

FIDIC Latin America Users' Conference

FIDIC Golden Principles – Latest Official
Guidance from FIDIC on Safely Modifying
Conditions of Contracts

Lima, Peru

12 & 13 September 2017

Zoltán Záhonyi

Chairman, FIDIC Contracts Committee
Z & Partners Consulting Engineers



International Federation of Consulting Engineers



Backgrounds

The FIDIC Contract Forms

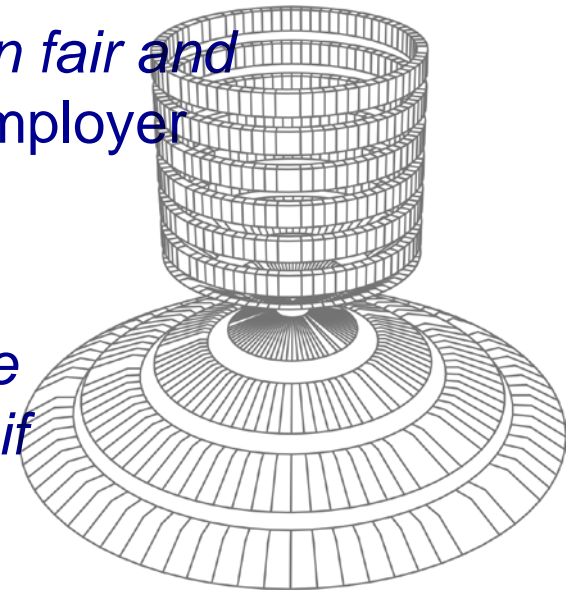
FIDIC publishes *General Conditions of Contract* (GCs) that are widely used for *international construction contracts*. They are intended to be used in *any jurisdiction*.

The Intentions

FIDIC GCs are drafted by FIDIC to *be based on fair and balanced risk/reward allocation* between the Employer and the Contractor, and are *widely recognised*.

FIDIC Documents include:

“Modifications to the General Conditions may be required in some legal jurisdictions, particularly if they are to be used on domestic contracts.”



Backgrounds

The Reality

As a result of “*customisations*” such heavily modified contracts (still referred as “*FIDIC Contracts*”) *damaging FIDIC’s reputation* for fair and balanced contracts —» *misleading* tenderers and the public.

The Results

Frequent disruptions, malfunctioning contracts, project failures —» ultimately blaming FIDIC for “*faulty*” conditions of contract.

FIDIC’s Reaction

FIDIC has limited means to take actions.

However, FIDIC decided to release a *strong set of messages* to the contract users, what is meant to be proper use of FIDIC contracts and what is not —» **to prevent misuse.**



What is FIDIC's response to all such misuses?

The FIDIC Contracts Committee established a “special force” (**Task Group 15**) to address these issues through:

- *Identifying* which contractual principles should FIDIC consider as “*Golden Principles*”;
- Providing *reasons*, why these are considered to be “*Golden Principles*”;
- Providing *guidance* for contract users and drafters not to violate these “*Golden Principles*”;
- Suggesting what *consequences* should apply where a particular user is found violating or deviating from these “*Golden Principles*”.



TG15 – Members, Programme

- ❖ Husni Madi (Jordan) [TG chair];
- ❖ Donald Charrett (Australia) [principal drafter];
- ❖ Axel Jaeger (Germany); and
- ❖ Rafal Morek (Poland)

Remaining major phases, milestone *estimates*:



Key Considerations Identified by TG15

In order to provide a firm base for the Golden Principles [GPs], the TG identified a number of **key elements** to consider.

Among others (and NOT limited to):

- » Comprehensive and fair conditions of contract;
- » Parties' legitimate interests are appropriately considered and balanced;
- » Best practice principles of fair and balanced risk/reward allocation;
- » No undue advantage (of bargaining power) for either Party;
- » The Contractor/Subcontractor is paid adequately;
- » Best value for money for the Employer;
- » Co-operation and trust between the contracting Parties;
- » Contract provisions are NOT onerous and can be practically put into effect;
- » Dispute avoidance – to the extent possible.



The FIDIC Golden Principles as Identified by the TG

- GP 1:** The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
- GP 2:** The Particular Conditions must be drafted clearly and unambiguously.
- GP 3:** The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
- GP 4:** All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.
- GP 5:** All formal disputes must be referred to a Dispute Adjudication Board for a provisionally binding decision as a condition precedent to arbitration.



The FIDIC Golden Principles – a Closer Look

Golden Principle 1: *Duties, rights, obligations, roles and responsibilities* of all the Contract Participants (as in the GC)

These are *not significantly changed* from their expression in the GCs;

But these must be *appropriate to the requirements of the project.*

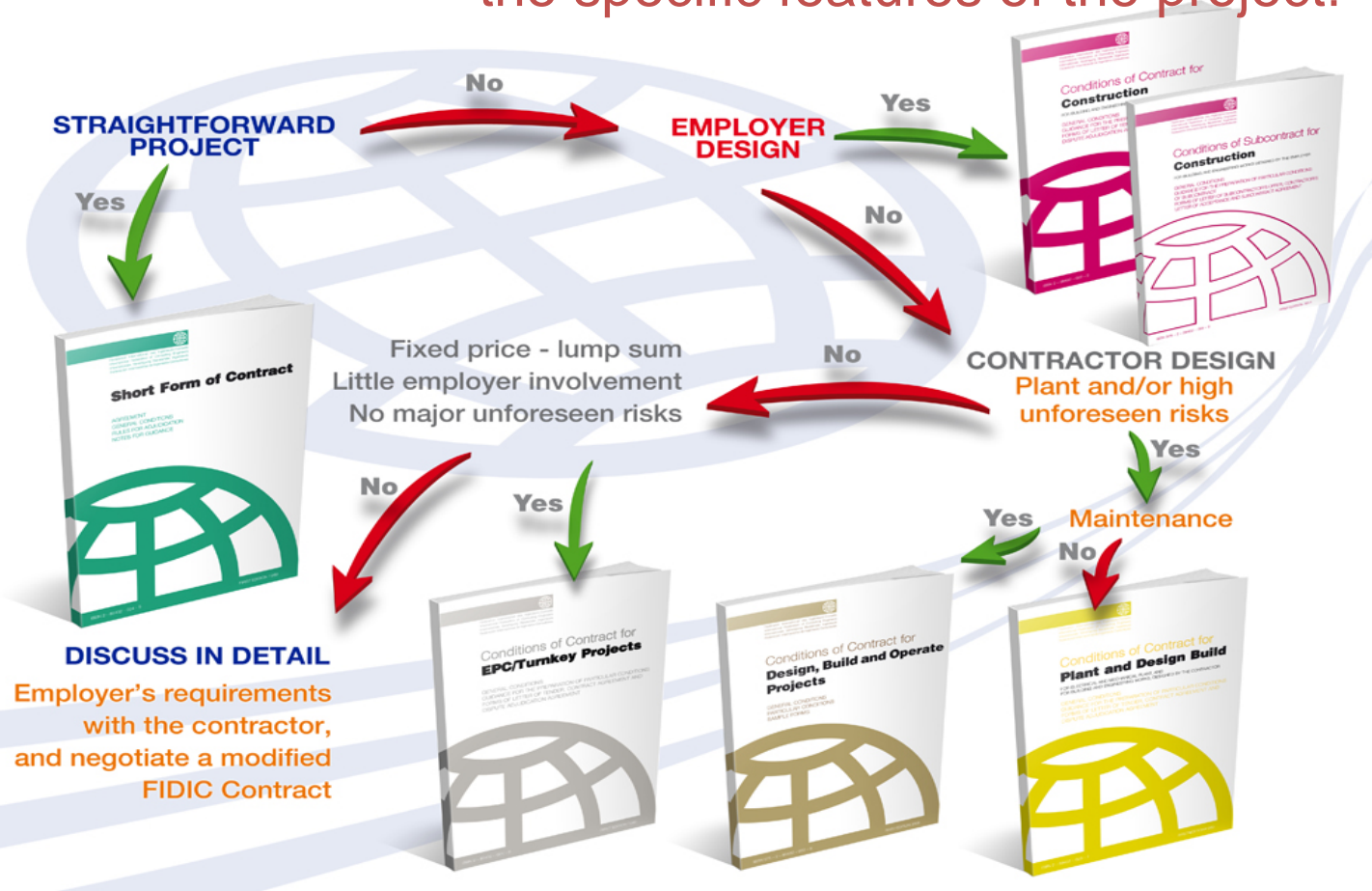
» Appropriate FIDIC Contract is selected for the specific features of the project!



The FIDIC Golden Principles – a Closer Look

Golden Principle 1

» Appropriate FIDIC Contract is selected for the specific features of the project!



The FIDIC Golden Principles – a Closer Look

Golden Principle 1: *Duties, rights, obligations, roles and responsibilities* of all the Contract Participants (as in the GC)

Examples, NOT breaching GP 1 principles:

» Employer must be able to *pay the Contractor* in acc. with the Contract, irrespective of any financial arrangements;

» Employer to provide *evidences of financial arrangements*, whenever requested.

Examples, breaching GP 1 principles:

» The Engineer is required to obtain the *Employer's approval before making any determination* of a Contractor's claim or granting any extension of time pursuant to Sub-Clause 3.5;

» *Transfer of the risk of Unforeseeable physical conditions* to the Contractor (Yellow Book Contract).



The FIDIC Golden Principles – a Closer Look

Golden Principle 2: Contract Conditions must be drafted *clearly and unambiguously*

Clear meaning of Tender documents together with answers to tenderers' inquiries made during the Tender period by the Employer;

Clearly drafted Particular Conditions (Sub-clause references + relationship identified);

Tender period *agreements and understandings recorded and incorporated* into the Contract and their *order of precedence* clearly identified;

Any *deletions* of GCs must be *replaced* with PCs that cover the same scope.



The FIDIC Golden Principles – a Closer Look

Golden Principle 2: Contract Conditions must be drafted *clearly and unambiguously*

Examples, NOT breaching GP 2 principles:

- » Any replacement of a General Conditions item in the Particular Conditions, *clearly identified and not breaching any of the Golden Principles*;
- » Any *agreement* between the Employer and the Contractor in the tender stage *made part of the Contract*.

Examples, breaching GP 2 principles:

- » *Failure to provide clear instructions* on how the Particular Conditions Clauses relate to the General Conditions by way of addition or replacement;
- » *Modifications* made to the Conditions of Contract during Tender negotiations *not documented properly*.



The FIDIC Golden Principles – a Closer Look

Golden Principle 3: The Particular Conditions *must not change the balance of risk/reward allocation* provided for in the GCs

A fundamental principle that must be satisfied by the PCs in a FIDIC Contract;

Closely linked with GP1 (as any significant changes to the roles, duties, obligations and rights as defined in the GCs will inevitably alter the fair and balanced risk/reward allocation).



The FIDIC Golden Principles – a Closer Look

Golden Principle 3: The Particular Conditions *must not change the balance of risk/reward allocation* provided for in the GCs

Examples, NOT breaching GP 3 principles:

» Requiring the *Contractor to design minor parts* of the Works under a Red or Pink Book contract;

» In the Red Book, the Contractor is *not required to perform a full design review* of the Employer's design.

Examples, breaching GP 3 principles:

» Requiring the *Contractor to design the majority* of the Works under a Red Book or a Pink Book contract;

» The *Contractor not being responsible or liable* for the Works carried out by its *Subcontractors*.



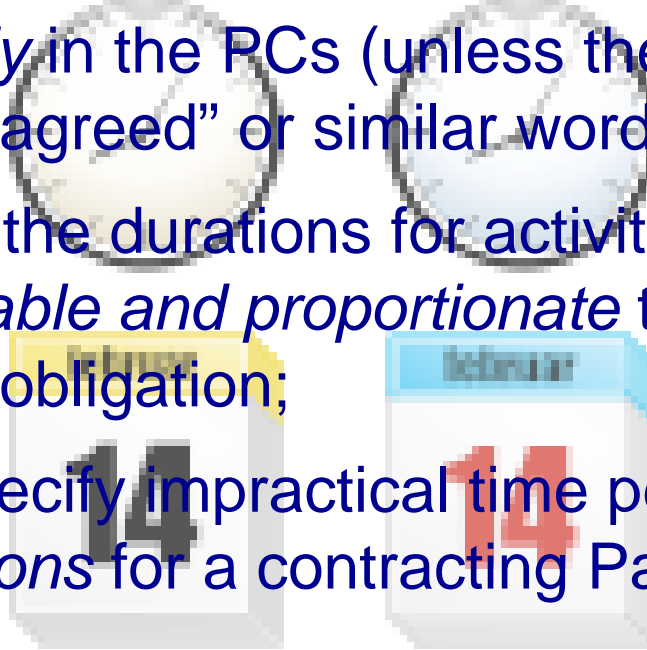
The FIDIC Golden Principles – a Closer Look

Golden Principle 4: All *time periods* specified in the Contract for Contract Participants to perform their obligations must be of *reasonable duration*

Durations for activities defined in the GCs *not be reduced or prolonged excessively* in the PCs (unless the times are qualified by “unless otherwise agreed” or similar wording in the GCs);

Any *change* made to the durations for activities defined in the GCs shall be *reasonable and proportionate* to the performance of the corresponding obligation;

The PCs must not specify *impractical time periods* that impose *unreasonable conditions* for a contracting Party.



The FIDIC Golden Principles – a Closer Look

Golden Principle 4: *All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration*

Examples, NOT breaching GP 4 principles:

» In the Pink Book, changing the period in which the Engineer is required to *deliver a determination to 56 days*;

» In the Red and Yellow Books, the *Commencement Date* shall be *within 60 days* after the Contractor receives the Letter of Acceptance.

Examples, breaching GP 4 principles:

» *Reducing the time bar for the Contractor to notify claims (from 28 days to 7 days)*;

» *The Contractor's right to suspend work (or reduce the rate of work) effective after giving not less than 3 months (in lieu of 21 days) notice to the Employer.*

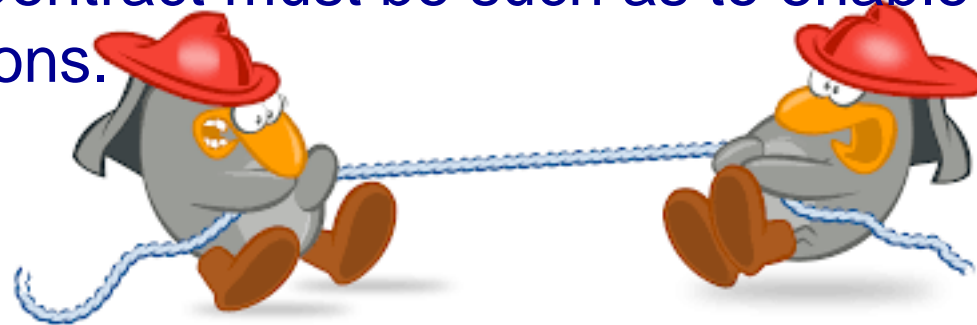


The FIDIC Golden Principles – a Closer Look

Golden Principle 5: All formal *disputes* must be referred to a *Dispute Adjudication Board* for a provisionally binding decision as a condition precedent to arbitration

The only GP that can be expressed in explicit terms: if the Contract provides for a Dispute Adjudication Board, then it complies with GP5. If there is *no Dispute Adjudication Board provided for, it does not comply with GP5.*

The *requirements of GP1* must also be complied with, since the *roles and responsibilities* of the Dispute Adjudication Board under the Contract must be such as to enable it to carry out its functions.



The FIDIC Golden Principles – a Closer Look

Golden Principle 5: All formal *disputes* must be referred to a *Dispute Adjudication Board* for a provisionally binding decision as a condition precedent to arbitration

Examples, NOT breaching GP 5 principles:

» In a 1999 Silver Book based contract, *changing* the ad-hoc DAB with a *permanent DAB*;

» Permitting the *DAB to correct its decision* for an *arithmetical error*.

Examples, breaching GP 5 principles:

» *Deleting all the clauses* in the GCs that refer to the DAB;

» *Restricting the ambit of disputes* that can be referred to the DAB to exclude certain determinations of the Engineer.



Further Subjects to Cover in FIDIC's Golden Principles Document

- ❖ General guidance for drafting Particular Conditions;
 - ❖ Consequences of NOT complying with FIDIC's Golden Principles;
 - ❖ Definition of "*FIDIC Compliant Contract*" – and maybe certification in this respect (?);
 - ❖ Protection of Intellectual Property;
 - ❖ Electronic licenses;
 - ❖ Format of Publication of the GPs;
- ...and many more!



Expected Results:

- » More certainty for FIDIC contract users
- » Support for contract drafters
- » Clearer contracts
- » Less chance to violate FIDIC's core principles
- » Providing baseline for dispute resolutions
- » Less disputes



Better projects !!!



***Thank you for your
kind attention!***

Zoltán Záhonyi

Chairman, FIDIC Contracts Committee

zoltan.zahonyi@zandpartners.com



International Federation of Consulting Engineers

© Zoltán Záhonyi, chair, FIDIC CC

Lima, Peru
12 & 13 September 2017

