confidentiality agreement with any parties as necessary for DB site visits and hearings

The main reason for having these entry qualifications to the FIDIC mentoring system is that upon completion of the mentoring, pupils will be eligible for application for listing by the local national FIDIC association. Clearly if the mentoring is not aimed at FIDIC national listing then a revised set of qualifications may be considered which at the least will not have points listed as 2 and 3 in the above list.

I have initially suggested that the mentoring period will be around 12 months which needs to be flexible and will basically slot into six modules each covering specific topics. There is no set time for each module and some may be shorter than others depending upon qualifications, experience and pupil aspirations and also how the pupil progresses with the tasks. The six modules are aimed at a FIDIC national listing and may vary if that is not required. The six modules are:

- Module 1: Understanding of alternative dispute resolution procedures (ADR)
- Module 2: Knowledge and understanding of FIDIC forms of contract
- Module 3: Contract administration and claims
- Module 4: Management of dispute resolution process
- Module 5: Dispute Board procedures
- Module 6: Dispute Board agreements and appointments

In order to start the mentoring process each pupil will need a basic minimum of course materials. For the FIDIC based pupilage system I have suggested that these will consist of:

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If you have news about DRBs, DRBF members, or an article to share, please tell us!

Deadline for the next issue of the Forum is January 1, 2007

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1. FIDIC Conditions of Contract for Construction - Red Book
2. FIDIC Conditions of Contract for Plant Design Build - Yellow Book
3. FIDIC Conditions of Contract for Construction - MDB Harmonised Edition
4. DB Procedures by G. Owen
5. Project Management Code of Practice – CIOB / Longman
6. Adjudication Standard Text Book (such as Construction Adjudication by Riches & Dancaster / Blackwell)
7. FIDIC Users Guide by Brian Totterdill / Thomas Telford
8. Case Studies x 6
9. Adjudication Appeal Court Judgments (2 cases)
10. Workshop Materials:
 - a. Course Notes
 - b. Standard Forms

How much will it cost? The quick answer is that the whole procedure is a voluntary process and the mentor will provide his time and effort at no cost. My philosophy has always been if you want DB members of the future to have the same outlook and standards as you then you will need to pass on your experience to them. There will be some pupilage materials such as books and course notes which I believe that the mentor should provide at his own cost to the pupils. The basic thought process here is that in some countries access to books often need to be paid for with foreign exchange is hard to come by. However the pupil does not get away expense free as he will need to share the cost of meeting rooms with other pupils and provide his own travelling costs. During the mentoring period he will also need to attend a minimum of one two-day training course at his own expense.

The pupilage is undertaken basically in three ways. The first is a correspondence by email, the second by participating in four workshops, and the third by attending a site visit and a dispute hearing as an observer.

There is also some external learning required and this is achieved by attending a two day

training course supplied by a suitable course provider. There are a number available through the DRBF and FIDIC.

The correspondence section of the course consists of 12 written exercises and will take in the order of about 90 hours to complete.

It will cover the following points:

1. Description of DB procedures
2. Case Study – Arbitration Award (documents only)
3. Case Study – Adjudication Decision (documents only)
4. Procedural directions
5. Design liability – Law & Contract (FIDIC Red & Yellow & MDB)
6. Claim submission
7. Response submission
8. What is a dispute?
9. Administration of projects under FIDIC
10. Post adjudication procedures – amicable settlement, arbitration
11. Source materials
12. Case Study – Draft Decision

The four workshops will each last in the order of 2 – 4 hours and will take the form of a general discussion structured around a particular topic. These are:

Workshop 1: Introduction to ADR and Procedures

Workshop 2: Forms of Contract, Administration and Claims

Workshop 3: DB Procedures and Management

Workshop 4: Interactive Session and Assessment

At the end of this mentoring process you will have had an ample opportunity to ask questions, see the process at work and see how users of Dispute Boards react to both the DB members and procedures. Hopefully you will also have seen the great benefits of the system in assisting the parties to work together and get to the end of the project in agreement. When you have this experience you are ready to go to work ... good luck! □

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