

## **DISPUTE BOARD GUIDELINES**

Prepared by Peer Dalland – SDBM - October 2009

### **PREAMBLE**

These guidelines have been prepared by Peer Dalland, the SDBM for the above Project as a ready reference to information, rules and procedures for the operation and efficient use of the Dispute Board, which has been established as part of the Contractual requirements for the Project.

During the Introduction at the first Site Meeting, the SDBM will briefly outline the contractual procedures for the DB process as well as procedures which are to be agreed for keeping the SDBM and the Parties informed of relevant issues. A summary of these procedures will be included in the Notice/Proposed Agenda for the first SDBM site meeting.

During subsequent site meetings the SDBM may elaborate on the process and propose fine tuning of the procedures for providing the relevant information such as copies of monthly reports and Minute of Monthly Meetings SDBM, generally in accordance with Rules and Procedures outlined in the Contract.

These Guidelines are intended to be a ready reference on all matters relating to operation and functions of the Dispute Board including the General Conditions of Dispute Board Agreement, Procedural Rules and relevant clauses extracted from the General Conditions of Contract.

Specific Procedures proposed by the SDBM during the first and second SDBM Site Meetings are also contained in these guidelines together with the SDBM's proposed procedure for obtaining opinions, proposed procedure for referrals and preliminary time schedule for referrals.

**NOTE: The introduction has been written in the format presented to the Parties at the first SDBM Site Meeting and may be used as a basic agenda for future first Site Meetings.**

## **GENERAL CONTRACT INFORMATION**

### **Contract Information**

Insert Name of Contract and relevant contract/project details such as Date of Commencement and date for Completion. Include Summary of EOTs.

### **General**

The SDBM is also more generally referred to as DRE under previous contracts and for the purpose of these Guidelines if term DRE has been used in any documentation by the parties, it shall be taken as being synonymous with the term SDBM. The term Dispute Board or DB is a generic term which shall be deemed to include the terms SDBM and DRE.

The agreed representatives of the various parties for the Contract for the purpose of Site Meetings are as follow:

### **SDBM**

Peer Dalland

Email: [peer@dalland.com.au](mailto:peer@dalland.com.au)      Mobile (local):

Mailing address: PO Box 4059, Wagstaffe, NSW 2257, Australia

Street address for delivery of documents:

11A Nukara Avenue,  
Hardys Bay, NSW 2257, Australia

### **EMPLOYER:**

Name,

Mr. Name – Project Engineer - Email:      Mobile:

### **CONTRACTOR:**

Name Ltd

Mr. Name – Project Manager

Email:      Mobile:

Mr. Name 2 – Advisor (if any)

Email:      Mobile:

### **ENGINEER:**

Consulting Engineers Ltd.

Mr. Name – Resident Engineer      Email:

Office:      Mobile:

Claims specialist (if any) contact details.

## **INTRODUCTION**

During the Introductions at the first Site Meeting, the SDBM will briefly outline the contractual procedures for the DB process as well as procedures to be agreed for keeping the SDBM and the Parties informed of relevant issues.

The Appendix to Section IV of the General Conditions of Contract contains the General Conditions of the Dispute Board Agreement (Attachment 1) and Procedural Rules (Attachment 2) which governs the functions and operation of the Dispute Board. The Procedural Rules are also contained in and in Annex 1 to the SDBM tripartite Contract Agreement (Attachment 3). Copies of these documents are attached for easy reference.

### **Dispute Boards should be considered as Dispute Avoidance tools.**

A Dispute Board (DB) is the most useful tool to reduce the impact of contentious issues and to avoid formal disputes. There are some important provisions in Clause 20.2 of the General Conditions of Contract (Attachment 4) which can be of great benefit in the dispute avoidance process. This is the provision that ***“If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion. Neither party shall consult the DB on any matter without the agreement of the other party.”*** (SDBM’s emphasis).

It is important that **all parties** involved in the daily operation and execution of the Contract understands the importance of early identification of potential problems and matters of concern.

The purpose of regular site visits by the SDBM is stated in (b) of the Procedural Rules and is ***“to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, endeavour to prevent potential problems or claims from becoming disputes.”*** (SDBM’s emphasis).

The SDBM’s opinion on a specific matter will not be binding on the parties or the SDBM should the matter proceed to formal referral, but the initial opinion may give the parties a basis on which to reach an agreement on a contentious issue.

During the first Site Meeting, the SDBM will outline additional procedures and routines to be agreed with Contractor and the Employer for receiving relevant contract information. Keeping the SDBM up to date on a regular basis between site visits will save time during future site visits and allow the participants to concentrate on important contract and construction issues which may affect the progress of the Works. The participants are encouraged to prepare workable proposals for this process and to present them at the first Site Meeting and to suggest improvements to the process as work proceeds.

## **SDBM SITE MEETING**

The Procedural Rules require that the site visits be attended by the Employer, the Contractor and the Engineer and the Site Meetings which are part of the SDBM's site visits, shall also be attended by these parties.

The agreed representatives for the Contractor and Engineer for the purpose of the SDBM meetings need not be limited to the Contractor's Representative under Clause 4.3 of the Contract, or the Engineer, Resident Engineer or Engineer's Representatives as defined in the Contract.

However, The Contractor's Project Manager, the Resident Engineer and an Employer's representative should attend each Site Meeting. The Employer's representative should be a Project Engineer or Project Manager attached full time to the Project.

The SDBM Meetings can be attended by any additional persons from the Employer, Engineer or Contractor's organisations. The purpose of the site visits are ***“to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, endeavour to prevent potential problems or claims from becoming disputes.”*** (Extract from the Procedural Rules).

Any team member from either the Engineer's staff or the Contractor's staff who is familiar with certain aspects of the project that has a bearing on the performance of the Project, and/or with specific knowledge of issues which are proposed for discussion at any specific meeting, should attend a Dispute Board meeting.

Such personnel may be persons who are, or have been, involved with, and are conversant with controversial issues such as ROW, survey or proposed land acquisition and related compensation issues. Other issues may relate to material testing, construction scheduling and programming and plant and equipment procurement, commissioning and maintenance.

The Dispute Board will always have the final say in any matters relating to its functions and how to deal with potential disputes. This is provided for in the Procedural Rules and the SDBM agreement.

The SDBM should provide an overview of the proposed procedures for the conduct of the meetings and advise that he will adopt a proactive approach both during meetings and site inspections, but will not deliberately offer advice or opinions on matters generally.

### **Meeting to be on a “without prejudice basis”**

The SDBM will not prepare minutes detailing discussions held during the meetings or site inspections as he considered that there would be more constructive dialogue between the parties if the meetings/site inspections are conducted on a “without prejudice” basis.

The SDBM will prepare a report outlining activities performed and in broad terms the matters discussed and matters that are of concern to the Parties as well as matters which are of concern to the SDBM

### **Documentation to be provided to the SDBM.**

The parties are required under the Contract to provide the SDBM with copies of all monthly reports and minutes of meetings, as well as any correspondence which would deal with any contentious issues, including requests for, and amendments to the Construction programme, access, obstructions and site possession issues which may be requested by the SDBM.

On Contract X, the parties confirmed earlier agreement (Site Visit 1) that the Project Manager for the Contractor and the Engineer should be jointly responsible for passing all relevant information on to the SDBM as soon as it becomes available to the parties, **always with a copy to the other Party.**

It was also agreed that routine information could generally be forwarded by email, but to follow up important issues by using couriers such as DHL. The street address for deliveries to the SDBM must be as shown above.

The Parties agreed that if early negotiations between the Parties on matters in contention fail to reach an agreement, the SDBM should be consulted sooner rather than later, for an opinion before the matter is referred for dispute resolution.

### **Proposed itinerary for Site Visits**

Because it is often the case that the SDBM is not in possession of up to date information or copies of latest reports, claims and other relevant information, the following itinerary has been proposed by the SDBM:

- 1. The SDBM is proposing that the Itinerary for Site Meetings should include a preliminary meeting on the first day of arrival on Site when all new documents will be handed over to the SDBM. This will give the SDBM time to peruse the information provided and digest any implications regarding the Site Visit which will now take place in the morning of Day 2. Following the Site Visit, the main meeting will be convened to discuss the matters that have arisen out of the additional information supplied on Day 1 and observations from the Site Visit.*

## **CLAIMS PROCEDURES**

Only matters which are in dispute can be referred to the Dispute Board for a decision. Under the MDB FIDIC Contract a Dispute will only arise once the Engineer has delivered his Determination on a matter in accordance with Sub-Clause 3.5.

Failure by the Engineer to give a determination on a claim submitted by the Contractor pursuant to Sub- Clause 20.1 within the period stipulated in that clause, or within a further time agreed between the Parties, is deemed under the Sub-Clause 20.1 of the Contract to constitute a rejection of that claim.

Any Party which disagrees with the Engineer's Determination may refer the matter to the Dispute Board in accordance with Sub-Clause 20.4.

The SDBM stress the point that the submission of a Sub-clause 2.5 or 20.1 claims notice should NOT be construed as a "hostile" act and that complying with provisions of the Contract, which are in fact designed as dispute avoidance provisions, should be rigorously complied with.

The provisions of Sub-clause 20.1 and 3.5 provides for a consultation process where the Engineer shall consult with each Party in an endeavour to reach agreement. This is should be considered as a contractual dispute avoidance/reduction provision.

### **REQUEST FOR OPINION**

If the Parties jointly agree to request an opinion from the SDBM on a contentious issue, each Party shall prepare a short submission outlining the arguments for and against with references to relevant sections in the specification and the Contract, and submit by email and/or mail to the SDBM for an opinion.

There has been no time limit set on these submissions, but the SDBM recommends that the Parties agree between themselves on a time schedule.

Any opinion so given shall be "without prejudice" and shall not be binding on the Parties or the SDBM.

### **PROPOSED ADDITIONAL PROCEDURES FOR REFERRAL OF DISPUTES TO THE DISPUTE BOARD.**

The following additional procedure is proposed to avoid referrals to the SDBM without the Parties first making a last effort to settle the dispute. The proposed time limits may be adjusted to suit specific matters in dispute, but always bearing in mind that the SDBM **must deliver a decision within 84 days of receiving the referral.**

As the referrals will nearly always relate to claims submitted by the Contractor pursuant to Sub-Clause 20.1 or by the Employer pursuant to Sub-Clause 2.5 of the Contract, most of the submissions required should already have been prepared and

submitted to the Engineer for his Determination pursuant to Sub-Clause 3.5, and the proposed time schedule reflects this.

The Parties may request extension of time and this will be subject to discussion and approval by the SDBM in each individual case.

Pursuant to Sub-Clause 20.4 of the General Conditions of Contract either Party can proceed in accordance with Sub-clause 20.4 to obtain the DB's Decision on a matter which is in dispute. **The referral must be in writing and must state that it is given under Sub-clause 20.4.**

It is proposed that before referring a matter in dispute, the referring Party (the Claimant) should submit an **Early Warning Notice** to the other Party and to the SDBM, advising that the matter will be formally referred for a Decision. The Early Warning Notice should be in writing and be received by the other Party and the SDBM at least 5 days before the Referral is submitted. The Parties shall make at least one attempt at settling the matter before the Referral is formally lodged. The Date of the Referral is when it is received by the SDBM.

The written Referral must contain full particulars of the matter which is in Dispute and should contain all relevant arguments and background information.

The responding Party must submit its response to the Referral within 14 days after receiving the Referral.

The Referring Party must submit its rebuttal to the Response within 7 days of receiving the Response.

The SDBM will advise the Parties within 7 days of receiving the last Rebuttal whether further submission will be required and whether the Parties agree that a Hearing will be necessary. The SDBM within the same 7 days will give the timing for further submissions if required and the date and place for the Hearing, if required.

If the SDBM decides that no further submissions will be needed, and the Parties agree, the SDBM will prepare a Decision in accordance with the provisions of the Contract and the Procedural Rules.

If it is decided that a Hearing is necessary, the SDBM will prepare a schedule for the dates and place for the Hearing.