

# FIDIC Latin America Users' Conference

Lima, Peru  
12 & 13 September 2017

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FIDIC accredited trainer (fully accredited)  
FIDIC assessed and listed Adjudicator  
FIDIC Legal Advisor



International Federation of Consulting Engineers



## Speakers

- Joao N. Veiga Malta, Practice Manager; Governance Global Practice, WORLD BANK, excused
- Liz Chirinos Sectorista Senior, JICA - JAPAN INTERNATIONAL COOPERATION AGENCY
- Gabriele Maria del Monte, Lead Procurement Specialist, INTER-AMERICAN DEVELOPMENT BANK

### Moderator:

- Sebastian Hök, Adjudicator (FIDIC PRESIDENT'S LIST), FIDIC Legal Advisor



# AGENDA

- Overview of FIDIC's partnership with the MDBs
- A comparison of various country procurement systems in Latin America
- The Pink book: Strengths and limits
- MDB Procurement reform
- Best value in the light of contractual project delivery method
- The way forward



# History

- The International Bank for Reconstruction and Development (the World Bank) had "recognized" the FIDIC Red Book for years.
  - Molineaux, Charles, Moving Toward a Lex Mercatoria - A Lex Constructionis, 14 J. Int'l Arb. 1997, No. 1, at 55 et seq.
- As observed by Mr. Nicholas Gold the MDB version of the FIDIC Red Book evolved out of the habit of the world's banking community of adopting the FIDIC Conditions as part of their standard bidding document.
- Actually the MDB's use FIDIC since long time. The SDBs incorporated the 4th edition of the FIDIC Red Book, but then set out a list of amendments, some of which were mandatory and others only recommended.
- Until 2005 former World Bank SBD have incorporated the fourth edition of the International Federation of Consulting Engineers (*Federation Internationale des Ingenieurs Conseils*, or FIDIC) *Conditions of Contract for Works of Civil Engineering Construction* (1987, reprinted 1992 with amendments).
- In 2005 the MDBs started to use FIDIC 1999 as a basis for their SBDs.
- **The FIDIC Red Book – harmonized version was borne**





AfDB, ADB  
 Black Sea  
 Trade & DB  
 Caribbean DB  
 Council EDB,  
 EBRD, Inter-  
 American DB,  
 World Bank

MDB Multilateral  
 Development Bank

published May  
 2005

Harmonised Edition

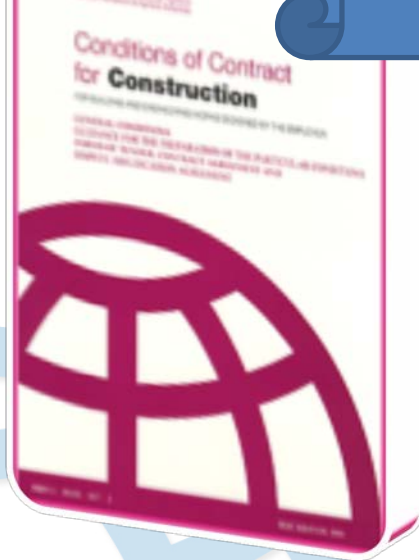
Adjustment  
 March 2007

Adjustment March  
 2006

Adjustment  
 June & August  
 2010

Adjustment March 2012

Participating  
 Agencies are  
 currently:  
 AusAID, Australia  
 AFB, France  
 JICA, Japan  
 EXIM, Korea



# FIDIC supported & Actual Support

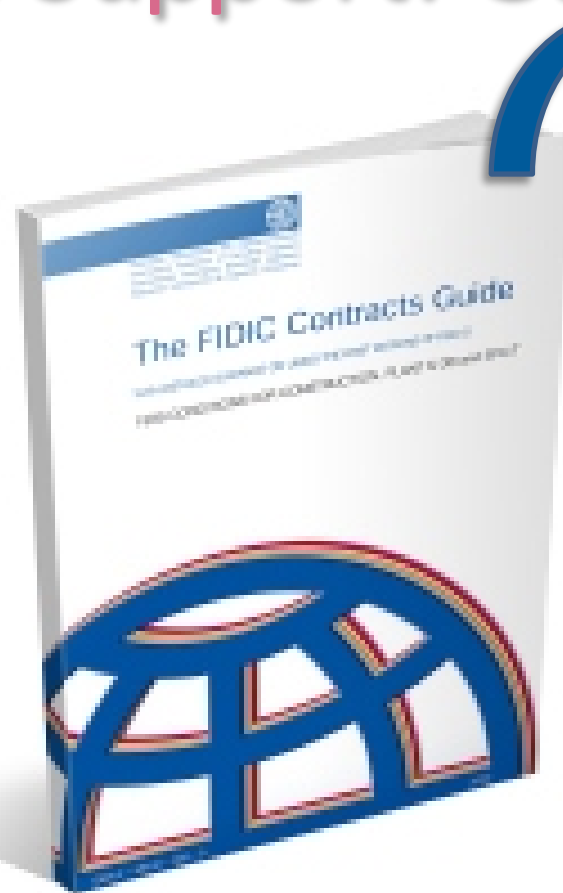
- FIDIC Advice

- [http://fidic.org/MDB\\_Harmonised\\_Construction\\_Contract](http://fidic.org/MDB_Harmonised_Construction_Contract)

- For the latest version of the General Conditions (June 2010), both printed and electronic versions of the complete, fully formatted Conditions of Contract is available from the [FIDIC Bookshop](#). For earlier (May 2005 and March 2006) only electronic version are available.
- [Access and download the May 2005 electronic version](#)
- [Access and download the March 2006 electronic version](#)
- June 2010 Version (current): General Conditions only in PDF, [download March 2010 General Conditions as Unprotected PDF as reproduced in the World Bank SBD](#)
- [Download the list of changes between the March 2006 and June 2010 version here](#)
- [Download the list of changes between the 1999 Construction Contract and MDB June 2010 version](#)



# FIDIC Support: Guidance



and



Japan International Cooperation Agency

## **Check List for One Sided Contracts**

For use with "Sample Bidding Documents under Japanese ODA Loans - Procurement of Works" June 2009 Edition

FIDIC Contracts Guide Supplement: MDB Harmonised Construction Contract (2006). Guide to the March 2006 release of the MDB Harmonised Construction Contract.

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# Changes to FIDIC

- It is worth noting, that the supplement to the FIDIC Contracts Guide states that extensive changes to the FIDIC MDB “Pink Book” are not intended or favored by the MDBs, specifically stating:
  - “..... It is not intended that the Particular Conditions of the Harmonised Edition shall be used to add a whole variety of new or changed clauses. The General Conditions represent the conditions which the MDBs require the parties to use as the basis of their contractual relationship.....”





# Procurement Framework

- Worldbank
  - New **Standard Procurement Documents (SPD)**
  - Revised **Standard Bidding Documents (SBD), updated March 2017**
    - incorporating **FIDIC Red Book (harmonised version), 2010 with adjustments**
    - changes to enhance environmental, social, health and safety performance
- JICA
  - Standard Bidding Document for Works
    - FIDIC Red Book
  - Standard Bidding Documents for Design & Build
    - FIDIC Yellow Book
- **Last substantial changes in March 2012, including**
  - Definitions 1.1.3.7, 1.1.3.9, 1.1.6.10,
  - Contractor's duties 4.2., 4.13,
  - Health & Safety 6.7. 6.20, 6.24,
  - Quality 7.7,
  - Time 8.1,
  - Measurement 12.3,
  - Variations 13.8,
  - Payments 14.2, 14.7, 14.9,
  - Termination 15.6, 16.2,
  - Employer's Risk & Liability 17.3, 17.6,
  - Insurance 18.1, 19.4,
  - Claims & Disputes 20.1., 20.4, 20.6



# Modifications

- In the view of some authors the MDB version requires changes to the particular conditions of contract, but are not limited to:
  - (a.) power to give the contractor possession of the site may not be vested in the employer, but instead with a regional authority;
  - (b.) certain authorities may have power to issue instructions to the contractor (which is in conflict with the normal procedures under the FIDIC contract), and
  - (c.) legal restrictions on the power of a non-government employee to authorize instructions and payments to the contractor in government or MDB financed projects,;
  - (d.) in some countries legislation may have the effect of making the condition precedent time bar is SCI 20.1 invalid.
- **Notes**
  - (a) Sub-Clause 2.1 deals with the risk; it does not matter whether the employer is the owner, supposed to be the owner or whether he is not the owner.
  - (b) There is no such conflict; the law applies and must be complied with; thus if authorities do have rights and powers these rights and powers must be respected
  - (c) The powers of the Engineer can be subject to restrictions without this causing legal issues; it is simply not convenient and not recommendable
  - (d) The last point constitutes an unproven thesis; there is no general evidence for such contradicting law neither in Sharia'h law nor in civil law jurisdictions



# Pros & Cons

- Strengths

- Reliable Basis
- Strong emphasis on health & safety, fight against forced labour, integrity
- Continuous review of own (MDB) changes

- Limits

- Some inconsistencies in the additional language,
  - see Sub-Clauses 20.1 and 3.5
  - See Sub-Clause 8.1
- Practical support regarding local legal constraints sometimes missing
  - Variation thresholds, payment conditions, etc.
- More flexible local dispute resolution results in less legal certainty and possible allowance for risk in bidding



# Developments

- During the last years **FIDIC** as full member of the IAGP (International Advisory Group on Procurement), comprising experts in procurement from the public sector, private sector, academia, and non-governmental organizations (NGOs),
- **has participated in discussions on the proposed Procurement reforms of the World Bank** and, has represented views of the private sector construction industry, which account together for more than 50% of the prior -review Bank-funded contracts awarded under IDA/IBRD investment projects.



# Questions

- Do you believe that the MDB has improved the situation compared to the standard as set out by FIDIC in 1999?
- Yes
- No

