

THE FIDIC GOLDEN PRINCIPLES

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Fédération Internationale des Ingénieurs-Conseils
International Federation of Consulting Engineers
Internationale Vereinigung Beratender Ingenieure
Federación Internacional de Ingenieros Consultores



FIDIC is the international federation of national Member Associations of consulting engineers.

FIDIC was founded in 1913 by three national associations of consulting engineers within Europe. The objectives of forming the federation were to promote in common the professional interests of the Member Associations and to disseminate information of interest to their members. Today, FIDIC membership covers some 90 countries from all parts of the globe and encompassing most of the private practice consulting engineers.

FIDIC is charged with promoting and implementing the consulting engineer industry's strategic goals on behalf of Member Associations. Its strategic objectives are to: represent world-wide the majority of firms providing technology-based intellectual services for the built and natural environment; assist members with issues relating to business practice; define and actively promote conformance to a code of ethics; enhance the image of consulting engineers as leaders and wealth creators in society; promote the commitment to environmental sustainability; support and promote young professionals as future leaders.

FIDIC arranges seminars, conferences and other events in the furtherance of its goals: maintenance of high ethical and professional standards; exchange of views and information; discussion of problems of mutual concern among Member Associations and representatives of the international financial institutions; and development of the consulting engineering industry in developing countries.

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FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works (Short Form, Construction, Plant and Design Build, EPC/Turnkey) and agreements (for clients, consultants, sub-consultants, joint ventures, and representatives), together with related materials such as standard pre-qualification forms.

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FIDIC organises an extensive programme of seminars, conferences, capacity building workshops, and training courses.

FIDIC aims to maintain high ethical and professional standards throughout the consulting engineering industry through the exchange of views and information, with discussion of problems of mutual concern among Member Associations and representatives of the multilateral development banks and other international financial institutions.

FIDIC publications and details about training courses and conferences are available from the Secretariat in Geneva, Switzerland. Specific activities are detailed in an annual business plan and the FIDIC website, www.fidic.org, gives extensive background information.

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1 DEFINITIONS

Capitalised terms not explicitly defined have the same meaning as defined in the FIDIC Contracts.

Contract Participants	All the persons referred to in a FIDIC Contract, including the Contractor, Employer, Engineer, Employer's Representative, Dispute Adjudication Board, Subcontractors, etc. (This term is used for the purposes of this document only, but not in the referred FIDIC contract forms.)
DAAB	Dispute Avoidance/Adjudication Board.
DAB	Dispute Adjudication Board.
FIDIC Contracts	FIDIC Works contracts.
FIDIC Golden Principles	The essential features of a FIDIC Contract that make the risk/reward allocation fair and balanced.
GCs	General Conditions for FIDIC works contracts (not FIDIC services agreements).
GPs	FIDIC Golden Principles.
PCs	Particular Conditions.
Pink Book	Conditions of Contract for Construction MDB Harmonised Edition for Building and Engineering Works Designed by the Employer, Third Edition 2010.
Red Book	Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer, First Edition 1999 or Second Edition 2017.
Silver Book	Conditions of Contract for EPC/Turnkey Projects, First Edition 1999 or Second Edition 2017.
Yellow Book	Conditions of Contract for Plant and Design-Build, for Electrical and Mechanical Works and for Building and Engineering Works Designed by the Contractor, First Edition 1999 or Second Edition 2017.

2 INTRODUCTION

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

The brand of FIDIC, amongst other things, represents fair, balanced and well recognised forms of construction and engineering contract and agreement forms. FIDIC GCs are based on fair and balanced risk/reward allocation between the Employer and the Contractor and are widely recognised as striking an appropriate balance between the reasonable expectations of these contracting Parties. Accordingly, a contract recognised as a FIDIC Contract has real commercial value to both the Employer and the Contractor, both at the tendering stage, and during execution of the Contract.

More and more frequently, FIDIC now experiences applications of “FIDIC contracts”, where significant changes to the General Conditions are made by means of replacing, changing or omitting part of the wording of the GCs through the Particular Conditions (PCs). The replacements and changes introduced have lately been found to be substantial and of such extent, that the final contract no longer represents the FIDIC principles, and thus are jeopardising the “FIDIC brand”, and misleading tenderers and the public.

On FIDIC's request, the Contracts Committee set up a special Task Group (TG15) in order to identify which contractual principles of each form of FIDIC contract FIDIC considers to be inviolable and sacrosanct. These principles are referred to as the “FIDIC Golden Principles” (GPs). TG15 was also requested to consider and suggest possible ways to prevent, or at least limit, misuses of FIDIC conditions of contracts.

This document was prepared by TG15 to set out:

- FIDIC's Golden Principles;
- the reason(s) why such principles are considered to be GPs; and
- guidance as to how users should draft PCs and the other documents of a contract based on FIDIC's GCs so as not to violate or deviate from FIDIC's Golden Principles.

GCs prepared for use in a wide range of projects and jurisdictions inevitably require supplementing with Particular Conditions that address the particular requirements of the Site location, the unique features of the specific project and (usually) the Employer's preferences. It may be necessary for such PCs to amend the GCs to comply with mandatory Laws that apply to the Site or to comply with the governing law of the Contract.

Provided that such modifications are limited to those necessary for the particular features of the Site and the project and the Employer's preferences do not violate the GPs, the Contract is recognisable as a FIDIC Contract.

The principle of freedom of contract means that parties are free to agree on the terms of their contract, provided it complies with the law and public policy. However, following the publication of the GPs which identify the essential elements of a FIDIC Contract, it would be misleading and inappropriate to refer to a contract using the FIDIC GCs that does not comply with the GPs as a “FIDIC Contract”.

TG15 confined its attention to limiting the amendments in the PCs so that the resulting Contract complies with the GPs. It did not consider misuse of unamended GCs, or existing GCs that are inappropriate in a specific circumstance, issues that should be avoided by contract administrators informed by appropriate legal advice.

3 GENERAL CONSIDERATIONS UNDERLYING THE GPs

In order to promote acceptance and understanding:

- the GPs are formulated at a conceptual level to encapsulate the essence of a FIDIC Contract;
- each GP expresses a single, readily understood and generally accepted concept;
- the GPs are limited to the minimum number necessary for completeness.

The GPs provide guidance on how to modify the GCs in the PCs. By definition, the provisions of a Contract that are based on unamended GCs will comply with the GPs. However, if such provisions are administered incorrectly, the intent of the GPs will not be achieved.

Except for GP5, the GPs are stated in broad terms, without reference to specific clauses of the GCs.

If the provisions of a Contract comply with the GPs, proper administration of the Contract necessarily implies that each Party will fulfil its obligations and can exercise the rights implicit in the GPs during the execution of the Works. If a Party is not afforded its contractual rights under a Contract complying with the GPs, that indicates that the Contract is not being administered correctly in accordance with the proper construction of its terms. Thus, how unamended GCs provisions are administered is not a GP issue, but a matter of the proper administration of the terms of the Contract, properly construed.

The following key considerations underpin the GPs:

- The terms of the Contract are comprehensive and fair to both contracting Parties.
- The legitimate interests of both contracting Parties are appropriately considered and balanced. The legitimate interests of each party include the right to enjoy the benefits of the contractual relationship generally recognised as implicit in the GCs. For example, the Employer's legitimate interests include the right to a facility constructed to the contractually specified quality, within the time and for the price contracted for. The Contractor's legitimate interests include the right to execute the Works in the manner contracted for, within a reasonable time and for a commercial price paid on time.
- Best practice principles of fair and balanced risk/reward allocation between the Employer and the Contractor are put into effect in accordance with the provisions of the GCs.
- No Party shall take undue advantage of its bargaining power.
- The Contractor/Subcontractor is paid adequately and timely in accordance with the Contract to maintain its cash flow.
- The Employer obtains the best value for money.
- To the extent possible, co-operation and trust between the contracting Parties is promoted, and adversarial attitudes are discouraged and should be avoided.
- The Contract provisions are not unnecessarily onerous on either Party.
- The Contract provisions can be practically put into effect.
- Disputes are avoided to the extent achievable, minimised when they do arise, and resolved efficiently.

4 FIDIC GOLDEN PRINCIPLES

The Golden Principles are as follows:

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.

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

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

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

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.

4.1 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.

This principle requires that the roles, duties, obligations and rights of the Contract Participants (i.e. all the persons referred to in the Contract - Employer, Contractor, Engineer, Employer's Representative, Dispute Avoidance/Adjudication Board, Subcontractors, etc.) are not significantly changed from their expression in the GCs.

However, GP1 also requires that the roles, duties, obligations and rights of the Contract Participants must be appropriate to the requirements of the project. This qualification is important in ensuring that the appropriate FIDIC Contract is selected for the specific features of the project. For example, the Introductory Note to the First Edition of the Silver Book states that this form of FIDIC contract is not suitable where there is insufficient time or information for tenderers to scrutinise and check the Employer's Requirements, or for them to carry out their designs, risk assessment studies and estimating. In these circumstances, selection of the Silver Book GCs would not be appropriate to the requirements of the project, and accordingly would not be compliant with GP1.

The following are some further examples of the proper application of GP1:

- The Employer is obliged to make payments under the Contract, irrespective of the Employer's financing arrangements.
- The Employer is required to provide reasonable evidence to the Contractor of adequate financing arrangements.
- In the case of a failure by the Employer to comply with its

payment obligations, the Contractor must not be deprived of its rights under the GCs, including the right to receive financial charges for delayed payments, and the right to suspension and termination in accordance with the GCs.

Conversely, the following are examples of modifications that do not comply with GP1:

- Under a Red Book, or Yellow Book contract, 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 3.7 (or Sub-Clause 3.5 in the 1999 Editions). The Engineer's role as defined in a FIDIC Contract is to fairly determine the Contractor's entitlements in accordance with the Contract conditions, and this should not be subject to influence or control by the Employer. If the Employer disagrees with the Engineer's determination, the Contract provides an avenue for resolving this by the Dispute Avoidance/Adjudication Board.
- The transfer of the risk of Unforeseeable physical conditions to the Contractor under a Yellow Book Contract. The Silver Book is the appropriate contract form to be used if the Employer is not willing to bear that risk.

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

This GP requires, amongst other things:

- Clarifications to the meaning of Tender documents together with answers to tenderers' inquiries made during the Tender period by the Employer should be well-organised, inherently consistent, and refer specifically to the Contract documents to avoid conflicts with other contractual provisions. Further, their place in the precedence of Contract documents must be defined to avoid ambiguity in the precedence of Contract documents by a PCs Sub-Clause to amend GCs Sub-Clause 1.5.
- In the PCs, all changes to the GCs must be clearly identified by reference to specific Sub-Clause numbers. Additionally, the PCs Sub-Clauses must clearly indicate the relationship between the newly introduced text and the corresponding GCs Sub-Clauses' original text e.g. addition to the original text, omission of the original text, replacement of the original text, amendment to the original text, etc.
- All agreements and understandings between the Employer and the Contractor made during the Tender period must be recorded and incorporated into the Contract by Addenda and referred to in the Letter of Acceptance and/or the Contract Agreement. Further, their place in the precedence of Contract documents must be defined to avoid ambiguity in the precedence of Contract documents by a PCs Sub-Clause to amend GCs Sub-Clause 1.5.

4 FIDIC GOLDEN PRINCIPLES

- Any deletions of GCs must be replaced with PCs that cover the same scope, and do not leave any roles, duties, obligations, rights, and risk allocation undefined, or otherwise disturb the integrity and consistency of the GCs.

The following would not comply with GP2:

- With rare exceptions, a provision of the GCs is deleted and replaced in the PCs by the words “not used”.
- Failure to provide clear instructions on how the PCs Clauses relate to the GCs by way of addition or replacement. For example, if the content of a PCs Sub-Clause amends a GCs Sub-Clause, it must be clearly stated that the PCs Sub-Clause replaces a specific part of the corresponding GCs Sub-Clause.
- Modifications made to the Conditions of Contract during Tender negotiations that were only documented in emails between the Parties, with those emails subsequently included in the list of Contract documents. Without incorporating those modifications in the Particular Conditions, the priority of Contract documents specified in the FIDIC Contracts may result in the provisions of the GCs prevailing over the Parties’ intended modifications.

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

GP3 is closely linked with GP1, as 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 following are examples of the proper application of GP3:

- 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, where the responsibility and liability for such design remains with the Employer.
- The Employer is required to provide the Contractor, prior to the Base Date, with all relevant data in the Employer’s possession on sub-surface and hydrological conditions at the Site. In the Red, Pink and Yellow Books, the Employer is responsible for the correctness and completeness of all such data, and the Contractor is responsible for the correct interpretation of such data.
- The Employer undertaking to provide storage facilities for the Contractor outside of the Site.
- The obligation on the Contractor to provide the Engineer with the data for its detailed and resourced time programme in a specified format as a precondition for issue of an Interim Payment Certificate.

The following are examples of Conditions of Contract that do not comply with GP3:

- Requiring the Contractor to design the majority of the Works under a Red Book or a Pink Book contract.
- The Contractor assuming the risk of Unforeseeable physical conditions under a Red, Pink or Yellow Book.
- The Contractor not being responsible or liable for the Works carried out by its Subcontractors.
- Omission of the Contractor’s entitlements for compensation under Red, Yellow or Silver Book Sub-Clause 2.1 [*Right of Access to the Site*] if the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to fulfil his obligations for right of access to and possession of, all parts of the Site within the time prescribed in the Contract.

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

GP4 requires that the durations for activities defined in the GCs must not be reduced or prolonged excessively in the PCs, unless the times are qualified by “unless otherwise agreed” or similar wording in the GCs. This is consistent with the fair and balanced risk/reward allocation principle of GP3.

Each time period stated in the GCs is the period FIDIC believes, based on experience, is reasonable for the particular matter to which it refers. Thus, even if any such time period is qualified by «or otherwise agreed» or similar wording and is changed in the PCs for a particular project, this must be a justifiable change. Further, the changed time period must be reasonable for and proportionate to the performance of the corresponding obligation.

Even in situations where the GCs provide that time periods may be changed by agreement; the PCs must not specify impractical time periods that impose unreasonable conditions for a contracting Party to exercise any of its rights and/or to perform its obligations. This is also in agreement with the fair and balanced risk/reward allocation principle GP3.

The following are examples of provisions in the PCs that would be consistent with GP4:

- 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, in lieu of 42 days.

The following are examples of provisions in the PCs that would not be consistent with GP4:

- Requiring the Contractor to give notice of an event or circumstance that might give rise to a claim within 5 days after the Contractor became aware or should have become aware of the event or circumstance.

4 FIDIC GOLDEN PRINCIPLES

- 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.

4.5 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.

This is the only GP that can be expressed in explicit terms: if the Contract provides for a Dispute Avoidance/Adjudication Board (DAAB) or a Dispute Adjudication Board (DAB), then it complies with GP5 if permitted by the applicable Laws. If there is no Dispute Avoidance/Adjudication Board or Dispute Adjudication Board provided for, it does not comply with GP5.

However, 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.

Some examples of PCs modifications to the GCs that are consistent with GP5 are as follows:

- Providing that the DAAB/DAB's decision is final and binding for disputes with a value less than a specified amount.
- Permitting the DAAB/DAB to correct its decision for an arithmetical error.

Conversely, the following modifications to the Conditions of Contract do not comply with GP5:

- Deleting all the clauses in the GCs that refer to the DAAB/DAB.
- Restricting the ambit of disputes that can be referred to the DAAB/DAB to exclude certain determinations of the Engineer.

5 REASONS FOR GPS

5.1 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.

All the Contract Participants have clearly defined roles, duties and obligations important to the efficient administration and proper functioning of the Contract. Concomitant with those roles, duties and obligations are rights defined in the Contract.

The allocation of specific roles, duties and obligations to the various Contract Participants in a FIDIC Contract has evolved over a long period and has stood the test of time. Experience has shown that this allocation is consistent with widely accepted and understood international usage. Further, it provides the best opportunity for the Contract Participants to deliver a project that satisfies the Parties' reasonable performance expectations.

The delivery of a large interdisciplinary construction project involves a complex interaction between all the Contract Participants. Each has its own roles, duties and obligations, which interface with the roles, duties and obligations of the other Contract Participants. The roles, duties and obligations defined in a FIDIC Contract are considered by FIDIC to be those most appropriate to the efficient delivery of the contractual objectives, and best suited to the skills and expertise normally expected of and exercised by the different Contract Participants.

A FIDIC Contract is based on the Employer and the Contractor undertaking their roles, duties and obligations and having the rights generally as defined in the GCs. For the Employer this involves, e.g. providing access to and possession of the Site at the time contracted for and paying the Contractor. For the Contractor it involves, e.g. executing and completing the Works in accordance with the Contract, and remedying defects during the Defects Notification Period.

The roles, duties and obligations of other Contract Participants as defined in the GCs are equally important for efficiently delivering the contractual objectives. Thus, for the Red, Pink and Yellow Books, this requires that an Engineer be appointed with appropriate authority, competence and resources to carry out his/her role, and that she/he fulfils their duties and obligations as defined in the Contract. Further, the Engineer must exercise their contractual authority and make fair determinations in accordance with the Contract, taking due regard of all relevant circumstances. This means that s/he must not make determinations that only suit the Employer's interests, without having due regard to the Contractor's rights and entitlements under the Contract.

Similarly, for the Silver Book, the Employer's Representative (if appointed) must have appropriate authority to carry out their role, and must carry out that role to enable the Contractor to enjoy its contractual rights.

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

FIDIC GCs undergo a comprehensive drafting and independent review process to ensure that they are clear, consistent and unambiguous. Clear and unambiguous drafting is fundamental to all Contract Participants understanding their roles and duties, in order that they can fulfil their obligations and exercise their rights.

The conditions of a FIDIC Contract comprise the GCs and the PCs, which incorporate any additions or changes to the GCs. A FIDIC Contract will only be clearly and unambiguously drafted if the PCs are clearly and unambiguously drafted, and interface harmoniously with the GCs and the Appendix to Tender/Contract Data.

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

In defining roles, duties, obligations and rights, a contract explicitly or implicitly allocates risks to either one or both of the contracting Parties.

Fair and balanced risk/reward allocation is widely accepted as the most appropriate basis for drafting of construction contracts to minimise the prospects of disputes, enhance the likelihood of achieving successful project outcomes, and to keep the Contract Price moderate and optimum. It is a fundamental principle on which FIDIC Contracts are based.

The Abrahamson principles, well known to construction lawyers, are widely regarded as the basis of «balanced» or «fair» risk/reward allocation. These principles, as refined by Dr Nael Bunni, dictate that the allocation of risks to a Party to a Contract should be determined by:

- Which party can best control the risk and/or its associated consequences?
- Which party can best foresee the risk?
- Which party can best bear that risk? and
- Which Party ultimately most benefits or suffers when the risk eventuates?

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

Time periods specified in the GCs have evolved as a consensus among the international construction community as an appropriate balance between the interests of a Contract Participant required to perform a duty, and the interests of the Party whose rights are dependent on the execution of that duty. FIDIC considers they are reasonable time periods for the particular matters to which they refer, but without undue delay.

5 REASONS FOR GPS

The consequences of reducing the time periods provided for in the GCs may result in a Contract Participant having insufficient time to properly perform their required duties or to exercise their rights. An earlier trigger of a time bar than is contemplated in the GCs is one potential consequence of reducing time periods.

Conversely, significantly extending those time periods may adversely affect the rights and entitlements of the Party for whose benefit the duties are being performed. For example, a longer period for issuing a payment certificate will result in the Contractor's cash flow being adversely affected.

In many provisions of the GCs the Parties are invited to amend the «default» time periods by agreement, using words such as «unless otherwise agreed» or similar wording. Such time periods are recognised as being fixed by negotiation if appropriate, whilst providing a default option considered to be a reasonable time period.

5.5 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 Dispute Avoidance/Adjudication Board (DAAB)/ Dispute Adjudication Board (DAB) (referred to in the Pink Book as the Dispute Board) has evolved as an important mechanism to provide the Parties with a procedure for resolving disputes (at least provisionally) at much lower cost and in much less time than required for arbitration. It resolves the conflicts of interest that

previously occurred, where the Engineer (engaged and paid by the Employer) not only determined the Contractor's entitlements under the Contract, but also had the authority to resolve disputes by issuing a decision as to whether his/her determination was correct.

The DAAB/DAB procedure provides for an independent third party that promotes early resolution of disputes to enable the Project to proceed without unnecessary disruption, and assists in maintaining appropriate communication between the contracting Parties. Additionally, a DAAB or a full-term (standing) DAB (as provided for in the 1999 Red Book and 2010 Pink Book) may assist the Parties to avoid disputes.

If one of the Parties is not satisfied with a DAAB/DAB decision, it can issue a Notice of Dissatisfaction and trigger arbitration after the expiry of the amicable settlement period. However, arbitration can be delayed until the project is complete, avoiding project personnel from becoming distracted. In the meantime, the Parties have a decision that provides a provisional resolution of the dispute.

FIDIC considers the availability of an independent and impartial DAAB or DAB to (provisionally) resolve disputes is fundamental to a fair and balanced Contract, if permitted by the applicable Laws. A DAAB or DAB can resolve disputes in real time, and thereby enable the Parties to plan their future activities based on the reasoned decision of experienced, independent and impartial persons who are familiar with the execution of projects and administration of construction contracts.

Further, a DAAB or standing DAB can materially assist in the avoidance of disputes, by assisting the Parties to informally resolve issues before they become formal disputes.

6 GUIDANCE FOR DRAFTING PCS

Minor additions or grammatical changes to the wording of a GCs Sub-Clause that do not alter the intent are not a breach of the GPs. However, such cosmetic changes should only be made for good reasons.

In the PCs, changes to the GCs required to comply with mandatory Laws are consistent with GCs Sub-Clause 1.13 [*Compliance with Laws*] (Sub-Clause 1.12 in 2017 Silver Book) and are necessary and appropriate for the Contract to properly express the Parties' legal and contractual obligations. Such changes do not constitute a breach of the GPs.

The principle of freedom of contract generally enables the Parties to choose the governing law of the Contract. Changes to the GCs for consistency with the governing law of the Contract do not constitute a breach of the GPs; they are appropriate and necessary to ensure that the Contract terms are expressed consistently with the way they would be construed by an arbitral tribunal.

One of the following terms as used in the GCs generally indicates that it may be amended in a reasonable manner by the PCs without being in conflict with the GPs:

- "or as otherwise agreed"
- "except as otherwise agreed"
- "Unless otherwise agreed"
- "Unless otherwise agreed by both Parties"
- "Unless otherwise stated in the Particular Conditions"
- "Except as otherwise stated in these Conditions"
- "Unless otherwise stated in the Contract" (which may refer to the Particular Conditions, the Employer's Requirements, the Specifications, or the Appendix to Tender/Contract Data).

In preparing the "technical" documents, it is important that these do not redefine the duties, rights, obligations, roles or responsibilities of any Contract Participants, in a manner that is inconsistent with the GCs as modified by the PCs. For example, the Engineer has a clearly defined role in the Red, Pink and Yellow Books to make determinations as required by the Contract after consulting both Parties. It would be a breach of GP1 for a Contract to require the Engineer to seek approval from the Employer before issuing any determination under Sub-Clause 3.7 [*Agreement or Determination*] (3.5 in the 1999 Editions).

The requirements of the project include the applicable Laws to the execution of the Works, as well as the applicable Laws relevant to the rights and obligations of the Contract Participants under the governing law. Changes in the PCs to make the Contract compliant with the applicable Laws and the governing law of the

Contract are appropriate and necessary, and not in conflict with GP1.

Compliance with GP2 requires, amongst other things, that each of the documents comprising a Contract provide a cohesive and comprehensive whole, without overlap or inconsistencies. The contents of each Contract document should be confined to its scope as generally understood. The appropriate document to amend the GCs is the PCs; the «contractual» issues detailed in the GCs should not be amended in other documents such as the Employer's Requirements or the Specification.

The content of «technical» documents such as the Employer's Requirements, purpose and scope of the Works, drawings or Specifications should be confined to technical issues, consistent with the provisions of the GCs as modified by the PCs.

GP3 is a fundamental principle that should be considered in any amendment in the PCs to the GCs. The yardstick to apply in drafting any provision that amends the roles, duties or obligations as defined in the GCs is to enquire whether risks are being allocated to the Party that is in the position to control them and bear the consequences of a potential risk becoming a reality. If so, the amendment is compliant with GP3.

There are two alternative considerations involved in complying with GP4 in respect of providing the Contract Participants with a reasonable time to perform their obligations and exercise their rights:

- "Fixed" time-frames (i.e. those that are not qualified by a phrase such as «unless the parties agree otherwise» or its import) should not be significantly changed from the value in the GCs.
- "Default" time-frames (i.e. those that are qualified by a phrase such as «unless the parties agree otherwise» or its import) when amended should not provide unreasonably short or unreasonably long time-frames. A timeframe would be unreasonably short if it did not provide sufficient time for the Contract Participant to perform its duties properly or exercise its rights; a time frame would be unreasonably long if it significantly impacts a Party's enjoyment of its rights, such as the Contractor's right to suspend or terminate the Works.

GP5 requires that the Contract provide for a DAAB (or a DAB) to give a provisionally binding decision on any formal dispute, as a condition precedent to referring a dispute to arbitration. Compliance with GP5 (and GP1) entails retention of the GCs clauses referring to the role and operation of the DAAB/DAB, and not significantly changing its role, duties, obligations and rights as defined in the GCs.

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