

FIDIC'S Golden Principles – holding back the tide?

Written by Victoria Tyson

FIDIC is concerned about its image. It says that heavily amending the FIDIC forms of contract impacts upon the FIDIC brand and that this is damaging FIDIC's reputation. It seeks to address this with the introduction of five Golden Principles. But the Golden Principles are merely aspirational; they are not binding and have no contractual effect. Does this render them a pointless gesture 'trying to hold back the tide'?

Introduction: why has FIDIC issued its Golden Principles?

In the FIDIC 1999 suite of contracts (Red, Yellow and Silver Books) the Conditions of Contract comprise:

- The Particular Conditions; and
- The General Conditions.

In the FIDIC 2017 suite of contracts (Red, Yellow and Silver Books) the Conditions of Contract comprise:

- The Particular Conditions Part A - Contract Data;
- The Particular Conditions Part B - Special Provisions; and
- The General Conditions.

In both the 1999 and 2017 suites, amendments to the General Conditions themselves are not recommended. They are FIDIC copyright and cannot legally be reproduced or amended without FIDIC's permission. FIDIC does not offer an editable 'Word' version. It is intended that the Particular Conditions will make the Contract both Site and project specific.

The Particular Conditions Part A – Contract Data in the FIDIC 2017 forms is essentially a table setting out the unique requirements of the Contract. It is the equivalent of the Appendix to Tender in the FIDIC 1999 Red and Yellow Books. It includes blanks for things such as the Employer's name and address, the Engineer's name and address, Time for Completion, the Defects Notification Period, etc. It should not be complicated to complete and is relatively uncontroversial.

The Particular Conditions Part B - Special Provisions in the FIDIC 2017 forms are more complicated. They are the equivalent of the Particular Conditions in the FIDIC 1999 Red, Yellow and Silver Books. They add to, or modify, the General Conditions. It is intended that they comprise limited Site and project specific modifications, and those which are necessary to comply with the mandatory local law. Sample 'special provision' clauses are included in the Guidance section of both the 1999 and 2017 suites, but it is acknowledged that the parties (in particular, the Employer) may wish to tailor the General Conditions with their own 'special provision' clauses, and that this is not necessarily bad practice.

FIDIC thinks that heavy or poor amendments are changing their contracts to such an extent that they are no longer recognisable as FIDIC forms. Indeed, it is rare to see a FIDIC contract used in the manner originally intended by FIDIC.

Therefore, FIDIC *'strongly recommends that the Employer, the Contractor and all drafters of the Special Provisions take all due regard of the five FIDIC Golden Principles'*¹. FIDIC say they are fundamental to the FIDIC philosophy. They are listed in the Guidance section of the FIDIC 2017 forms of contract and have been explained in *'The FIDIC Golden Principles'* (First Edition 2019)².

¹ FIDIC 2017, Red, Yellow and Silver Books.

² http://fidic.org/sites/default/files/golden_principles_1_12.pdf



Although introduced in the FIDIC 2017 editions, FIDIC would like to see these Golden Principles considered when drafting amendments to both the FIDIC 1999 and 2017 books.

The Golden Principles: what are they?

GP1: 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.

The role etc. of Employer, Contractor, Engineer, Employer's Representative, DAAB, Subcontractor etc. should not be significantly changed from that which is *'generally as implied'* in the General Conditions. This wording is vague and subjective. FIDIC suggests:

- Removing the Engineer's obligation to consult with both parties before making a determination would not be compliant with GP1.
- Requiring an Engineer to obtain the Employer's approval before making a determination, or granting an extension of time, would not be compliant with GP1.
- Removing the Engineer's obligation to provide supporting particulars when giving notice of an agreement or determination would not be compliant with GP1.

The role etc. of Employer, Contractor, Engineer, Employer's Representative, DAAB, Subcontractor etc. must also be *'appropriate to the requirements of the project'*. Again, this wording is vague and subjective. FIDIC suggests:

- Requiring the Contractor to assume the risk of Unforeseeable physical conditions under the

FIDIC Red, Pink or Yellow Books would not be compliant with GP1.

- Leaving insufficient time for tenderers to scrutinise and check the Employer's Requirements under the FIDIC Silver Book would not be compliant with GP1.

GP2: The Particular Conditions must be drafted clearly and unambiguously.

A deleted General Condition must be replaced with a Particular Condition that covers the same scope, and must not leave any roles, duties, obligations, rights and risk allocation undefined; nor must it disturb the integrity and consistency of the General Conditions.

Any changes to the General Conditions must include specific reference to the relevant sub-clause numbers. The Particular Condition must clearly state whether the change is an addition to the original text, an omission of the original text, a replacement of the original text, or an amendment to the original text etc.

Clarifications and tenderers' inquiries made during the Tender period must be expressly included in the precedence of Contract documents. They must be well-organised, consistent and refer specifically to the Contract documents.

Agreements and understandings reached between the Employer and Contractor during the Tender period must also be expressly included in the precedence of Contract documents. They must be recorded and incorporated into the Contract by Addenda and referred to in the Letter of Acceptance and/or the Contract Agreement. FIDIC suggests:

- Deleting a general condition and writing *'not used'* would not be compliant with GP2.
- Failing to provide a clear statement as to how a Particular Condition relates to a General Condition by way of addition, omission, replacement or amendment would not be compliant with GP2.

- Documenting modification to the Contract during the Tender negotiations in emails would not be compliant with GP2.

Note: whilst the Golden Principles seek to prevent contracts that are unclear or ambiguous, local law will apply when construing the wording of contracts that are unclear or ambiguous.

GP3: The Particular Conditions must not change the balance of risk/reward allocation provided for in the GCs.

This overlaps with GP1 as changing roles etc. will inevitably alter the fair and balanced risk/reward allocation.

Construction contracts are sensitive to a large matrix of hazards and risks. FIDIC adopts a fair and balanced risk/reward allocation in the General Conditions. It says this complies with the Abrahamson Principles³ as refined by Nael Bunni⁴: i.e. (i) which party can best control the risk and/or its associated consequences, (ii) which party can best foresee the risk, (iii) which party can best bear that risk and (iv) which party ultimately most benefits or suffers when the risk eventuates.

It is true that, whilst it is unlikely that the parties will ever truly agree what is a fair and reasonable balance of risk, it would be short-sighted to simply ‘off-load’ the risk on to the party with the weakest bargaining power. Such an approach will rarely achieve the greatest value for money. However, what if the Contractor has equal bargaining power and is genuinely willing to take a greater risk (for example, in respect of Unforeseeable physical conditions) in exchange for more money? Should commercial parties not be free to negotiate risk/reward as they choose? FIDIC suggests:

- Requiring the Contractor to design the majority of the Works under the FIDIC Red Book (or FIDIC Pink Book) would not be compliant with GP3.

- Requiring the Contractor to assume the risk of Unforeseeable physical conditions under the FIDIC Red, Pink or Yellow Books would not be compliant with GP3.
- Requiring the Contractor to be responsible or liable for the Works carried out by its Subcontractors would not be compliant with GP3.
- Omitting the Contractor’s entitlement for time and/or money for the Employer’s failure to give access to, and possession of, the Site (within the prescribed period) would not be compliant with GP3.

GP4: All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.

FIDIC prescribes balanced time limits in the General Conditions. FIDIC suggests modifications may be made to ‘default time periods’ by agreement, i.e. those which are qualified by the phrase ‘*unless otherwise agreed*’, but that modifications ought not to be made to ‘*fixed time periods*’, i.e. those not so qualified. In fact, there are very few default time periods: for example, in the Yellow Book 1999 (sub-clauses 9.1, 12.1 and 20.2) and still fewer in the Yellow Book 2017 (sub-clauses 12.1 and 21.1).

Where modifications are made, durations must not be increased or decreased excessively. Any changed period must be reasonable and proportionate to the obligation. This is, of course, subjective and may give rise to disagreement. FIDIC suggests:

- Requiring a Contractor to give notice of an event or circumstance that might give rise to a claim within 7 days after the Contractor became aware, or should have become aware, of the event or circumstance (rather than the 28 days prescribed in the General Conditions) would not be compliant with GP4.

³ Max W Abrahamson, ‘Risk Management’ (1983) 1 *International Construction Law Review* 241, 244.

⁴ Nael Bunni, ‘The Four Criteria of Risk Allocation in Construction Contracts’ (2009) 26 *International Construction Law Review*, 4, 9.

- Requiring a Contractor to give 3 months' notice of an intention to suspend the Works (rather than the 21 days prescribed in the General Conditions) would not be compliant with GP4.

GP5: Unless there is a conflict with the governing law of the Contract, all formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.

The Contract must include a DAAB or DAB (unless incompatible with the local mandatory law). FIDIC suggests:

- Deleting all the clauses that refer to the DAAB/DAB would not be compliant with GP5.
- Precluding Engineer's determinations from being referred to DAAB/DAB would not be compliant with GP5.

This is controversial because in many jurisdictions (particularly in the Middle East) it remains common for the DAB or DAAB provisions to be deleted from FIDIC-based contracts.

It is also worth noting that the Golden Principles appear to devalue arbitration. For example, there is no requirement for the seat of arbitration to be a neutral country or one that is recognised under the New York Convention so that the award is enforceable. Nor is there any requirement to use an internationally acceptable law of arbitration. This may be, in part, because there is no provision for these things in the Contract Data / Appendix to Tender.

Conclusion: status and enforceability

Although FIDIC describes the Golden Principles as 'inviolable and sacrosanct', they are merely aspirational; they are not binding and have no contractual effect. They do not fall within the definitions of Contract or Contract Documents and are not included in the priority of documents provision in either the FIDIC 1999 or the

2017 editions. If the Golden Principles are not honoured, the FIDIC licence permitting use of the Contract will not be jeopardised, and compliance is unlikely to be made a condition of lending by the multilateral development banks. The best that FIDIC can suggest is that the parties may not advertise that the project is based on a FIDIC form; but how is FIDIC going to enforce that?

Even if they were made enforceable, the Golden Principles are vague and any breach of them subjective. Potentially, they risk driving Employers into using other forms of contract.

What they do highlight is that the balance of power may be slowly changing. It is becoming less acceptable for the Employer to impose ridiculously onerous contract terms on the Contractor. Good EPC contractors are an endangered species. Some have gone out of business and a good number still in business cannot continue to sustain significant losses; that situation is stark and real.



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