

FIDIC'S procedures for the appointment of a DAB need improvement

Written by Steve Mangan

If the parties to a FIDIC contract cannot agree on a suitable DAB member and they have selected FIDIC as their appointing entity, they may request FIDIC to appoint that DAB member. FIDIC's present procedures however seem less than ideal. They increase the prospect of rejection of the candidate nominated by FIDIC in the first instance and so also the need to repeat the exercise. They could also result in an appointment unacceptable to one or both parties. In my view they need to be revised.

Obligation under the Contract to Consult

Recent court decisions from England and Switzerland have highlighted the difficulties caused when the parties to a FIDIC contract are unable to agree on the appointment of a DAB.¹ Lack of agreement may be genuine. However, we have seen cases where it is part of one party's attempt to stymie the DAB or even the entire dispute resolution process. Whatever the cause, when the parties *do* need to turn to the appointing entity under the Contract for assistance, it is vital that the appointment procedures are reasonable and fit for purpose.

FIDIC's 1999 edition of the Red, Yellow and Silver Book contracts provides at Sub-Clause 20.3 for the appointment of a DAB member as follows:

If any of the following conditions apply, namely:

- *the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2,*
- *either Party fails to nominate a member (for approval by the other Party) of a DAB of three persons by such date,*
- *the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or*

- *the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,*

then the appointing entity or official named ... shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive ...

Note that the appointing entity's prior "*due consultation*" with both parties is obligatory under the FIDIC contract. Anything less could rightly be regarded as contravening the principles of natural justice which include the duty to act with procedural fairness. But as to the form that this "*due consultation*" should take, the contract is silent.

The Meaning of "Due Consultation"

The Oxford Dictionary of English defines the word "*consult*" as to "*seek information or advice from (someone) ...*" and to "*have discussions with (someone), typically before undertaking a course of action.*"

The phrase "*due consultation*" (without definition) is found in many clauses in the earlier FIDIC 4th edition of the Red Book, obliging the Engineer to consult with both Contractor and Employer prior to making an assessment or determination. In his work *The FIDIC Forms of Contract*, Dr. Nael Bunni refers to commentators having expressed the view that those words should be interpreted there as a consultation appropriate to the circumstances. Similarly, in relation to the appointment of a DAB member by an appointing entity or official under the 1999 editions of the Red, Yellow and Silver Books, Dr. Bunni opines that it means "*consultation with both parties to the extent*

required by the nature of the difficulty encountered.”²

So as one might expect, the detail of the procedures for due consultation with both parties is a matter for the appointing entity or official to determine in accordance with the complexity or difficulty of the particular circumstances. As long as its procedures are fair and balanced and sensitive to circumstance, they should withstand objection.

FIDIC’s Procedures for Consultation, Nomination and Appointment

Turning to the procedures currently in use by FIDIC, its website at <http://fidic.org/node/2552> provides an information checklist to those submitting a request for appointment of a DAB member. Surprisingly, a request for information or the applicant’s views (or even joint applicants’ views) regarding the preferred attributes of the candidate member does not feature.

FIDIC’s website at <http://fidic.org/node/816> sets out the procedure it will then follow, once it has received a request, as follows:

FIDIC shall discharge this obligation by notifying both parties to the contract that "the President/official named is considering appointing Mr/Ms A.N. Other to the DAB ... and that Mr/Ms Other's CV is attached.

Should either party have reasons why Mr/Ms Other is unsuitable for appointment to the DAB such reasons should be communicated to the FIDIC secretariat within 48 hours of the receipt of this notification and, in the event that FIDIC, in its sole discretion, considers that such reasons justify a reselection, this will be undertaken and the parties notified accordingly.

Objections to Mr/Ms Other that are of a general nature rather than specifically related to his or her suitability for this particular appointment are unlikely to result in reselection".

If no objections are received or if those that are received are not considered to disqualify Mr/Ms Other from undertaking the appointment ... , FIDIC formally notifies the parties and Mr/Ms Other of the appointment.

In the event that objections are considered to warrant reselection, FIDIC notifies Mr/Ms Other that he will not be nominated (without giving reasons) and proceed to progress the next highest Candidate on the shortlist.

This procedure is repeated until an appointment is made.

Potential Problems with FIDIC’s Procedures

Several points emerge from a review of FIDIC’s procedures above:

- By its initial submission checklist, FIDIC misses an early opportunity to obtain information on the preferred attributes of the appointee as regards basic matters like nationality, language, capability, profession, qualifications, experience and the like.
- Following receipt of the request, FIDIC will then proceed to identify and notify the parties of a candidate DAB member that FIDIC thinks might be suitable - without first having canvassed the views of the parties. It is of course the parties’ own dispute. They are closest to it and are likely already to have formed their own views on the future appointee’s preferred attributes such as those referred to above. A perception that the parties’ views have little importance to FIDIC could easily arise.
- In my view the suggested meaning of “due consultation” referred to above, whereby the extent of the consultation is sensitive to the difficulties involved, does not sit easily alongside a provisional decision on a disputed matter made without having first heard from the parties and subject only to limited right of objection later.

- FIDIC leaves the parties just 48 hours in which to make their first submission on the desirable characteristics of the DAB member - by way of objection. It is conceivable that a party will feel that there is no realistic prospect of overturning FIDIC's provisional decision within such a short timescale and before it becomes "final" under Sub-Clause 20.3. This could arise simply because the circumstances in which a party finds itself at that time do not permit a rapid response in the timescale demanded by FIDIC.
- So here also there is scope for the parties to feel that there has been procedural unfairness in the appointment. If there were already a perception that the parties' views were of little importance, it could easily be compounded by one of having been afforded no reasonable opportunity to research FIDIC's proposed appointee and then make a considered response to FIDIC on the question of suitability. All of this does nothing to engender confidence in the DAB whose appointment may then follow. Furthermore, it could generate a challenge to the validity of that appointment and potentially to the validity of a DAB decision that results.
- If a reasonable objection to the suitability of FIDIC's candidate follows from one or both of the parties, for example one relating to the profession or experience of FIDIC's proposed appointee, and this results in FIDIC's withdrawal and reselection of the candidate, then FIDIC's original research and administrative effort will all have been wasted for want of prior consultation; so also will the time and costs of the parties have been wasted.

Suggested Solution

I suggest that in any review of its DAB appointment procedures, FIDIC might consider the following scheme:

- After receipt of an application to appoint which should set out the applicant's views on the desirable attributes of the DAB member, FIDIC should first copy the application to the other party and invite further submissions on the desirable attributes of the DAB member from

each party within a suitable period of, say, seven days. FIDIC might take the opportunity here to remind the parties that it proposes DAB members only from its own finite President's List of well-qualified and approved persons. There will inevitably be restrictions on the availability of some of those persons and their particular skill sets at any one time. So it may not be possible for FIDIC to comply in every respect with the wishes of the parties.

- After having considered any such submissions, FIDIC should inform both parties of its proposed appointee whose appointment will automatically come into effect after a short further period of, say, five days, unless FIDIC has received from either or both parties objections with reasons on why the proposed member is unsuitable.
- FIDIC informs the parties that objections to a proposed DAB member that are of a general nature, rather than specifically related to his or her suitability for this particular appointment, are unlikely to result in reselection.
- In the event that FIDIC, in its sole discretion, considers that such reasons do justify a reselection, that reselection will be undertaken and the parties notified of the new proposed member. The reselected proposed member's appointment will be subject to the same right of objection with reasons.
- However, if FIDIC considers that the reasons given for a proposed member's unsuitability do not justify a reselection, the appointment will be expressly confirmed by FIDIC.

Conclusion

Minor changes only to the content and timing of FIDIC's published procedures would be sufficient to ensure that they do not offend the principles of natural justice. A DAB appointment under such improved procedures would serve to increase the level of confidence that the parties to a dispute have in their DAB and in its eventual decision. Those improved procedures

should also avoid the prospect of wasted costs.

¹ <http://www.bailii.org/ew/cases/EWHC/TCC/2014/3193.html>

<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements>

² Third edition, 2005, Blackwell Publishing, pp 616-7.



Article Author
Steve Mangan

Email: steve.mangan@corbett.co.uk

