

# DRBF & SCL Vietnam

## Webinar on Dispute Avoidance and Resolution in Construction

### FIDIC GOLDEN PRINCIPLES & Covid19 GUIDANCE MEMORANDUM

4<sup>th</sup> May 2020

**Prof Sarwono Hardjomuljadi**

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Dr Sarwono is FIDIC Board of Director; DRBF Board of Director of Region 2 (Europe-Asia-Africa); DRBF Country Representative for Indonesia (2012 – Now);


He is ASEAN Chartered Professional Engineer (ACPE); FIDIC International Accredited Trainer, Adjudicator; Member of Chartered Institute of Arbitrator (M.CI Arb); Former Chairman of Committee for Advocacy of Indonesian Engineer's Association (PII); Vice Chairman of Association of Construction Contract Engineer of Indonesia (HAKKI).

He work as Special Adviser to the Minister of Public Works and Housing of Indonesia; Formerly Vice President of the State Electricity Corporation; Board of Supervisor National Construction Services Development Body of Indonesia; Founder of Indonesian Construction Arbitration and Alternative Dispute Resolution Centre; President of Dispute Avoidance Board for Construction of Indonesia; and the contributor on the Dispute Avoidance Board of the Indonesian Law No 2/2017.


Dr Sarwono is Professor in Construction Contract Administration at Mercu Buana University, Tarumanagara University, Parahyangan Catholic University, Atma Jaya Yogyakarta, Muhammadiyah Jakarta University, President of Indonesian Professor Association of Indonesia (Pergubi) DKI Jakarta; He is also writer of some Books related to construction contract, claims and alternative dispute resolution. Translation (under FIDIC license) of FIDIC Rainbow series;

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## FIDIC FIVE GOLDEN PRINCIPLES


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## FIDIC FIVE GOLDEN PRINCIPLES

- 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.


This qualification is important in ensuring that the appropriate FIDIC Contract is selected for the specific features of the project.

- 1** Red book : FIDIC conditions Of Contract For Construction (Kontrak Unit Price)
- 2** Yellow book : FIDIC conditions of Contract for Plant & Design Build (Kontrak Unit Price/Lump Sum)
- 3** Silver book : FIDIC conditions of Contract for EPC/Turnkey Project. (Kontrak Lump Sum)




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## FIDIC FIVE GOLDEN PRINCIPLES



### 2

**The Particular Conditions must be drafted clearly and unambiguously.**


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

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


A provision of the GCs is deleted and replaced in the PCs by the words "not used".

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## FIDIC FIVE GOLDEN PRINCIPLES



### 3

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

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.

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## FIDIC FIVE GOLDEN PRINCIPLES



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

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.

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## FIDIC FIVE GOLDEN PRINCIPLES



**5** 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 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. .

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## FIDIC FIVE GOLDEN PRINCIPLES



In line with its Golden Principles , FIDIC commends all members of the construction community to particularly keep in mind that FIDIC:

- promotes cooperation and trust between contracting Parties, • does not support any Party taking undue advantage of its bargaining power,
- discourages adversarial attitudes and encourages dispute avoidance; and
- encourages timely and adequate payment in accordance with the Contract to maintain cashflow.

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## Covid19 FIDIC GUIDANCE MEMORANDUM



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## Covid19 FIDIC GUIDANCE MEMORANDUM



COVID-19 presents an extraordinary challenge and FIDIC commends all members of the construction community to be focused on the successful delivery of the project before them in a way that sustains the long-term viability of the construction community

FIDIC's core purpose of drafting this Guidance Memorandum is to help Parties to a FIDIC contract to consider mutually satisfactory solutions and avoid disputes arising between them. COVID-19 pandemic is a unique broad scale and extraordinary event which should be recognized as such

This Guidance Memorandum was written by the FIDIC Contracts Committee which now comprises Vincent Leloup (the Chair), Des Barry, Adam Bialachowski, Deryl L. Earsom, Siobhan Fahey (currently in sabbatical), Zoltán Záhonyi, Kiri Parr, Matthias Neuenschwander, Peter Collie and Husni Madi together with Sarwono Hardjomuljadi, the FIDIC Board Member and Aisha Nadar, the FIDIC Board Member.

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## Covid19 FIDIC GUIDANCE MEMORANDUM



Reminder of the health, safety and environment contractual obligations of the Contractor, the Employer, and the Engineer.

**The Contractor** has a general obligation to be responsible for the safety of all its operations and activities, and holds specific health, safety and environment obligations.

They stipulate in particular that the Contractor shall:

- comply with the applicable health and safety regulations and Laws which is relevant in the present times where some governments are setting out COVID-19 specific obligations to be complied with on construction Sites; and
- ensure that "suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics".
- Limit damage and nuisance to people resulting from the Contractor's operations and/or activities .

**The Employer** is generally responsible for ensuring that its Personnel (including the Engineer, depending on the FIDIC Contract used<sup>8</sup> ) and its other contractors comply to some extent with the same health, safety and environment obligations which are imposed on the Contractor<sup>9</sup> .

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## Covid19 FIDIC GUIDANCE MEMORANDUM



As has been emphasized in this Guidance Memorandum, a significant range of FIDIC contractual provisions are relevant and can be considered in the current COVID-19 pandemic situation, such as:

- Health and safety
- Change in Laws
- Force Majeure / Exceptional Event
- Unforeseeable shortages in personnel and in the supply chain
- Variation
- Delays caused by authorities
- EOT
- Claims and disputes, in particular dispute avoidance provisions

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## Covid19 FIDIC GUIDANCE MEMORANDUM

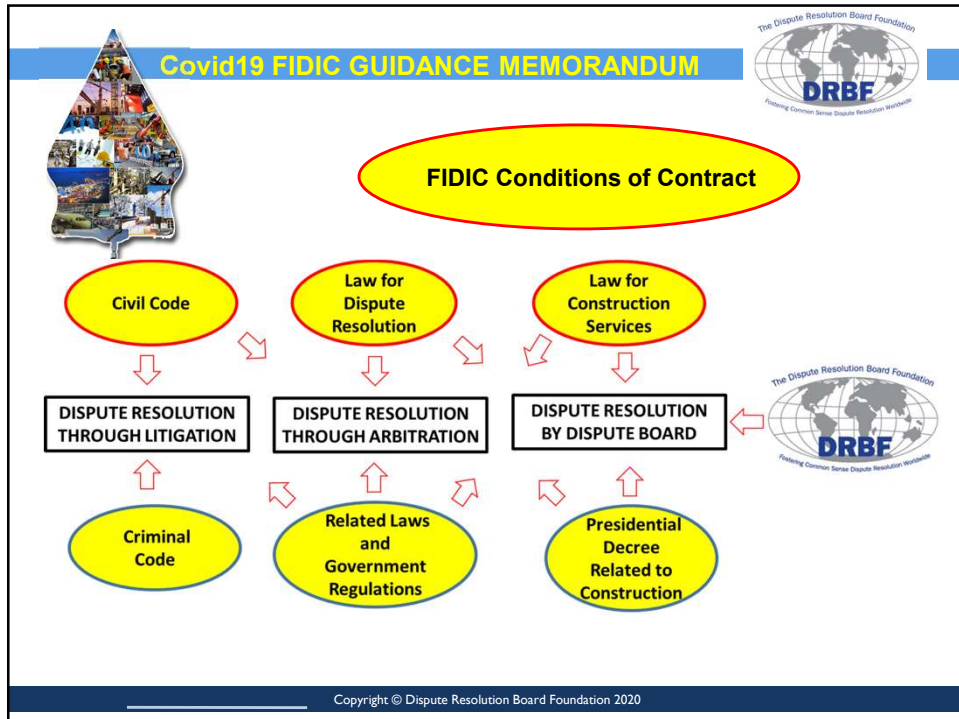


### COVID19: FIVE PRINCIPLES TO AVOID DISPUTE IN THIS

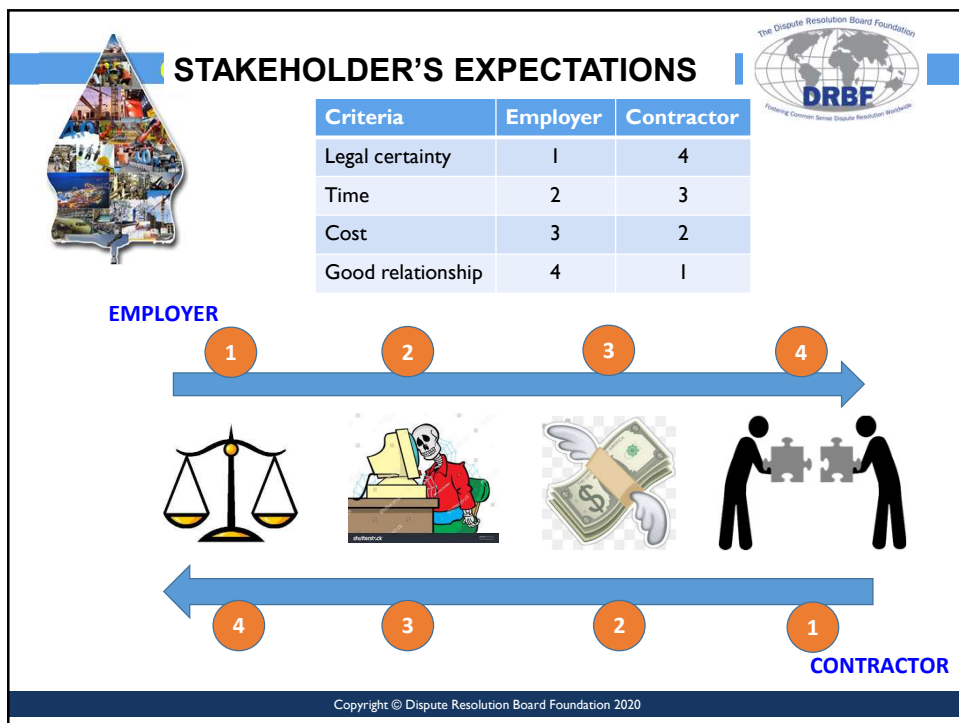
1. The Parties have to read the contract carefully, both the substance or the wording
2. The Parties are reminded to timely comply with all their communication obligations not limited to formal meetings and notices.
3. The Parties have to prepare the contemporary records
4. The Parties have to follow the dynamic changes in the law and regulation of the country or other regulation of local government.
5. Last but not least, the FIDIC contracts hold unique fully fledged dispute avoidance features – on a live and real-time basis, dispute boards

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Should the Parties fail to reach common ground, and find themselves entrenched in adversarial attitudes, dispute boards can greatly assist in bringing Parties back to an amicable territory, or, if not possible, to quickly issue decisions as to their matters in dispute.

**FOSTERING THE COMMON SENSE DISPUTE RESOLUTION**

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