

Public Works Contracts Conference

Issues with Project Boards How can they be Overcome ?



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Billy Morrissey & Project Boards



- **Standing Conciliator** on a wide range of public works contracts both building and civil works for many years now.
- An experienced **chartered engineer** having held the roles as **commercial director** in Ireland and the UK.
- Over **4 decades of experience** with public works, many at director level in both the public and private sector including public bodies and contractors.
- Appointed as a **Project Board Member** in the past.

CWMF Suite of Public Works Contracts

Dispute Management Procedure(DMP) 2016



The process is the Dispute Management Procedure (DMP) and it consists of the Project Board and, to a certain extent, the Standing Conciliator.

Relevant documents:

- Dispute Resolution GN-3.1.1 - primary explanation
- Clause 13.1 of PW-CF 1-4 inclusive – defines operation of the Board
- FTS-1 – establishment of Board
- Appointment of Standing Conciliator MF-1.18



Application of Project Board



- CWMF contract forms PW-CF 1-4 inclusive > €10,000,000
- Optional for PW-CF 1-4 inclusive, €5,000,000 - €10,000,000
- The Project Board can exist whilst a Standing Conciliator may not be appointed, for example contract sum €5M - €10M
- Input into Schedule Part 1N at tender stage



Purpose of Project Board



To allow the Parties to the contract to engage in a **without prejudice resolution process** concerning disputed ER determinations **under subclauses 10.5.4 and 10.5.5** (any dispute referred to this C13.1 process is required to go through the DMP process before it can be referred to conciliation)

C10.5.4 concerns an ER determination under sub clauses 10.5.1 (3) or 10.5.2

C10.5.5 concerns an agreement by the ER (of a Contractors proposal) under 10.5.1(2)

This is the main issue with Project Boards, remit confined to 10.5.4 and 10.5.5 notices!

Establishment of Project Board



Schedule Part 1A

1,2 or 3 members per Party, (default is 1)

Names and details of Employer's members notified to Contractor in letter of successful tenderer.

Names and details of Contractor's members notified to Employer in response to the letter of successful tenderer.

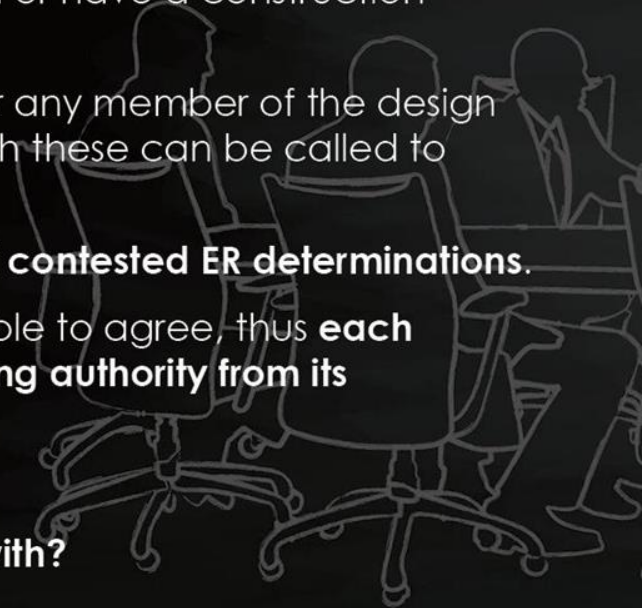
All details entered into Schedule Part 3A at letter of acceptance stage.

These steps outlined above are not always carried out and can sometimes lead to problems.

Project Board Composition



- The Project Board membership is nominated in **equal numbers** by the Employer and the Contractor, the Employer confirms the number in the Schedule Part 1A at tender stage.
- At least one person nominated by each Party **must hold a construction related role** in the Party's organisation, or have a construction related qualification or have a construction related background relevant to the project.
- Neither the Employer's nor the Contractor's Representatives, nor any member of the design team (under PW-CF 1 &3) shall be members of the Board, though these can be called to attend the Board.
- **The purpose of the Board is to consider and hopefully dispose of contested ER determinations.**
- In order to dispose of any disputed matter, the Board must be able to agree, thus **each member of the Board is required to hold negotiating and agreeing authority from its nominating Party.**
- A Party can nominate someone external to its organisation.
- **The above requirements once again are not always complied with?**



Dispute Management Procedure

C 13.1.2



- The sole purpose of the Project Board is to consider disputed ER determinations under clauses 10.5.4 or 10.5.5 which may be referred to the Project Board under C13.1.1.
- The Project Board meets every 60 days, or by agreement, sooner (in the event of new disputes) or later (in the event of no disputes) - C13.1.2(1).
- The quorum is a minimum of one member from each Party -C13.1.2(1).
- The maximum allowed is 3 members from each Party - C13.1.2(1).
- Unresolved disputes shall be notified to the Parties the next working day, who may then refer the dispute to conciliation (under clause 13.2) within 14 days, otherwise the originally disputed ER's determination becomes binding - C13.1.2(2).
- Communication among the board and/or with the standing conciliator can be orally or in writing on a "without prejudice" basis, and shall remain on a "without prejudice" basis unless incorporated into an agreement - C13.1.2(3).
- Any agreement to resolve the dispute shall be in writing and **shall be signed by the Parties**, and is binding on the Parties - C13.1.2(4).
- **Is this always the case, no.**

Project Board & Standing Conciliator



- The project board may have the Standing Conciliator or Conciliator draft such an agreement - C13.1.2(5)
- If an agreement issued by the Standing Conciliator is not signed by both Parties within 14 days, either Party may refer the dispute to conciliation within a further 14 days, otherwise the originally ER's determination shall become binding - clause 13.1.2(5)
- The Standing Conciliator may be invited to attend or chair the Project Board meetings - clause 13.1.2(6)
- The Project Board may seek advice or opinion from the Standing Conciliator in an effort to resolve a referred dispute- clause 13.1.2(7)

Standing Conciliator

- The role, authority and other aspects of the role of Standing Conciliator is contained in model form MF 1.18.
- This is a separate contract to the underlying construction contract between, on the one part, the Employer and the Contractor in the construction contract, and on the other part, the Standing Conciliator.
- The Standing Conciliator is primarily referred to in C13.1.1. Section 2.8 of GN 3.1.1 – intention of role of Standing Conciliator C13.2, Conciliation, provides that where a standing conciliator is appointed, the Standing Conciliator shall take the place of the conciliator under C13.2 for all disputes referred to conciliation. In these circumstances the standing conciliator is acting as a conciliator - not as the Standing Conciliator
- A wide differences in the skill sets, abilities, style and approach of Standing Conciliators ... **'hands on interventionists' ... 'light touch diplomats' ...**
- The Standing Conciliator is at the centre of the dispute resolution process but, it remains essential that the Standing Conciliator does not, and is not seen to the slightest degree to, substitute the role of the parties or their representatives within the process: **to do so is to risk losing the confidence of either or both of the parties where this confidence is the basis on which his / her influence and in his / her purpose rests.**



Observations

An illustration of a person in a dark blue suit and red tie, holding a wooden telescope to their eye with their right hand and a red ladder with their left hand. The person is positioned in the upper half of the frame, with the word 'Observations' overlaid on their chest. Below the person's chest are three small orange dots.

Observations

- Generally, (Standing) Conciliators seek to be fair and reasonable; notionally in accordance with the contract. Fairness can be a judgement call in a commercial context.
- There seems a general reluctance on the part of public sector teams to make such judgement calls even on Project Boards.
- Project Boards & Employers can use (Standing) Conciliators advice to support such judgement calls when making submissions to the funding Department.

Risk Management

A person is seen from behind, climbing a thick black rope. Above the person, three orange dots are arranged horizontally. The background is a dark, textured wall with vertical lines.

- The Employer's role in a construction project is not about risk transfer for a fixed price **but**, rather risk management for a reasonable cost.
- Look at Covid-19 and recent High Inflation costs. They could not be dealt with inside the contract so had to be dealt with outside the contract with so called 'burden sharing' !
- The introduction of the Project Board and the Standing Conciliator are potential supports to the Employer in the risk management of construction projects.
- On Project Boards of which I am familiar, the key agenda item is not strictly part of the Boards' remit but it is the only one that should make sense:
Risk Mitigation.

A hand is shown moving a black chess piece, specifically a king, on a chessboard. The background is dark and slightly blurred, focusing attention on the hand and the piece.

Is there any advantage with Project Boards ?



Maybe,

- Regular meetings on site
- Active Engagement
- Ongoing positive dialogue regarding potential Issues
- Can assist in the prevention of disputes forming
- Value for Contracting Authority & Contractor

But, *'If Project Boards are only about dealing with disputes when they have been referred to them then ... that's like sending in the bomb squad after the detonator has been triggered'.*



Summary of Dispute Resolution Process

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- **Pre-emption:** The first stage is to foresee and pre-empt which is a function of the Standing Conciliator who is deemed to be experienced, well informed, and who is widely authorised to engage informally with whomever he/ she considers appropriate to achieve his / her purpose.
- **Project Board Resolution:** The second stage is the Employer's Representative's Determination, which, if disputed, is referred to the Project Board, which may engage with the Standing Conciliator to resolve the disagreement.
- **The Standing Conciliation:** The third stage is where the Project Board fails to resolve the matter which may be referred to Standing Conciliator who formally accepts the dispute and again seeks to resolve it by agreement: if this approach fails, the Standing Conciliator issues a Recommendation. Therefore, any disagreement between the parties is given every opportunity for resolution prior to protracted and expensive engagement with collateral consequences.



Role of Project Board

It is instructive that the Role of the Project Board is limited to ER Determinations:

- all other matters are otherwise addressed directly to the Standing Conciliator, and the Project Board has no formal standing in such matters

Thanks for Listening



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