

8th Biennial Conference on Construction Projects from Conception to Completion

Amending FIDIC Conditions

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FIDIC Conditions of Contract

- Balanced** — Seen as generally fair apportioning of risks, rights and obligations between parties (not Silver Book)
- Engineer** — Two party contract, three party execution (Red and Yellow)
- Accepted** — In wide use for international contracting
- Supported** — Recommended or required by multilateral development bank Standard Bidding Documents
- Continuity** — Long-term use gives familiarity and degree of certainty
- Proactive** — Dispute avoidance and early resolution focused

FIDIC's Guidelines for Amending Conditions

Golden Principles

- 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 as to ensure that modifications to the General Conditions:
 - are limited to those necessary for the particular features of the Site and the project, and necessary to comply with the applicable law;
 - do not change the essential fair and balanced character of a FIDIC contract; and
 - the Contract remains recognisable as a FIDIC contract.

FIDIC Golden Principles

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

The Engineer

3.1.4

The Engineer shall obtain the Employer's specific written approval before taking action under any of the following Sub-Clauses:

- (a) Sub-Clause 3.2: Delegation by the Engineer;
- (b) Sub-Clause 3.3: Instructions of the Engineer;
- (c) Sub-Clause 3.5: Determinations;
- (d) Sub-Clause 4.7: Subcontractors and Suppliers;
- (e) Sub-Clause 4.10: Nominated Subcontractors and Novation;
- (f) Sub-Clause 8.4: Extension of Time for Completion;
- (g) Sub-Clause 8.6: Delay Damages;
- (h) Sub-Clause 8.7: Bonus Payments;
- (i) Sub-Clause 8.8: Suspension of Work;
- (j) Sub-Clause 8.11: Prolonged Suspension;
- (k) Sub-Clause 10.1: Taking Over of the Works and Sections;
- (l) Sub-Clause 11.9: Performance Certificate;
- (m) Sub-Clause 13.1: Right to Vary;
- (n) Sub-Clause 13.7: Provisional Sums;
- (o) Sub-Clause 13.8: Daywork; and
- (p) Sub-Clause 14.13: Issue of Final Payment Certificate.

3. THE ENGINEER

3.1 Engineer's Duties and Authority

3.1.1 The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. ~~The Engineer's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.~~

3.1.2 The Engineer ~~shall have~~ only has the powers and authority as set out in the Contract, and has no authority to amend the Contract.

~~3.1.3 The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.~~

~~3.1.4 However, whenever the Engineer exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Contract) the Employer shall be deemed to have given approval.~~

Yellow book

4.17 ~~4.12~~ Unforeseeable Physical Conditions

4.17.1 ~~4.12.1~~ In this Sub-Clause, 4.17, "physical conditions" means natural physical conditions and ~~man-~~mademanmade and other physical obstructions and pollutants, which the Contractor encounters at ~~the Site~~or around the Site or in gaining access to the Site or carrying out Temporary Works, and when executing the Works, including sub-surface and hydrological conditions ~~but excluding, and~~climatic conditions.

4.17.2 The Employer makes no representations or warranties of any type regarding the physical conditions at the Site. Any information provided by the Employer to the Contractor regarding the physical conditions at the Site shall be interpreted and verified by the Contractor.

4.17.3 The Contractor bears the entire risk of any and all physical conditions at the Site. The Contractor represents and warrants to the Employer that it has fully assessed all possible physical conditions and has priced and allowed for their risks, if any, in the Accepted Contract Amount.

Yellow book?

- 4.17.4 ~~4.12.2~~ If the Contractor encounters ~~adverse~~ physical conditions which he considers to have been ~~Unforeseeable~~ unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable.
- 4.17.5 ~~4.12.3~~ This notice shall describe the physical conditions, so that they can be inspected by the Engineer, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Engineer may give. ~~If an instruction constitutes a Variation, Clause 13 (Variations and Adjustments) shall apply.~~
- 4.17.6 However, and whenever, the extent that the Contractor encounters physical conditions which he considers Unforeseeable, he shall have no Entitlement nor shall he make any Claim in connection with or arising from them.

8.4 Extension of Time for Completion

8.4.1 The Contractor shall be entitled ~~subject to Sub-Clause 20.1 (Contractor's Claims)~~ to an extension of the Time for Completion if and to the extent ~~that completion~~ Completion for the purposes ~~of~~ Sub-Clause 10.1 (Taking Over of the Works and Sections) is or will be delayed by any of the following ~~causes~~ clauses:

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause ~~13.3 (Variation Procedure)~~, 13.2.3(b) or 13.2.3(c));
- (b) a cause of delay ~~giving an entitlement to extension of time under a Sub-Clause~~ expressly stated in these Conditions, as giving an Entitlement to an extension of time under the Contract; or
- (c) ~~exceptionally adverse climatic conditions,~~ a material breach of the Contract by the Employer.
- ~~(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or~~
- ~~(e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.~~

~~13.7 Adjustments for Changes in Legislation~~

~~13.7.1 The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeat or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.~~

~~13.7.2 If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws or in such interpretations, made after Base Date, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 (*Contractor's Claims*) to:~~

- ~~(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 (*Extension of Time for Completion*), and~~
- ~~(b) payment of any such Cost, which shall be included in the Contract Price.~~

~~13.7.3 After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 (*Determinations*) to agree or determine these matters.~~

~~13.8 Adjustments for Changes in Cost~~

Termination by the Contractor (SC 16.2)

TERMINATION BY CONTRACTOR

Termination by Contractor

The Contractor shall be entitled to terminate the Contract only if:

the Engineer fails, within 60 days after receiving a Statement and supporting documents, in accordance with the Contract, to issue the relevant **Interim Payment Certificate**;

the Contractor does not receive the amount due under a Interim Payment Certificate within 60 days after the expiry of the time stated in Sub-Clause 14.8 (Payment) within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 (Employer's Claims)); or

~~(d)~~ the Employer substantially **fails to perform his** and materially breaches its obligations under the Contract₅.

Termination by the Contractor (SC 16.2)

In any of these events or circumstances, the Contractor shall give notice to the Employer detailing the event or circumstance that it says entitles termination of the Contract. Then:

the Employer shall have a 30-day period from receipt of the notice to remedy the event or circumstance contained therein. The Contractor shall not be entitled to terminate the Contract if the Employer remedies the event or circumstance within 30 days of receipt of the notice; and

~~16.2.2 In any of these events or circumstances~~following expiry of the 30-day period required by Sub-Clause 16.1.2 (a), if the Employer has not remedied the event or circumstance contained in the notice, the Contractor may, upon giving ~~14~~30 days' notice to the Employer, terminate the Contract. ~~However, in the case of sub-paragraph (f) or (g), the Contractor may by notice terminate the Contract Immediately.~~

Termination by the Contractor (SC 16.2)

16.2. The termination of the Contract by the Contractor	the suspension . Delete the Subparagraphs (a) and (d) of the first paragraph.
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Indemnities (SC 17.1)

Always subject to Sub-Clause 17.6 and to the extent attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel or any of their respective agents the Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including reasonable legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, ~~unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents,~~ and
- (b) damage to or loss of any tangible property, real or personal (other than the Works and the Employer's Property at Site), to the extent that such damage or loss:
 - (i) arises out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, ~~and~~
 - (ii) ~~is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.~~

Indemnities (SC 17.1)

Always subject to Sub-Clause 17.6 the Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including **reasonable** legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [Insurance Against Injury to Persons and Damage to Property].

To the extent a Party is obliged to indemnify and hold harmless another Party, the indemnifying Party may (at the indemnifying Party's cost) assume overall responsibility for negotiating the settlement of the claim, and/or any litigation or arbitration which may arise from it. The other Party shall, at the request and cost of the indemnifying Party, assist in contesting the claim. This other Party (and the Contractor's Personnel or the Employer's Personnel, as the case may be) shall not make any admission which might be prejudicial to the indemnifying Party, unless the indemnifying Party failed to promptly assume overall responsibility for the conduct of any negotiations, litigation or arbitration after being requested to do so by the other Party.

Dispute Resolution

Neither party shall refer a dispute to arbitration, or make application to the ICC or otherwise seek to commence arbitration proceedings, until after a Taking Over Certificate for the whole of the Works has been issued under the Sub-Clause 10 (Employer's Taking Over). For the avoidance of doubt, this arbitration agreement is not effective until, and has as a pre-condition to it becoming effective, the issuance of the Taking Over Certificate for the whole of the Works.

Dispute Resolution

20.2 – 20.5. The nomination of the commission for out-of-court resolution of disputes	Delete the Subparagraph.
20.3. Inability to agree on the composition of the commission for out-of-court resolution of disputes	Delete the Subparagraph.
20.4. Making decisions by the commission for out-of-court resolution of disputes	Delete the Subparagraph.
20.5. Out-of-court settlement	Delete the Subparagraph.
20.6. Arbitration	Formulate as follows: “The Court of Law Any dispute that the Parties are unable to resolve by mutual negotiations, shall be submitted for consideration by the court of law in accordance with regulatory legal acts of _____”.

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