

The use of Dispute Avoidance System as a means of cost control measure for public projects in Hong Kong

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ABSTRACT

In order to monitor and control public expenditure on new developments in Hong Kong, the Hong Kong Government has adopted a Dispute Resolution Advisor system (DRAd System) as a key dispute avoidance measure in all contracts between the Hong Kong Government and the Main Contractor for projects of contract value over 20 million Euro. The system brings in a neutral third party person selected from a panel of construction professionals jointly appointed by the Government as employer and the Main Contractor from the commencement of the Main Contract to the expiry of the Defects Liability Period. The functions of the DRAd are to foster closer co-operation between all parties in the contract, to minimize the number of claims, disputes and disruption to the project and to assist the parties to identify potential disputes and if it arises, deal with it effectively and expeditiously.

In this paper, the author would share with the audience how the DRAd system works and how it is used to monitor and control cost in the various stages of a public project development.

Keywords : Dispute Resolution, DRAd system, Dispute avoidance, Notice of Claim, Partnering

INTRODUCTION

The Dispute Resolution Advisors (DRAd) system has been adopted by the Development Bureau of the Hong Kong Government and the Hong Kong Housing Authority for the past 10 years. The two executive arms of the government are responsible for over 70% of the public development works. It evolves from the concept of partnering and is proved to be an effective system for the purpose of avoiding disputes.

However, the use of the DRAd system is not mandatory for all public works. The adoption of the system for a particular project must be approved by the Project Director-in-charge. The key requirements for the use of the DRAd system are: (1) preliminary risk assessment has shown that the nature of the work is complicated that disputes are likely to arise during the course of the contract, (2) the contract value is over HK\$200 Million (approximately 20 Million Euro) and (3) where there is a demonstrable benefit to adopt and implement the DRAd system.

THE DRAd SYSTEM

The DRAd system is primarily dispute avoidance in nature. It aims at fostering co-operation between all parties, to minimize the number of claims, disputes and disruption to the works and to assist the parties to identify potential areas of disputes and if arises, dealt with it effectively and expeditiously.

The DRAd is a neutral person selected from a panel of construction professionals and paid for jointly by the Employer and the Main Contractor from contract commencement to end of the Defects Liability

Period. For those contracts between the Hong Kong Government and the Main Contractors and Nominated Sub-Contractors where the DRAd system are adopted, the Special Conditions of Contract is amended to introduce a clause “Dispute Resolution” to enable the parties to adopt the system. The standard clause is as follows:

“SCC86(1) *In order to foster co-operation between the Employer and the Contractor and among Specialist Sub-contractors who may be engaged for the execution of any part of the Works, to minimize the volume of claims, disputes and disruptions to the Works, and to ensure the cost-effective and expeditious resolution of those disputes that do arise, the Dispute Resolution Advisor (DRAd) system, as set forth in this Clause, shall be implemented.*”

Once the contract is signed, it is a contract condition that the parties shall adopt and implement the DRAd system.

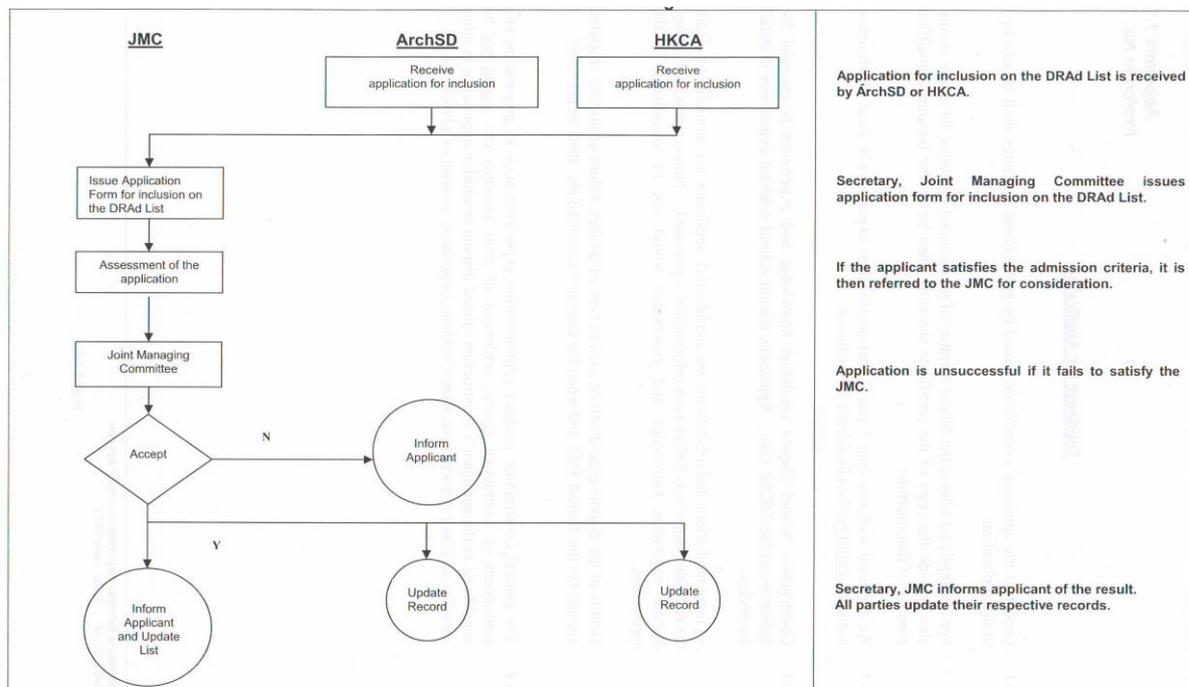
CRITERIA FOR ADMISSION TO THE DRAd LIST

The Joint Management Committee (JMC) represented by the Architectural Services Department (ArchSD) and the Hong Kong Contractors Association (HKCA) maintain and regulate the list of DRAd. Application for inclusion in the list is year round by way of a letter to the Secretary of the JMC, expressing interest for inclusion on the DRAd list.

All applications would be assessed by the JMC according to the following admission criteria:

- (1) Construction related professional/academic qualifications;
- (2) Other relevant training in dispute resolution;
- (3) Post-qualification experience in construction industry; and
- (4) Construction related dispute resolution experience in the capacity of mediator or conciliator, expert witness, legal counsel, arbitrator or adjudicator, both in terms of years and in terms of the number of cases.

The following flowchart illustrates the DRAd listing procedures.



The list of DRAd is updated annually by completing a standard form to that effect. All DRAd on the list are required to submit returns on their updated personal details. Those who did not submit updated return would be removed from the list until an application of reinstatement is received and approved based on the same admission criteria.

SELECTION AND APPOINTMENT OF DRAd

According to the SCC clause 59(3)(a), a DRAd shall be appointed within 60 days of the award of the Contract. After the award of the Contract, the concerned Government Department will provide a selected list of 10 possible DRAds to the Contractor for the purpose of short-listing of the preferred candidates.

The Contractor will seek confirmation from the selected DRAds by way of a written letter to express their interest in bidding for the DRAd post for the project and to declare that there is no actual perceived or potential conflict of interest in discharging the DRAd duties if so appointed.

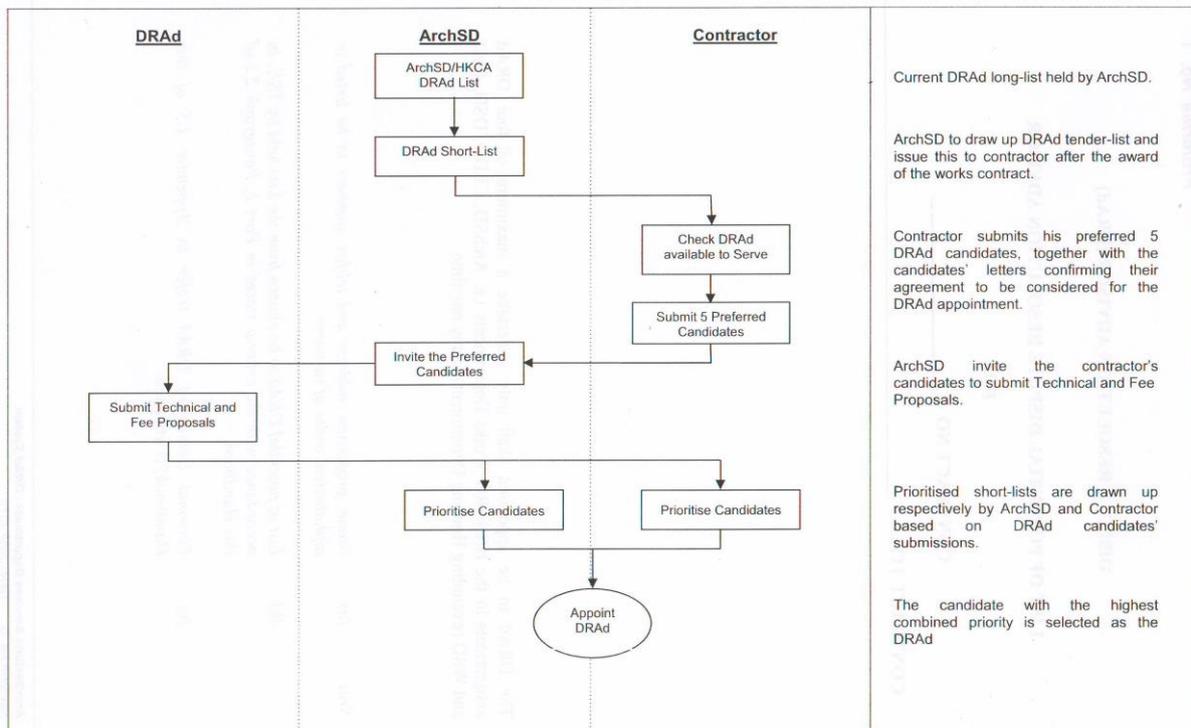
The Contractor shall select and submit a preferred list of 5 DRAd candidates to the concerned Government Department together with the confirmation letters from the selected DRAds.

The concerned Government Department will issue tender to the 5 preferred DRAds for bid submission. The bid documents contain an invitation letter, condition of tendering, schedule of fees, guidance notes for preparing submissions for DRAd which include a description of the extent of Contract, programming requirement, in particular for those projects with multiple completion dates, specific criteria for the due performance of the project, etc. together with the roles and responsibilities of the DRAd. Candidates are requested to submit a fee proposal (based on provided template) and a technical proposal.

The Technical Proposal shall include the DRAd’s understanding of the project, an appreciation of the potential areas of dispute that might arise and the methods to be used to deal with the dispute if it arises.

The concerned Government Department and the Contractor shall each separately assess the submissions and prepare their own prioritized list of preferred candidates. Candidate is selected on the basis of the highest combined score of technical and fee submissions assessed both from the concerned Government Department and the Contractor.

The following flowchart illustrates the procedures for the selection and appointment of DRAds:



A DRAd agreement shall be prepared by the concerned Government Department and signed by the 3 parties, i.e. concerned Government Department (Employer), the Contractor and the DRAd.

In order to ensure the appointed DRAd would spend sufficient time for the project, each DRAd shall only undertake a maximum of 4 DRAd appointments from the Works Department and 4 from the Hong Kong Housing Authority at any point of time. The DRAd would be asked to confirm the number of current DRAd assignments in hand before his/her bid submission is to be considered.

THE ROLES OF THE DRAd

The DRAd shall carry out his/her functions, duties and obligations in accordance with the terms of the DRAd agreement which include his technical submission and the relevant Contract provisions for the DRAd process. It is worth to note that the DRAd has no power to make decision. He/she only performs a facilitative function, similar to that of a mediator.

The DRAd does not have the authority to impose on the Employer and the Contractor on: (1) his/her opinion as to the substance of the problem or dispute in question, and (2) his/her proposal to solve problems or settle disputes.

The DRAd shall spend a sufficient amount of time at the beginning of the Works on the site to become familiar with the relevant personnel from both the Employer and the Contractor. The DRAd shall also become familiar with the construction, design and programme for the Works, including all plans required for the co-ordination of the Works, including but not limited to general building plans, structural plans, building services plans, geotechnical and survey plans.

The DRAd shall meet on a monthly basis with the Employer and the Contractor either separately or together to attempt to resolve problems that arise before they become formal disputes and to anticipate problems that may arise in the future. In the normal course of a construction project, disputes are unavoidable. If the disputes cannot be resolved by the site level representatives of the parties, either side shall serve a Notice of Dispute (NOD).

Upon receiving a NOD, the DRAd shall promptly meet with the site level representatives of the parties to understand the background of the dispute and attempt to resolve it at site level. The DRAd shall meet as often as it is required with the parties if either of them request such a meeting. The DRAd shall have access to those records that are material to the dispute. The DRAd can choose any dispute resolution approach that he can use to help to settle the dispute.

If the dispute cannot be resolved at site level, then the DRAd shall prepare a report to the non-site senior staff officers of the parties with detailed analysis of the dispute. The report shall identify the key issues in dispute and the perceptions of the DRAd as to the obstacles to settlement. The DRAd may provide a non-binding recommendation for a resolution or a non-binding evaluation of the merits of the dispute. However, the report of the DRAd shall not be admissible in any subsequent arbitration or litigation, except it is relevant to the issue of whether the costs of the DRAd involvement with respect to a particular dispute may be transferred from one party to the other. Also, the DRAd cannot subsequently act as adjudicator, arbitrator, consultants or advocate in any legal proceedings of the same project unless agreed by the parties.

MONITORING OF THE PERFORMANCE OF DRAdS

The performance of the DRAd shall be regularly assessed and an appraisal report made to the JMC by the Chief Architect responsible for the administration of the contract. Interim reports are usually submitted on a quarterly basis, covering the period from start to completion or termination of the DRAd agreement. The appraisal report consists of two parts, the first part to be completed by the Employer's representative and the second part to be completed by the Contractor's representative.

The aspects of performance of the DRAd are wide. To assist the parties to complete a useful appraisal report, the Handbook has provided a proforma for the parties to use. The areas to be appraised includes, but not limited to, assimilation of the Employer's and Contractor's procedures, assimilation of project details, adherence to DRAd system procedures, collaboration with associated consultants, performance at site and/or design team meetings, encouragement of collaboration of site

level representatives, promptness in resolving problems, adequacy of site visits and inspections, competence in handling claims, efficiency in resolving difference and disagreements at site level, quality of written report to senior management, quality of services from other DRAd contract team members, etc.

In case of unsatisfactory performance, an “Unsatisfactory Report” will be issued to the DRAd. This contains a letter from the Chairman of the JMC highlighting the areas of concern and if needed, the DRAd will be invited to attend an interview with the JMC to discuss the problem areas.

If poor performance continues, it may lead to further warning resulting in termination of the DRAd agreement and suspension of tendering or deletion from the DRAd’s list.

ROLES OF THE PARTIES

The main duty of the Employer and the Contractor under the DRAd agreement is to ensure that their consultants, sub-contractors and others involved in the project under their control co-operate with the DRAd such as the timely supply of all information and documents as the DRAd may reasonably require for discharging his duties.

PAYMENT OF THE DRAd FEES

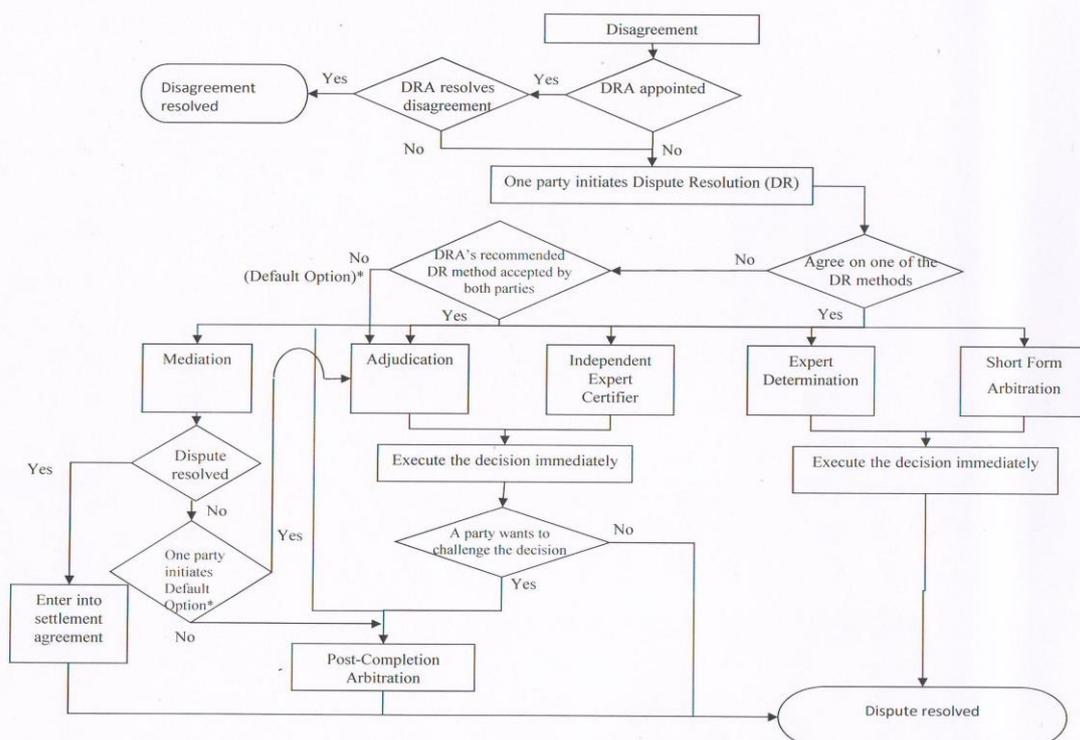
The DRAd fee is as submitted by the DRAd in his fee submission. The Employer and the Contractor shall each be responsible for 50% of the total DRAd fee.

The DRAd shall submit invoices and time sheet detailing the time spent on the project and submits to the Employer and the Contractor on a regular basis for settlement.

In the event that it is likely the total fee would exceed the budget fee, prior approval from the Employer and Contractor shall be sought before further work begins.

OPERATION OF THE DRAd SYSTEM

The following flowchart illustrates how the DRAd system operates to resolve disputes.



EXCLUSION OF LIABILITY

By agreement, the DRAd shall not be liable to the Employer or the Contractor for any act or omission in connection with the performance except for the consequence of any fraud or dishonesty.

CONCLUSION

The DRAd system brings in a neutral third party person jointly appointed by the Government as employer and the Main Contractor from the commencement of the Main Contract to the expiry of the Defects Liability Period. The primary function of the DRAd is dispute avoidance. Since the engagement of the DRAd is from the beginning of the project to the end, he should be well informed of the background of any dispute. Also, he is paid equally by the parties and therefore be seen as neutral to the parties. His appearance fosters closer co-operation between all parties in the contract, to minimize the number of claims, disputes and disruption to the project and to assist the parties to identify potential disputes and if it arises, deal with it effectively and expeditiously.

The DRAd system embodies the concept of partnering and the use of mediation skills to assist the contracting parties to resolve various types of disputes at an early stage and thereby helps to monitor the time and cost of the project. The system has been used by the public sector projects in Hong Kong for more than 10 years and is proved to be a successful one. It helps to reduce claims and serve as a means of cost control measure for the Works. Last but not the least, the DRAd fee, when compared with the contract sum, is minimal but the effect in reducing unnecessary claims is very effective.

REFERENCES

Architectural Services Department of Hong Kong, The Dispute Resolution Advisor (DRAd) System Handbook (Revised), June 2013.