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FIDIC-SIDiR-EFCA Regional Infrastructure Conference

Krakow
7 & 8 March 2016

*FIDIC's Golden Principles
Reflections on the 1999 Suite*



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FIDIC Golden Principle

Procurement

Irrespective of the size of the project the employer will look for a procurement strategy that results in **contractual arrangements that will provide a defect-free project, that is fit for purpose, which is completed in a timely fashion and within budget.**

- The strategy should take into account the need for economic whole-life operating and maintenance costs.



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FIDIC Golden Principle

Procurement

This requires:

A procurement package that is properly and fully prepared by experienced staff, **and includes the correct standard form of FIDIC's conditions of contract**


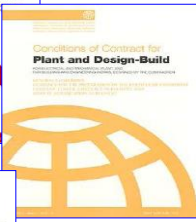

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FIDIC Conditions of Contract: Which One is The Correct One?

- Red Book
 - Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1st Edition 1999
- Yellow Book
 - Conditions of Contract for Plant and Design Build, for Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor, 1st Edition 1999
- Silver Book
 - Conditions of Contract for EPC/Turnkey Projects, 1st Edition 1999

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FIDIC Golden Principle

Procurement

- Don't choose the wrong form for your project
- Adapt the 'right' FIDIC form correctly
 - Tailoring the terms of the contract
 - The process
 - Challenges of modifying standard forms of contract



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Considerations for Contract Selection

Allocation of:

- Design function
- Project risks
- Contract administration function



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Allocation of Design Function

- Conceptual design accomplished by Employer
 - Project planning
 - Red and Pink books
 - Employer responsible for detailed design
 - Yellow, Silver and Gold books
 - Contractor responsible for detailed design
- “4.1 The Contractor shall design, execute and complete the Works in accordance with the contract... **When completed, the works shall be fit for the purposes for which the Works are intended...**” (emphasis added)



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FIDIC Risk Allocation Philosophy

Balanced risk allocation

- Risk is allocated to the party that is best able to
 - Control the risk
 - Manage the risk
 - Sustain the consequences

Silver book is the exception

- New for FIDIC
- Employer pays higher price to transfer more risk
- Based on commercial practice where projects were privately funded

Contractual mechanism allows for only paying for risks that eventuate

- Claims



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Risk Allocation

Owner Retains risk Risk Transfer Contractor Assumes risk

| | | |
|--------------------------|--------------------------|-----------------|
| Design -Bid- Build | Design- Build | EPC/ Turnkey |
| Red Book Pink Book | Yellow Book Gold Book | Silver Book |

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Contract Administrator's Role During Construction

- Supervise work carried out by the Contractor
- Ensure conformity with the contract requirements
- Give instructions
- Determine claims
- Value/certify payments
- Instruct or approve variations

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Contract Administrator and FIDIC Conditions of Contract for Major Works

| FIDIC Book | Contract Administration Role |
|------------|------------------------------|
| Red/Pink | Engineer |
| Yellow | Engineer |
| Silver | Employer's Representative |
| Gold | Employer's Representative |



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Contract Administrator

- **Red, Yellow and Pink books**
 - Two party contract – Three party execution
 - Employer
 - Contractor
 - Engineer
 - Sub-Clause 3.1 [Engineer's Duties and Authority]
*"...(a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, **the Engineer shall be deemed to act for the Employer..***
- **Gold and Silver books**
 - Two party contract - Two party execution
 - Less day-to-day employer involvement during progress of works

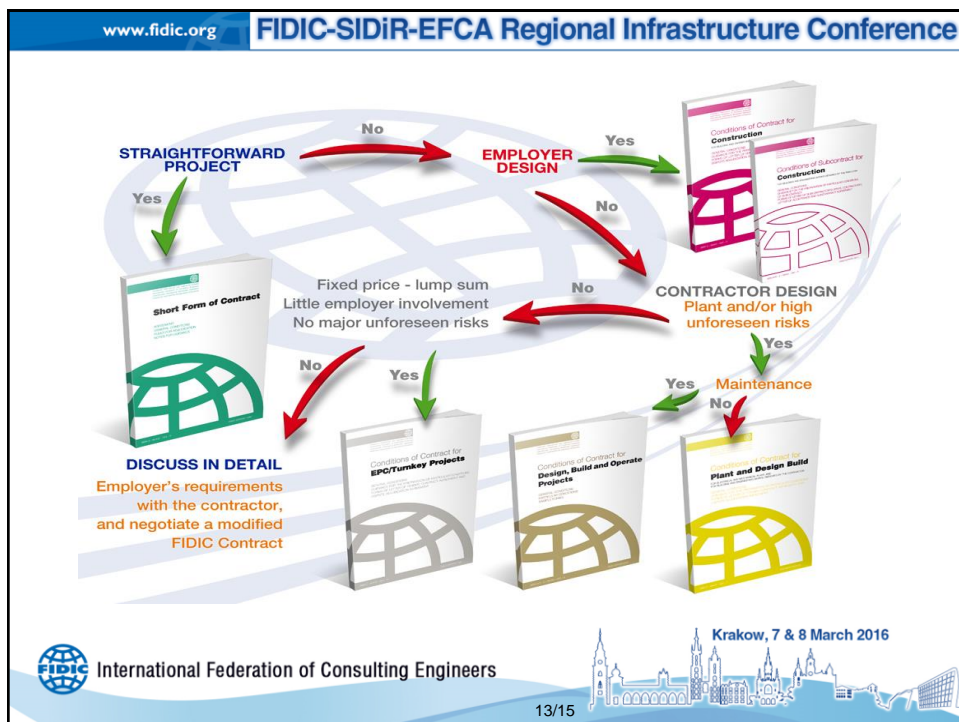


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Adapting the FIDIC Contract

Foreword

*"In the preparation of these Conditions of Contract for Construction, it was recognised that, while there are **many sub-clauses which will be generally applicable**, there are **some sub-clauses which must necessarily vary to take account of the circumstances relevant to the particular contract**. The **sub-clauses which were considered to be applicable to many (but not all) contracts have been included in the General Conditions**..." (emphasis added)*

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Adapting the FIDIC Contract

Foreword

- “It will be necessary to prepare the Particular Conditions for each individual contract”
- “The **General Conditions** and the **Particular Conditions** will together comprise the Conditions of Contract governing the rights and obligations of the parties”
 - Particular Conditions higher priority than General Conditions (SC 1.5 Priority of documents)
- Guidance for the Preparation of Particular Conditions



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FIDIC Golden Principle

**CONSIDER THE CONSEQUENCES OF
EACH CHANGE
AND
BEWARE OF UNINTENDED
CONSEQUENCES**



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Intra-Contract Considerations

- Each clause does not stand alone
 - A set of interrelated provisions relating to parties' rights and obligations
- Multi-tier dispute resolution
 - Engineer
 - DAB
 - Amicable settlement
 - Arbitration
- Dispute Avoidance

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Intra-Contract Considerations

- The Main contract does not stand alone
 - Sub-contracts
 - Financing contracts
 - Insurance contracts
- Mandatory provisions of local law

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FIDIC Golden Principle

UNDERTAKE YOUR DUE DILIGENCE APPLICABLE LAW AND CULTURE

Before Entering Into Contract

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Dankie Gracias
Спасибо
Köszönjük
Grazie Dziękujemy
Ďakujeme
Kiitos
感谢您
Σας Ευχαριστούμ
Bedankt
Děkuje vám
ありがとうございます
Tack

תודה
Gracias
شكراً
Merci
Takk
Terima kasih
Děkojame
Vielen Dank
Paldies
Tāname teid
谢谢
Tak
Teşekkür Ederiz
감사합니다
ขอบคุณ
Děkuje vám
Tack

Thank You

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