



DiMAP 2022
DISPUTE MANAGEMENT IN AFRICA INFRASTRUCTURE PROJECTS

 **The Lancaster Accra**
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DISPUTE MANAGEMENT IN AFRICA INFRASTRUCTURE PROJECTS (DiMAP) 2022

ACCRA, GHANA

CASE STUDY FOR BREAK-OUT SESSION (PUBLIC INFRASTRUCTURE)

Fishy Business vs Level Best – A marine construction dispute case study in Watanga, West Africa

Watanga is a West African country, with a booming tuna fishing fleet.

A locally registered Watangan company - Fishy Business, have a 50-50 joint venture concession with the Government Port Authority to Build, Own, Operate and Transfer (BOOT) a fish landing and handling dock for the next 30 years (the port). They are financing the construction using a commercial loan from a local bank.

The Government have granted planning permission and the use of a piece of reclaimed land on the coast to Fishy Business, and have issued them an approved drawing (stamped and signed by Wasa Municipal Assembly), showing the location of the new port, complete with minimum operating standards. These standards include a minimum dredged area and depth for the approach channel, quay wall dimensions, and a specific boundary and area for the land development. Fishy Business has a specific date by which the development must be complete, failing which they are at risk of losing the Concession. The

Government will benefit in the long run by having 30 years of income from the lucrative tuna fishing business, and to receiving 15 ha of developed land with two working quay walls after 30 years.

Fishy Business have no in-house construction expertise, and have therefore appointed a local civil engineering consultant, Max Profits, to act on their behalf in technical matters.

The Watangan construction industry is relatively immature, but there is one private developer “Level Best”, who recently completed a similar marine project for the Government on an adjacent piece of reclaimed land. Level Best’s owner is well known to the CEO of Fishy Business, and rather than enter into competitive tender, is approached directly for a Fixed Lump Sum price for the new port.

Fishy Business, based on their perceived understanding of the simplicity of the project, (only consisting dredging, land reclamation, and services and paving of the reclaimed area), decide to use FIDIC Green Book 1999 as the basis. The Contract is governed by English Law, with London Chamber of Commerce rules for arbitration under Clause 15. Fishy Business also pass all design responsibility to the Contractor, based on:

- The approved Wasa Municipal Assembly drawing for layout and location; and
- Design loads for the operating area defined by Fishy Business.

The CEO of Fishy Business remains the Authorised Representative under Clause 3.1 and he formally delegates the post of Employers Representative to Max Profits under Clause 3.2. The powers delegated are all technical supervision and progress monitoring, but no powers related to time or cost affect instructions, which are still with the Authorised Representative.

Level Best prepare a provisional Bill of Quantity (BoQ) for the work and price it at US\$19m. They carry out a visual site inspection. After negotiation with Fishy Business the price is agreed at a final Fixed Lump Sum of US\$16m. The provisional BoQ is seen and used by Fishy Business to justify the loan from the local bank, but is not bound into, nor included in the Contract. Since the Project was signed on a Fixed Lump Sum basis, a provisional payment schedule, of monthly lump sum payments, was proposed by Level Best, discussed and agreed (subject to progress), but not bound into the contract. Progress would be tracked using a program issued at time of tender by Level Best. The same program was accepted by the Employers Representative on behalf of Fishy Business under clause 7.2.

The Contract is signed on 3rd July 2014 and after issuing of bonds and insurances, the site is handed over on time with a commencement date of 17th July 2014. Time for Completion is 588 days (giving a completion date of 25th February 2016 (the **Completion Date**)).

Level Best mobilized on time and work progressed on schedule for the first six months. Payments (including the agreed 10% advance) were also made on time.

For the following six months, works gradually fell behind, particularly in the sheet piling for the quay wall, and in the dredging. The Employer’s Representative regularly notified all parties of the delay and requested an updated program and an explanation of delays. Level best claimed that the ground conditions were not as they had expected and that sheet piling was therefore delayed. More significantly, they regularly reported that the dredger was broken down thus delaying the Works.

Watanga is a relatively small country and all members of the community know one another. It quickly became common knowledge that the dredger was not broken down, but had been moved to the

Government quay (recently constructed by Level Best), to deepen the approaches as a lucrative Variation. Fishy Business were not happy since they could actually see the dredger working on the adjacent site, whilst reports came from Level Best that it was under repair.

The honeymoon was over, and relationships slowly soured with correspondence becoming more and more acrimonious. Level Best claimed the payment schedule was not being followed, and Fishy Business responded saying the progress was not following the program issued. Level Best successfully applied for an Extension of Time (EoT) of three months, due to difficulty in sheet piling. Fishy Business management felt that they granted the EoT out of sympathy rather than for technical reasons, since Level Best had recently built the very similar adjacent Government quay and should have been aware of the ground conditions.

Deadlines were continuously missed and a Taking Over Certificate finally issued 400 days later than the original Completion Date and 319 days later than the agreed EoT completion date. At this stage payments up to 80% had been made by Fishy Business. 5% retention was withheld for the defects period (1 year) as indicated in the Appendix to Tender.

Level Best refused to carry out any defect work, and promptly demobilized the site. Fishy Business responded by applying the maximum (10%) Delay Damages payable under the Contract, being US\$1.6m. They stated that the delayed Completion Date (which risked the overall Concession, and had prevented Fishy Business operating for over a year), had cost them far more than the Delay Damages value.

Level Best responded with a counter claim for US\$1.6m for extra dredging. This was a complete surprise to Fishy Business, since they had agreed a Fixed Lump Sum project on a Design and Build basis and believed that the Contractor was responsible for quantities. The amount claimed was also coincidentally the same as the Delay Damages which was suspicious to Fishy Business.

Attempts at amicable settlement on site failed, and communication was very limited. The Contract required the dispute to be referred to Adjudication (Clause 15.1), and the parties spent a year disputing a suitable Adjudicator, whereupon in accordance with the Rules of Adjudication, the president of FIDIC was jointly requested to appoint one.

The appointed Adjudicator visited the site, received both written and verbal submissions and then ruled in favour of the Contractor being paid for additional dredging and granted additional time. He justified his decision on the basis of the Employers Liability Clause 6.1(l) (Physical conditions which could not have been foreseen by an experienced contractor).

The Employer immediately issued a Notice of Dissatisfaction in accordance with Clause 15.2, and the dispute was referred to Arbitration which is pending. They stated that the Admiralty charts gave clear bathymetric data (measurements for depth of ocean) for the Contractor to determine dredging quantities, and they were at liberty to carry out their own survey prior to bidding, which they failed to do.

The Ministry of Planning in issuing the final approval certificate for the construction carried out a land survey. The results shocked both the Government and Fishy Business. The survey showed that the quay wall had been built in the wrong location, with an approximate shift of 25m inland from its planned and approved position. The consequence of the shift was to reduce land fill works by 40,000m³ and increase dredging quantities by 30,000m³. Based on the rates in the provisional BoQ originally issued by the Contractor, this would have resulted in a saving of over US\$2m. In addition, the Government/Fishy

Business have lost the use of 2ha of land. It cannot be determined if the shift is simply a setting out error, undetected by all at commencement, or a deliberate ploy by the Contractor to change the scope of works and make a saving.

Since the Adjudicator was not aware (as apparently no one was) of the quay shift, Fishy Business requested that Arbitration was put on hold, and the dispute referred back to the Adjudicator, with him being supplied with the updated information.

Questions:

- 1) Did the employer choose the correct form of contract in FIDIC Green book?
- 2) Did the employer correctly assess the risks prior to entering into a contract?
- 3) How could the dispute have been avoided or resolved before becoming so serious?
- 4) Should the Adjudicator reverse his decision based on the new information? Oral arguments.