

## Report on Workshops

International Association of Dredging  
Companies (IADC),  
Central Dredging Association (CEDA)  
Institution of Civil Engineers (ICE)

## Contract Management for Dredging and Maritime Construction

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## About this report

This report captures the results of the workshops held at the Contract Management for Dredging and Maritime Construction Conference organised by the International Association of Dredging Companies (IADC), the Central Dredging Association (CEDA) and the Institution of Civil Engineers (ICE) on 12 and 13 October 2006 in London, United Kingdom.

Expert presentations on the workshop topics were held in the mornings of both days of the conference. In the afternoons of both days interactive workshops were held in parallel sessions, with the experts also joining the workshops on their respective topics. A team of facilitators and reporters from Prospex covered all workshops (their names are listed below). Conference participants subsequently discussed the results of each workshop.

This report covers the results of all workshops including the subsequent conference discussions.

Prospex facilitators	Prospex reporters
<ul style="list-style-type: none"> <li>▪ Katia Tieleman</li> <li>▪ David Duerden</li> <li>▪ Marc Gramberger</li> <li>▪ Paul De Ruijter (day 1 only)</li> <li>▪ Steven Libbrecht (day 2 only)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ard Jongsma</li> <li>▪ Hans- Peter Lassche</li> <li>▪ Rebecca Warden</li> <li>▪ Ilse Van Cauwenbergh</li> </ul>

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## Pre-tender information

*Workshop facilitator: Marc Gramberger*

*Reporter: Ilse Van Cauwenbergh*

*Lead expert: John Land, Director, Dredging Research Ltd, UK*

Participants first explored questions about pre-tender information on issues of responsibility, client motivation, foresee-ability, risk analysis and methodology. On the question of responsibility, many participants mentioned that the client should take responsibility - “it is the client’s hole, so it is his/her responsibility”. Accurate and adequate investigations should be finalised by clients and their engineers and consultants during the pre-tender phase. On the other hand, contractors need to inform clients when there is insufficient information. Practice shows, however, that neither of these approaches is necessarily followed. Time pressure plays a role here. However, in a growing number of countries judges seem to be favouring the contractor when the information supplied by the client is insufficient.

In terms of client motivation, the role of the consultants was emphasised. Not every client is sufficiently familiar with procedures and needs of a dredging project. Consultants should provide their clients with insights and should use concrete examples and statistical data to make their case on adequate pre-tender information. Participants mentioned that “nobody likes surprises” or unexpected additional costs, which supports the value of investing in pre-tender information.

Not everything is foreseeable and reasonable seems to be a key word here. Participants rejected the notion that trial dredging could provide the solution to foresee-ability, since cost-effectiveness depends heavily on the location and therefore the results of trial dredging are not always informative. Instead it was seen as important to provide reliable factual data

rather than speculation, and then to interpret this data in a focussed risk analysis. Some participants mentioned the possibility of contractors sharing their interpretation of investigations; others saw liability issues prohibiting such an approach.

In terms of methodology of site investigations, the information provided should be complete and clear and include the raw data. The investment in and the scale of investigation should not necessarily match the scale of the project, but rather the complexity of the site and its environment. Clients and their engineers and the consultants should be the decision-makers here.

Participants also saw a clear opportunity for developing a constructive approach between contract partners by involving pre-qualified contractors in the on-site investigation process. Contractors may even act pro-actively and request to be involved, and they should actively ask for more time for investigations if needed. A shared investigation by contractors may also be a possibility. Most participants rejected the notion of one-on-one negotiations with a pre-selected contractor as a replacement for competitive tenders, reasoning that this would contradict existing laws or the rules of state-clients and large companies.

In general, participants were in favour of a feedback system between clients, consultants and contractors for pre-tender information. Clients were advised (by contractors and consultants) to invest more time and funds in the pre-tender information phase.

On the other hand, clients asked contractors to be more open and transparent concerning their processes. Contractors responded by inviting clients to ask for more information, although it was cautioned that contractors will not provide information on production rates and operating costs. Other information such as that concerning sensible tolerance levels and financial consequences, however, could be provided.

As there “is no ideal world”, minimising risks for all parties was seen to be a constructive approach in providing pre-tender information.

### **In summary**

Consultants should have a bigger role in the pre-tender process. Consultants’ qualifications are key and the consultant in charge should be experienced in the dredging process on every level.

Unfortunately, one cannot always trust that people have honest intentions when starting tender procedures for dredging projects.

Perhaps it is not really necessary for the client to spend great sums of money to study the site and then have the contractor do the same. The contractor could instead send a representative.

Although ground investigation data always needs to be interpreted, from the client’s view, certainty of price should be achieved regardless of the conditions at site.

There was consensus that time allowed for tendering should be feasible and risk analysis should be part of the site survey report.

## Environmental issues during preparation stage

*Workshop facilitator: Katia Tieleman*

*Reporter: Ard Jongsmā*

*Lead expert: Wouter Dirks, Specialist Senior Engineer, Van Oord, the Netherlands*

Questions raised by participants in this workshop on environmental issues during the preparation stage could roughly be divided into four groups relating to: awareness raising, contractual processes, technical issues and legal issues.

After the initial opening questions were answered, a debate focussing on communications with stakeholders through lobbying and dialogue followed.

Problems typically arise because environmental demands are either restrictive to the extent that satisfactory completion of a contract becomes technically unfeasible or lax to the extent that a seriously negative environmental impact of contract activities may be foreseen. Dialogue with legislators is key in both scenarios. Although such dialogue exists in theory (e.g. through PIANC and CEDA) participation of legislators is minimal. Some participants went as far as to wonder why legislators were not present at this conference. Others suggested that dialogue with the general public was even more important as, in a democracy, public opinion tends to set the course for legislators.

There was a general feeling that there is a need to help clients navigate in this fast-moving field. Contractors can play an important role in this process but so can good consultants and it could not be fully agreed who should take the lead.

There were proposals for bottom-up efforts to raise awareness amongst clients through a “code of conduct” that would define the minimum environmental requirements with which a tender procedure should comply in order for contractors to bid on it. It was acknowledged that this required a level playing field where contractors would be willing to report published tenders that clearly did not meet broadly accepted minimum environmental standards, such as tenders with severely flawed or entirely lacking environmental impact assessments (EIAs).

Because of the competitive nature of tenders, this could only be achieved on very large projects where all potential tenderers would be members of established associations. There was also doubt about how such a practise could be enforced. The United Nations and the IADC were named as possible lead regulatory organisations.

Related again to communication and to the speed of changes in this field, the issue of the need to harness the available knowledge amongst all players involved in contracts with a potential environmental impact was raised. Neither the client, nor the consultant, nor the contractor is individually sufficiently knowledgeable about the environmental consequences of a project and possible mitigating steps that could be taken. All the parties together, however, can muster a collective expertise that will be of benefit to the entire operation. Communication and co-operation -- at as early a stage as technically and legally possible -- is key here. So is openness: contractors must, at the very minimum, have access to all available material related to a potential environmental impact at the tendering stage. Reference was repeatedly made to the benefits in large projects of alliance contract constructions that were discussed in workshop 4.

Indeed, because of the speed of developments and the recent global surge in environmental concerns, more research into the environmental impact of dredging and maritime construction must be encouraged. One suggested



proposal concerned the establishment of a research fund supported by a fixed levy on dredging contracts.

### **In summary**

Dialogue and lobbying needs to be intensified amongst contractors, consultants, clients, legislators and the general public.

Dialogue with legislators in particular must be strengthened. Such communication should aim to help clients navigate in a fast-changing field and inform legislators on the technical feasibility of legislative measures. In fact, contractors should rethink their role in the environmental debate and not leave all the initiative with legislators.

Ways in which contractors could affect the system could include a voluntary or enforced code of conduct or practise, specifying that tenders without EIAs would be unacceptable.

In general, knowledge about the environmental impact of dredging and maritime construction must be deepened. Existing knowledge must be better harnessed and utilised through more open sharing of expertise amongst clients, consultants and contractors.

# The balance between technical and functional requirements

*Workshop facilitator: Paul De Ruijter*

*Reporter: Rebecca Warden*

*Lead expert: Dirk Heijboer, Director Business Development - Coastal & Rivers, Haskoning Nederland B.V. , a company of Royal Haskoning, the Netherlands*

Workshop participants discussed what the right balance between technical and functional requirements in a project specification for the dredging and maritime construction industry should be. As striking the right balance can be difficult, they examined how finding this balance can become a constructive approach for everyone concerned. They also made suggestions for improving the working relationship amongst clients, consultants and contractors in general.

Inexperienced clients often tend to assemble a long list of technical requirements for their project rather than simply focussing on the functionality of the project, i.e., what they would like the finished product to be able to do. They may see technical requirements as easier to enforce than other benchmarks, but their very inexperience can lead them to include unnecessary requirements or to insist on the use of specific techniques or equipment that may not be the most appropriate for the job.

More experienced clients are usually in a better position to handle complex technical requirements, but because of their practical experience they are often quite happy to leave the technical specifications fairly broad and allow contractors to propose the technical solution or kind of equipment they think will work best.

In both cases, the workshop participants believed that it is better for the client to focus on functional rather than technical requirements. Giving contractors more flexibility -- in technical matters such as these but also in commercial ones such as currency -- will often allow them to put in a more accurate bid.

The participants then offered some general suggestions on how to achieve more constructive working relationships in the industry. First, the client should aim to use the same consultant throughout the process from project design to implementation. This person has the advantage of knowing the history of the project and will have a clearer idea of what is really important to the client than someone taken on halfway through the process. Consultants should strive to be as independent as possible, even though the client is their paymaster. If a project is not technically feasible, they should say so no matter what.

A successful project depends upon forging a real partnership amongst client, consulting engineer and contractor. All three must do their best to foster good relations, and, in the event of conflict, should be willing to replace members of their team if this will help solve the problem. Ideally all three partners, including pre-qualified contractors, should be involved in the project process from day one so that a team approach is adopted from the outset. This may not always be possible as, in some countries, tendering procedures or the rules of international financing institutions specifically rule this out. Nonetheless, the process of tendering should be seen as a dialogue. For inexperienced clients this can be a chance to learn about the risks involved. It is far more constructive for contractors to have an open discussion with clients at this stage about the risks involved than to merely put in a quote for the lowest possible price and rely on putting in a claim for compensation if and when problems arise later on.

Market conditions in the dredging and maritime construction industry are very different today than ten years ago. The sheer number of projects underway around the world means that reputable contractors are very much in demand. Being able to pick and chose their projects has made contractors reluctant to take on risky projects. Clients have a different mindset and are generally focussed on cost and functionality. While some industry players already have their own internal code of conduct, there is a need for an industry-wide code. For contractors, this should cover minimum rates to avoid the practice of offering a low price and then relying on subsequent claims as compensation.

It was recommended that the IADC should draw up a set of minimum requirements for clients.

### **In summary**

A correct balance between technical and functional requirements in a project should be found, and a more constructive working relationship amongst clients, consultants and contractors should be promoted. A clear definition of rules and objectives from the start helps avoid conflicts later on. The process of tendering should be seen as a dialogue.

Clients are an extremely varied group of people. Contractors may find some clients in certain countries do not feel very committed to their projects and are happy to hire a firm of consultants and hand over all responsibility to them. Inexperienced clients will often include overly narrow technical requirements in their project specifications instead of focussing on functional rather than technical requirements in project specifications. Giving contractors more freedom to decide which technical solutions and equipment to use should make for better proposals and lower prices.

Overall success depends upon forging a real partnership amongst client, consulting engineer and contractor. Continuity is very important so clients

should make sure they employ the same consultants from early stages through to implementation. Ideally all three partners, including pre-qualified contractors, should be involved in the project process from the outset, granted that in some countries this is not allowed.

Consultants should strive to be as independent as possible and if a project is not technically feasible, they should say so. Clients should aim to pass on their local knowledge such as the availability of local materials or which other projects are underway in the area to contractors.

Potential challenges for clients are: Prevailing market conditions favour contractors and mean they can pick and choose their projects. This has made them reluctant to take excessive risks. Also, low fees and fierce competition between consultants are making it harder for them to attract and retain good technical personnel.

All players should be prepared to think out of the box and look for innovative solutions. Clients should concentrate on reaching timely decisions rather than aiming for total perfection if this will mean long delays in the tendering process.

There is a need for an industry-wide code of conduct. For contractors, this should cover minimum rates to avoid the practice of offering a lower price and then relying on subsequent claims as compensation. The IADC should draw up a set of minimum requirements for clients.

# Choice of form of contract

*Workshop facilitator: David Duerden*

*Reporter: Hans-Peter Lassche*

*Lead expert: Hendrik Postma, Manager Dredging Department, Royal Boskalis Westminster, the Netherlands*

The discussion on the choice of form of contract centred mainly on the so-called alliance contract. The essence of the alliance contract could be described as a form of contract in which both parties benefit. Therefore trust, instead of distrust, is the basis of the contract. If trust prevails, why then is a good and transparent contract needed? “I want trust, but I shouldn’t need it, because I have a clear and transparent contract”, as one of the participants said.

For example, parties can agree to share a bonus for the early delivery of a project. Normally, a contractor might benefit from a longer-lasting project, while the client wants it to be finished as soon as possible. By sharing the early-delivery bonus, both parties profit from an early delivery.

Although the alliance contract is not a formal form of contract (and not by far a common form yet), everybody can “sense” its essence. One alliance contract characteristic is that it does not only depend on legal clauses, but also on non-legal considerations, such as mentality and trust.

Does working within an alliance contract take more time, because of the need for more frequent and better communication? Not according to those who have experience in working with alliance contracts. Because there is less competition between client and contractor, they work together much more closely as a team, and the formation of teams in an early stage of the contract actually saves time. By working together you learn to respect your client and vice versa.

Because not everyone is used to working in this way, an alliance contract can also fail, even though, as one participant observed, an alliance contract is the “most mature form of contract”.

Not everybody would agree with this observation. Alliance contracts are by no means the only form of contract for the future and for a small-scale, straightforward job a regular contract may still be the most appropriate form. Alliance contracts are especially useful for large-scale, complicated projects. In other cases it can lead to overkill. Still another caveat, coming from one of the participants: “I prefer a good and sound contract, just in case things do go wrong”.

Besides the normal criteria such as price or working methods, the willingness to work in an alliance can be one of the selection criteria for a contract. However, according to some participants, other issues than just price are becoming more important in the dredging business. Everyone should remember that dredging is almost always part of a bigger project, and in that project, contractors themselves are often clients of third parties. Because of the obligations deriving from those relationships, forming an alliance contract could be difficult. It could lead to a conflict of interest.

Basically in a contract there are only two ways of enforcing obligations: time and money. It is impossible to enforce quality directly, only indirectly by using time or money. Prices nowadays are rising because of stricter environmental requirements. Will clients will accept and respect these increasing costs, or will they go to a contractor who is less strict and promises the client that they “will get away with cutting corners”?

In an ideal situation parties would share the risks, or at least would make clear agreements about who is responsible for which risk. This would demand that parties make a risk analysis in a much earlier stage of the process, so that the risks can be identified and attributed to one of the parties. The

“owner” would be the party who can steer the risk. Another advantage of an early risk analysis is that parties can act instead of react.

Taking a different approach, a suggestion was made that all the risks should go to the contractors, because they have the knowledge as it is their core-business. The contractors agreed that accepting this risk would not be a problem for them as long as they are paid for it. But for the client this may be an expensive solution.

In the end, maybe, the choice of form of contract is less important than it seems. If parties share a constructive approach from the beginning and identify the risks, then the best form of contract should automatically follow from that approach.

### **In summary**

Alliance contracts (AC) offer many advantages, but are not the sole form of contract for the future. AC can be overkill in case of straightforward jobs. Also, it may not work if the contractor is client for third party with different obligations.

AC can save time, because of “true cooperation”, but it has to be tailor-made. It is not a formal form of contract; key elements are trust, a cooperative mentality and a certain mindset.

In all forms of contract, beware of copying the past and realize that while trust is good, it should be supported by a good and transparent contract. Agree in advance on procedures to avoid claims and legal procedures and include consultants in the process.

Price and working methods are still the main selection criteria. Presently, environmental requirements are driving up prices. Dilemma: will clients accept higher prices or go to more lenient contractor?



Managing risk means identifying risks at an early stage; sharing risks if possible; and making clear agreements on risks that can be or should not be shared. Or should all risks go to the contractor? If the client is willing to pay that would be fine, but this is a dilemma for client. They may pay for risks which do not happen and this drives the price up as well.

Generally speaking, never forget that dredging is always part of larger projects with more parties. It is important to try to control the “unknown” at an early stage by identifying problems and risks in an early stage and by sharing knowledge and information. When there is real cooperation possible, all parties benefit.

Time and money are the only ways to enforce a contract.

In case of complex and extensive projects: establish a board of experts, strive for trust instead of distrust, solve problems in the most efficient way regardless of blame, and share the benefits.

# Tender procedures

*Workshop facilitator: Marc Gramberger*

*Reporter: Ilse Van Cauwenbergh*

*Lead expert: Luc Imbechts, Head of Legal Department, Jan De Nul, Belgium*

The discussions on tender procedures focussed on the issues of involvement of contractors, pre-qualification, registration and alternative solutions.

In terms of the involvement of contractors, providing more information to the contractor is seen as the foremost issue. Furthermore, involving the contractor in setting-up the information and data collection system would benefit the process, ensuring adequacy of data for both the tendering and the construction stages. Many participants highlighted that all interested contractors should be given the chance to be involved as stipulated in, e.g., EU regulations.

Rigorous pre-qualification based on a scoring system results in fewer contractors being invited to tender. This enlarges the possible success of invited contractors. While bigger contractors seem to be favourable to this idea, some participants raised concerns that too rigorous pre-qualification procedures would discourage smaller contractors and new contractors, thus stifling competition. On the other hand, screening of possible contractors could encourage competition.

In practical terms, contractors mentioned that 4 to 6 weeks would usually suffice for them to provide the requested information -- this under the condition that they can start from day 1. They especially advised clients to ask only what is necessary and refrain from requesting contractors to provide non-essential translations and certifications in unusual formats. Clients and consultants mentioned that, in their perspective, contractors sometimes do

not use the allocated time optimally, leading to last minute actions and requests.

The idea of a registration database attracted the most interest amongst participants. This proposal by a number of participants foresees establishing a central registration database for contractors, following the way in which they exist in other industries. This, it was argued, would simplify the (pre-) registration process for all parties concerned and would lead to competition amongst equals. Contractors could be distinguished by a number of stars assigned on the basic ability to take on different sizes of projects. While generally speaking the idea was positively received, it did encounter strong resistance from a smaller group of participants. This group proclaimed that registration is the client's job. In the discussion of the proposal, many concerns were raised including:

- Is this legal?
- Who would be in charge of administering this database, and who would decide on the allocation of stars? Would this be a job for IADC?
- How would a company be able to earn additional stars and how would it lose them for that matter?
- How would joint bids or joint ventures be treated?
- Would this not result in bigger contractors ceasing to collaborate with smaller ones?
- Would there be a black list?
- How can the requests from developing countries for local provider involvement be included?
- Should this database be differentiated by geography and by activity? And, if yes, how should cross-regional and cross-activity assignments be treated?

- Would this not result in too many qualified companies?
- If there is a contractors' database, shouldn't there be one for clients as well? And for consultants, for that matter?

Participants also discussed alternative solutions in the tender process, such as approaches in designs and concepts differing from the ones requested in the tender documentation. The discussion focussed on different technical solutions, with participants explicitly mentioning that these alternative solutions could also concern different commercial and financial approaches.

Contractors raised as their main concern the fear that clients could unfairly take advantage of these proposals -- such as by taking it from the proposing contractor and having it implemented by a lower-cost contractor. Amongst the open questions posed but not yet answered was: would copyrights provide a way to handle this? Participants suggested that clients could invite alternative solutions by specifically stipulating this in the tender documentation.

### **In summary**

Registration database systems for pre-qualification already exist in other industries. It would be good to check on their experiences and learn from this.

Should alternative solutions be evaluated, and if so, how and based on what criteria? Should the client take the initiative in the tender documentation? Can alternative solutions be copyrighted to protect the contractor?

# Project finance

*Workshop facilitator: Steven Libbrecht*

*Reporter: Rebecca Warden*

*Lead expert: Michael Dinham, Michael Dinham, Managing Director  
Infrastructure Finance, ING, UK.*

A small group including clients, contractors and one consultant looked into the subject of the different stages of project financing. The conference speaker, a representative from the banking world, provided extra input and guidance. The participants aimed to identify the challenges facing the different players in the industry today and suggest what could be done to create more constructive solutions for the future. The debate centred on two main issues: First, at what stage in the project cycle should you start looking for sources of funding? Should clients be solely responsible for securing funding or is there also a role for contractors? Second, how can clients and contractors manage risk better in the context of competitive tendering processes? What are the financial implications?

The group agreed that many clients, particularly those working on large public sector projects, do not start looking for sources of funding at an early enough stage in the project development. Ideally they should begin considering the issue of funding as part of the feasibility study, and in any case, well in advance of putting out the call for tender. The group accepts that changing conditions and long time-scales between inception and execution of projects can make this difficult. Clients may also lack the necessary financial expertise. But employing financial consultants as well as engineering consultants at an early stage, something that is not common practise at the moment, could solve this.

Doing this would provide benefits all round. Knowing that a client has solid financial backing removes some of the uncertainty for contractors preparing

their bids. This means reducing the financial risks for contractors, which in turn means they can offer clients lower prices and a more competitive bid.

Unfortunately, the financing situation appears to be moving in the opposite direction. Contractors reported that a growing number of clients are asking them to provide some of the financing, usually by asking for funding packages as part of the tendering process. The contractors present did not believe this is the right path to follow. They do not see providing financing as part of their core business, although they did not rule out the possibility of providing short-term finance such as bridge loans. When rushing to put together a bid, the contractors said they are busy looking for the ideal technical solution for the project and they worry that getting involved in the funding aspect could put a strain on their resources. Moreover, contractors are geared to generating a payback as soon as possible and are not keen on factoring in revenues that will only materialise in the long term.

Dredging and maritime construction is a field with a high level of risk and how this risk is shared amongst all the players is an ongoing concern. Allocating risk will always have financial implications; contractors who accept a high level of risk tend to factor this in and charge higher prices. The group agreed that it is important to identify risks and other factors which will affect the construction costs at an early stage of the project. For instance, the difference between hard and soft materials lying under the surface of the seabed can make all the difference to the viability of a project. However, in some tenders contractors do not have adequate information on the ground conditions to help them prepare their bid.

If contractors are forced to carry out their own site investigations, this can be both expensive and time-consuming. The solution put forward by some of the group is to put the onus on clients to provide extensive and accurate information. A fair way solution would be for clients to employ independent consultants to carry out extensive site investigations. The information would

then be made available to all interested contractors via a data room, thus helping to provide greater transparency and a level playing field for interested parties.

While some of the group believed this would be the best solution, others were not so sure. One contractor pointed out that he relied on his better local knowledge to give him a competitive advantage over rival contractors. Others found this suggestion unrealistic in the fiercely competitive environment found when bidding for dredging contracts.

### **In summary**

Clients often do not start looking for funding early enough in the project cycle. There is as well a growing tendency for clients to ask contractors to get involved in funding, often by asking for funding packages in the tender. Contractors do not see this as part of their core business. Clients should instead do their homework on financing, preferably as part of the feasibility study. In any case, they should have secured funding before the project is put out to tender.

Securing funding early has benefits for all; it reduces uncertainty for contractors preparing their bids. Contractors are then able to offer clients lower prices.

If they are not knowledgeable about securing finance, clients should consider using financial consultants the way they use consulting engineers. This is not common practice today and could be a new service to be offered by consultants.

Although contractors are not keen on providing long-term financing for projects, short-term modalities such as bridge loans may be possible. However, sharing risk in a dredging project, has financial implications and can result in higher bids.

Sharing information can reduce cost, but in a competitive arena, the players are usually reluctant to do this. For instance, clients often do not give enough historical data, while contractors do not want to provide production rates. Contractors often do not have sufficient ground information to identify and manage the risks, yet carrying out their own site investigations may not be feasible. Should clients provide the maximum amount of information on ground conditions to contractors preparing a bid?

Some people suggested that clients could create a more level playing field for contractors by hiring independent consultants to carry out site investigations and then making this information available to all interested parties via a data room. Others do not believe this is a realistic suggestion. Hiring the right team of sensible advisors could help all parties to adopt a reasonable attitude towards sharing risk.



# Liability issues

*Workshop facilitator: David Duerden*

*Reporter: Hans-Peter Lassche*

*Lead experts: Victoria Hughes Galatea & Adrian Durkin North of England P&I Association, UK*

Participants in the workshop found a common ground in trying to identify risks at a much earlier stage than is presently common, in order to reduce being surprised by unexpected events. Better risk analysis and management in an early stage has many obvious advantages. It gives parties the opportunity to decide who is in the best position to do the assessment. Too often the assessment is done by the party that is not necessarily the most knowledgeable in a specific field. This can lead to being over-insured or under-insured. Cooperation at an early stage also makes it possible to harmonise and synchronise policies for the same reason: to avoid under- or over-insurance.

The concepts of assessment, analysis, cooperation and synchronising were major subjects throughout the discussions. Liability issues raise many questions because so many parties and issues are involved. For instance, if a pipeline is damaged, who owns the pipeline -- the client or a third party? Who is to blame -- the contractor or the consultant? Who bears the risk -- the owner of the pipeline, the contractor, or the consultant? What laws are relevant? Was the damage the result of contractual or non-contractual work? There are many variations to this example, but it underlines the complexities involved in liability issues. A general observation therefore was that experts should participate in the earliest stage possible.

Although there is widespread agreement that the issues are complex, there is a general feeling that policies should be kept as simple and to the point as

possible. Too often policies address more subjects than necessary. Often this is a result of copying and pasting from earlier policies and contracts.

A widely shared recommendation was that the party most qualified to do the assessment for the amount of coverage needed should be the one to do it. Why let a contractor assess the needed coverage, while the client is much better qualified to do so? The question that follows is whether the party that does the assessment should also bear the risk.

There was some concern about the role of consultants. Most claims will land on their doorsteps. If contractors cause damage, they will claim that the consultant's research was poor, as will the insurer. It will cost time and energy for the consultant to refute such claims (and sometimes of course the consultant will actually be the one to blame). Clients and contractors both called for better insurance coverage for consultants. Consultants fear long-lasting legal procedures which may jeopardise their business. This problem could also be mitigated by better risk management and cooperation at an early stage.

### **In summary**

It is difficult to make general statements about liability. Many factors are involved, such as ownership (of vessels or equipment or damaged property), local laws, contracts and policy. Consultants are in a vulnerable position as they will often be blamed for failing investigations. In addition, the insurer for the owner of the damaged property or the insurer for the contractor will often lay a claim on the consultant. But do consultants actually have enough coverage?

Liability for clients may suggest too much knowledge on their part, but they should be more open although there is the danger of this backfiring: the insurer may retract the policy if client tells all.

Sometimes contracts and policies contradict each other so the dilemma is whether to go uninsured or go elsewhere. But is that really a good option? Generally speaking, all eventualities should be covered. However, the differences in size between a contractor and a consulting firm can be substantial. That should be taken into account. On the other hand, contractors are not insurance brokers.

When considering insurers, be aware that not all insurers have enough knowledge of the industry and that all dredging projects are more or less unique.

A few recommendations included creating more risk awareness by bringing in the right people at an early stage; investigating the possibility of sharing risks and liability; synchronising policies of contractors, consultants and clients to eliminate too much double coverage.

Each partner should take some responsibility and the partner with the most knowledge in a certain field should do the assessment. For instance, the risk for the rig or equipment should be for the owner as they can best assess the needed coverage.

The goal should be to keep the insurance coverage and liability simple, but be wary of paste and copy policies. Overall there should be better communications between contracting parties and an effort to avoid conflicts of interest. Perhaps the solution is to try to establish an industry framework for insurance coverage.

# Dispute settlement

*Workshop facilitator: Katia Tieleman*

*Reporter: Ard Jongsma*

*Lead expert: Edward Corbett, FIDIC D&R working group, UK*

After some clarification on the differences between mediation, adjudication and arbitration, this workshop group spent considerable time debating the role of the Dispute Adjudication Boards (DABs) that the lead speaker, Edward Corbett, had introduced in his plenary address. DABs were generally seen as a promising means of making the dispute settlement process between clients and contractors less painful and less time-consuming.

Enforcement is a serious issue with DAB rulings as they now exist. In principle, all partners accept that DAB rulings are binding, but in practice enforcement (payment of the claim) is a problem. It was agreed that the next generation of FIDIC contract revisions should support enforcement. A DAB ruling should be “convertible” into a summary award from the ICC arbitration and thus be made enforceable under national legislation in accordance with the New York Convention.

In fact, the speed of DAB procedures and their tight wording in the FIDIC contracts can also backfire. The claim notification period of 28 days and the harsh consequences of it not being observed are both condemned and indeed sometimes abused. Often there is not even agreement on when the counting towards 28 days should start: on the first day of the discovery of an unforeseen boulder? Or on the first day it becomes obvious that there are more? On the day it is known how many there are and what the consequences are? There is general agreement that the phrasing of the notification specifications must be modified in future revisions of the FIDIC contract models.

For long-term projects, the “standing DAB” variant was considered preferable. A standing DAB (as opposed to an ad-hoc DAB) is appointed at the start of a project, and follows the project from beginning to end. Because of its permanent and close involvement, it has strong potential to defuse disputes in situ, or “on deck” as one participant put it -- in any case well before the dispute escalates.

This preference for prevention rather than settlement continued to govern the group’s debate.

Dispute prevention during the pre-tender stage was discussed again, with participants believing that the poor quality of ground condition specifications in particular was a hotbed for later disputes. Some argued for “conditions reasonably foreseeable by an experienced contractor” to be specified and quoted for, as is often done in offshore tendering. On the same note, German public tender specifications ask for a list specifying the price of unforeseeable conditions and the results of this have been encouraging. Generic pricing schedules for different materials that may be encountered, however, have proven to be unworkable. Dredgers work with natural materials, claim the contractors, and these are simply too diverse for generic pricing schedules to make sense.

Increasingly the cost-driven procurement of consultants -- particularly in Eastern Europe -- was viewed with concern and generally considered false economy. Legal experience can amply demonstrate how, on large projects, selecting consulting services on quality, not price, can save millions of euros.

There was a general consensus that the contract administration on all sides needs to be good if disputes are not to end in an endless arbitrary tug-of-war. Keeping records is essential for building a case should a dispute escalate. And indeed, sound staff management also has the potential to

avoid disputes because it is often underestimated how many disputes start with personality clashes.

### **In summary**

DABs (Dispute Adjudication Boards) are an important step in the right direction but specifications of their modus operandi must be refined in future FIDIC contract models, and the enforcement of their decisions deserves particular attention. DAB enforcement can be supported by way of the NY Convention through ICC arbitration. This construction must be supported by future FIDIC model contracts.

The 28-day notice period phrasing in FIDIC contracts needs to be clarified, as should vague phrasing, such as the infamous “conditions reasonably foreseeable by an experienced contractor”. A specified and priced bill of unforeseeable conditions may be a helpful requirement to tendering parties.

The cost-driven procurement of consultants risks resulting in more disputes and claims. Contract administration must be improved on all sides, and detailed and complete records should be kept in order to be prepared in case a dispute cannot be settled in an amicable way.

In the end, prevention is far preferable over any form of dispute settlement and so using all means in the pre-tender phase to reduce potential conflicts is advisable.