

Major Challenges and Opportunities for General Contractors Under the FIDIC 2017 Red Book



A SHORT SUMMARY

All multilateral development banks ('MDB's') have agreed to fully adopt the FIDIC 2017 suite of contracts, replacing the FIDIC 1999 version (which has been the baseline contract for many construction contracts over the last 20 years or so).

The 'Pink Book' - the MDB's version of FIDIC's 1999 'Red Book' - is being phased out.

FIDIC 2017 Red Book is very different to FIDIC 1999 - it is nearly twice as long and has 28 additional defined terms, and a number of these are very important.

	FIDIC 1999 Red Book	FIDIC 2017 Red Book
Number of Clauses	163	168
Number of Pages	74	128
Number of Words	35,300	56,900
Number of Defined Terms	60	88

There are also many important differences in the drafting of many clauses and FIDIC 2017 is far more prescriptive.

Failure to comply with requirements will severely impact rights and entitlements.

Managing contracts under FIDIC 2017 will require much higher contract administration expertise (with the attendant additional costs).

The FIDIC 2017 Red Book contains very different requirements. These differences include the requirements for 'Notices', for the 'initial Programme' and the submission of any subsequent 'revised Programme' (and for the Contractor's monthly progress report), for the application for interim payments and the final payment, and for the submission of claims for additional payment and/or extensions of time.

Compliance with these requirements is essential for rights to extensions of time and additional payment.

An updated version of the FIDIC 2017 Red Book will be issued later in 2022.

What is FIDIC 2017?

FIDIC has issued an updated version of its 'Red Book' conditions of contract for use on international construction projects. This 2017 edition of the Red Book is very different to FIDIC 1999 which has been in use for over 20 years.

All multilateral development banks have agreed to use the full suite of FIDIC 2017 contract forms, and their current use of the FIDIC 1999 version will cease.

An updated version of FIDIC 2017 will be issued later in 2022.

The World Bank, AIIB, EBRD, EIB, ADB, AfDB, IsDB, IDB, and CDB, have all agreed to fully adopt the FIDIC 2017 suite of contracts. The 'Pink Book' (the multinational development banks version of the FIDIC 1999 'Red Book') is being withdrawn. Some regard FIDIC 2017 as having responded to real market requirements and created a document which provides a valuable and practical contract management tool. Other commentators view FIDIC 2017 as too lengthy and overly complex, and hence unsuitable for small or simple projects.

General Observations on FIDIC 2017

The fundamentally different principles in FIDIC 2017 might be described as:

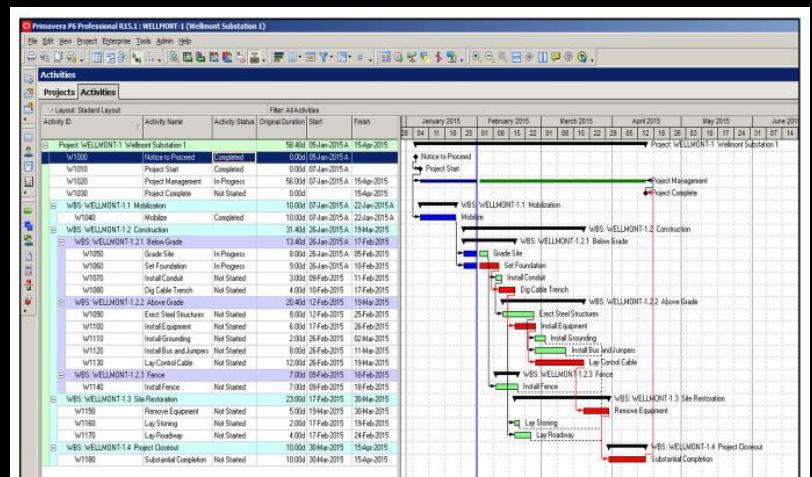
- there is far more detail particularly in what constitutes a valid 'Notice', and what should be included in a notice from the Employer, the Engineer, or the Contractor
- there are additional detailed provisions for quality management and for verifying the Contractor's compliance with contract obligations
- there is a mechanism for the early warning of events which might delay completion of the Works or increase the Contract Price
- there are mechanisms for the avoidance of disputes
- there are requirements for the Employer to notify and evidence any claims it wishes to make against the Contractor
- there is an independent dispute board appointed from the start of a project
- there are five so called 'FIDIC Golden Principles' which are recommended to be applied to any proposed amendments to the standard conditions.

FIDIC 2017 is far lengthier than FIDIC 1999 and is much more complex. It might, therefore, likely find most use on very large projects.

Key Changes Between FIDIC 2017 and FIDIC 1999

There are many important changes introduced in the FIDIC 2017 Conditions of Contract for Construction (the 'Red Book'):

- the conditions in the FIDIC 2017 Red Book are contained in 128 pages (compared to 74 pages in FIDIC 1999)
- there are 88 defined terms in the FIDIC 2017 Red Book (compared to 60 defined terms in FIDIC 1999)
- FIDIC 2017 is considerably more prescriptive than FIDIC 1999 including much greater detailed processes for establishing entitlements to additional payment and/or extensions of time
- FIDIC 2017 contains numerous new time-bars
- a 'Notice' (from either the Employer, the Engineer, or the Contractor) is required in 80 clauses in the FIDIC 2017 Red Book
- 'No-objection' replaces approvals and consents of the Engineer
- it contains very substantial requirements for the Contractor's initial programme, and all subsequent revised programmes (and complying with these requirements is vital to entitlements of the Contractor)
- there are important revisions to the requirements for application for interim payments and for the final payment
- there are extensive changes to the procedure for submitting, evidencing, and justifying claims
- FIDIC 2017 requires a Dispute Avoidance/Adjudication Board to be appointed from the commencement of the Contract.



Contract administration under FIDIC 2017 will cost contractors far more than under FIDIC 1999. Requirements and processes under FIDIC 2017 are much more complex and prescriptive. This is particularly the case with the specific requirements for the initial and revised programmes, and for submission of a 'fully detailed Claim'. But there are numerous significant advantages in complying with these requirements and processes. Will contractors invest in the additional training, expertise, and technology necessary to be better prepared - or can they afford not to?

Some Important Issues Arising from the Changes

There are a number of important issues which require particular attention:

- *the definitions for a 'Claim', 'Compliance Verification System', 'Contract Data', 'Cost Plus Profit', 'DAAB Agreement', 'Date for Completion', 'Dispute', 'Programme', 'QM System', 'Review', 'Schedule of Performance Guarantees', 'Statement', and 'Special Provisions'*
- *the definition and application of 'Exceptional Event' (which replaces the term "force majeure" under FIDIC 1999)*
- *the amended definition of what constitutes 'Unforeseeable'*
- *the new requirements for the giving of a 'Notice', and how a 'Notice' is to be identified*
- *the requirement that any 'Notice' is "not to be unreasonably withheld or delayed"*
- *the requirement for the Contractor to provide assistance and documentation to allow the Employer to obtain any permit, licence, or approval for the Permanent Works*



FIDIC 2017 is very different to FIDIC 1999. A number of those changes significantly affect the obligations for protecting rights and entitlements. Particular attention must be given to the new requirements for a 'Notice', for a 'Notice of No-objection', for a 'Review' by the Engineer, for monthly progress reports, and for the initial and revised 'Programme'.

- *the work to be carried out by a member of a joint venture contractor cannot be altered without the prior consent of the Employer*
- *the requirement for a 'Notice of Dissatisfaction' to be given if either the Contractor or the Employer is dissatisfied with a determination of the Engineer or with a decision of the Dispute Avoidance/Adjudication Board*
- *the Employer, the Engineer and the Contractor are required to advise in advance any event or circumstance which might adversely affect performance of the completed Works, increase the Contract Price, or delay execution of the Works*
- *the Employer now has the same obligations as the Contractor (for the giving notices, keeping contemporary records, and submitting detailed particulars) if it wishes to make a claim for additional payment, or obtain a reduction in the Contract Price, or for an extension of the 'Defects Notification Period'*

- when making a determination of any matter or Claim the Engineer is required to “act neutrally”
- there are extensive requirements for the submission of an initial programme and all subsequent revised programmes (and for ensuring many entitlements under the contract this is, perhaps, the most important provision in FIDIC 2017 for contractors)
- monthly progress reports now include a requirement for the Contractor to detail events or circumstances which may adversely affect completion of the Works in accordance with the Contractor’s ‘Programme’



- there is a very prescribed process for the preparation of the ‘Contractor’s Documents’ and for the ‘Review’ of them by the Engineer
- the ‘Statement’ to be submitted for applications for interim payment requires much greater information and details from the Contractor
- there are now provisions for a ‘Draft Final Statement’, an ‘Agreed Final Statement’, and ‘Partially Agreed Final Statement’ (and compliance with each of these is vitally important for cash flow)

- there are new requirements related to the discharge required to be provided by the Contractor with the Final Statement, and important links to the ‘Final Payment’ to be made by the Employer
- recommendations are included for any amendments made to the standard conditions – these are termed the five ‘FIDIC Golden Principles’.

Further major differences in FIDIC 2017 affecting obligations for protecting rights and entitlements and for which particular attention must be given are new requirements for obtaining a ‘Taking-Over Certificate’, for the ‘Tests’ on completion, for the rectifying of defects, and the requirements for notification of a ‘Claim’, and for the contents of a ‘fully detailed Claim’.

Some Fundamental ‘Must-Do’ Compliance Requirements

There are many requirements which demand compliance if rights or entitlements are not to be prejudiced. Some important ones require a clear understanding of:

- any additional requirements set out in the ‘Special Provisions’ the requirements for a proper ‘Notice’ under the contract
- the detailed requirements for a valid ‘Programme’ (both for the initial and revised programmes)
- the obligations in respect of the issue of a revised programme (and what is meant by a programme “ceases to reflect actual progress or is otherwise inconsistent with the Contractor’s obligations”)
- the procedures for submission and Review by the Engineer of the ‘Contractor’s Documents’
- the procedure and limitations of a ‘Review’ by the Engineer





- the importance of obtaining a Notice of 'No-objection' from the Engineer
- the proper use of a 'Notice of Dissatisfaction'
- the requirements for something to be 'Unforeseeable'
- what properly constitutes a 'Variation'
- the information required to facilitate interim payments
- the details to be included in the 'Draft Final Statement', the 'Agreed Final Statement', and particularly any 'Partially Agreed Final Statement'
- the quite different requirements for a 'Claim' and a 'Dispute'.

Some Specific Challenges for Contractors under the FIDIC 2017 Red Book

FIDIC 2017 has some specific and detailed requirements which may be particularly challenging for many contractors, and some very important ones are:

- **Consultation to Reach Agreement [Sub-Clause 3.7.1]** - *the Engineer is required to agree or determine any matter or Claim and must consult jointly and/or separately with the Employer and the Contractor and must "encourage discussion between (the Employer and the Contractor) in an endeavour to reach agreement". This consultation is generally required to be within 42 days of the Engineer receiving the matter or Claim.*

Failure to comply with 'must-do' requirements will undoubtedly prejudice rights and entitlements to extensions of time and additional payment.

The Contractor must:

- *be properly prepared for these consultations and, therefore, maximise the opportunity to avoid the time and expense of resolving matters or Claims through the dispute processes*
- *accordingly, ensure that:*
 - *any matter is carefully and fully prepared as required by the Contract and all necessary evidence has been properly collected and presented*
 - *in respect of a Claim, a 'fully detailed Claim' has been prepared and presented in accordance with Sub-Clause 20.2.*

Many contractors may struggle to fully prepare for these consultations with the Engineer and/or the Employer because:

- *they have not fully complied with the requirements of the contract (for example, a failure to provide a proper 'Notice', or a failure to submit a revised programme in accordance with Sub-Clause 8.3)*
- *they do not have the necessary contemporary records to demonstrate the true impact of an event or circumstance*
- *they are unable to provide sufficient supporting particulars to prove the claimed entitlement.*

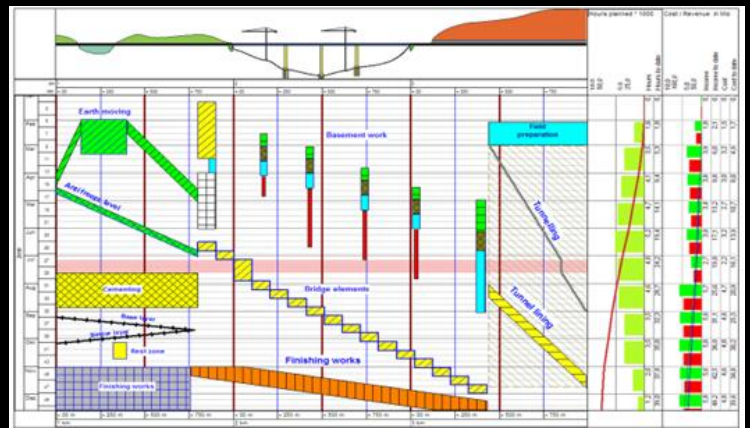


- Monthly Progress Report [Sub-Clause 4.20]** – the Contractor is required to submit a report which includes a comparison between actual and planned progress and details of events or circumstances which may adversely affect completion of the Works “in accordance with the Programme and the Time for Completion” – this requirement highlights the importance of a compliant Sub-Clause 8.3 programme and advance warnings under Sub-Clause 8.4 (and this Sub-Clause 4.20 report is an element necessary for application for interim payments under Sub-Clause 14.3).



These requirements may prove challenging for some contractors because:

- obtaining complete and accurate information (particularly regarding forecast performance through to completion) from subcontractors and suppliers may be difficult
 - obtaining such information within the 7-day period for reporting is likely to be extremely challenging
 - contractors may be reluctant to report actual performance (including delays by subcontractors or suppliers) and risk prejudicing entitlements to extensions of time and/or additional payment.
- Programme [Sub-Clause 8.3]** – the Contractor is required to submit an initial programme within 28-days of receiving a Notice from the Engineer of the Commencement Date of the Works. The Contractor is then required to submit a revised programme which “accurately reflects actual progress of the Works, whenever any programme ceases to reflect actual progress...”. The initial programme and each revised programme are required to contain very specific information.



These requirements may prove challenging for some contractors because:

- obtaining complete and accurate information from subcontractors, suppliers, and vendors within 28-days of the Notice from the Engineer of the Commencement Date (when some subcontractors, suppliers and vendors may not yet be appointed) is likely to be very difficult
 - submission of a revised programme because actual progress is different to that shown on the previous programme will be difficult if that progress has been caused in full or in part by delays of subcontractors or suppliers.
- ‘fully detailed Claim’ [Sub-Clause 20.2.4]** – the Contractor is required to submit a detailed description of the event giving rise to the ‘Claim’, the contractual and/or legal basis of the ‘Claim’, all contemporary records, and detailed supporting particulars within 84-days of the Contractor being aware of the event giving rise to the ‘Claim’.

These requirements may prove challenging for some contractors because:

- often contemporary records maintained by contractors, subcontractors and suppliers are inadequate
 - often contractors are unable to submit supporting particulars sufficiently detailed to fully demonstrate the additional payment and/or the extension of time claimed
 - the requirements for contemporary records and supporting particulars are not defined in the contract and often those submitted by the Contractor are not accepted by the Engineer
 - accordingly, the submission of a ‘fully detailed Claim’ compliant with Sub-Clause 20.2.4 within the 84-day time limit will be extremely difficult.

- **Variations [Sub-Clause 13.1]** – a Variation is a “change to the Works which is instructed as a variation under Clause 13 [Variations and Adjustments]”.

These requirements may prove challenging for some contractors because:

- *often contractors are unsure what is truly required for the Works often contractors are unsure what is truly required by the Works (and what is the minimum required to fully comply with the contract)*
- *an instruction for a Variation will often be initiated by the Engineer by notes on documents (such as drawings or specifications) submitted by the Contractor – and the additional requirements to the Works because of such notes must first be challenged (usually by requesting the Engineer to make a determination under Sub-Clause 3.5 [Agreement or Determination]).*



Some Specific Opportunities for Contractors under the FIDIC 2017 Red Book

Compliance with the requirements of FIDIC 2017 will provide contractors with opportunities to protect and successfully pursue its rights and entitlements, and some very important ones are:

- **Dispute Avoidance/Adjudication Board (‘DAAB’) [Clause 21]** – is usually three members one appointed by the Employer, one appointed by the Contractor, and a third member to be agreed. The DAAB is usually appointed 28 days after the Contractor receives the Letter of Acceptance.

These requirements provide significant advantages to contractors because:

- *the DAAB provides an independent forum to consider and decide upon issues which have been in dispute between the Employer and the Contractor*
- *the DAAB can be requested to assist the Employer and the Contractor to resolve issues or disagreements between them*
- *the DAAB is required to give a decision within 84 days*
- *the decision of the DAAB is binding on the Employer and the Contractor and must be complied with.*

- **Programme [Sub-Clause 8.3]** - the Contractor is required to submit an initial programme within 28-days of receiving the Notice from the Engineer stating the Commencement Date. The Contractor is then required to submit a revised programme which “accurately reflects actual progress of the Works, whenever any programme ceases to reflect actual progress...”. The initial programme and each revised programme are required to contain very specific information.

These requirements provide significant advantages to contractors because:

- *properly prepared initial and revised programmes will provide a very effective means to manage subcontractors, suppliers, and vendors*
- *properly prepared initial and revised programmes will establish the timing for Reviews by the Engineer and for any necessary instructions, directions, and the like*
- *properly prepared initial and revised programmes will provide a very powerful basis for obtaining the correct entitlements for extensions of time and/or additional payment (there is probably nothing more important for the Contractor under FIDIC 2017)*
- *properly prepared initial and revised programmes will reduce the time and cost to resolve those entitlements by ensuring events or circumstances giving rise to delays or additional costs can be clearly established, and a properly evidenced “fully detailed Claim” submitted.*



- **Advance Warning [Sub-Clause 8.4]** – the Employer, the Engineer, and the Contractor are obliged to advise the other of future events or circumstances which may (amongst other things) increase the Contract Price and/or delay execution of the Works
These requirements provide significant advantages to contractors because:



- *it obliges the Employer, the Engineer, and the Contractor to identify events or circumstances which might cause additional costs or delay (and hence mitigate the impact on the affected party)*
- *it obliges the Employer or the Engineer to advise the Contractor if it is aware of, for example, any future instruction which may increase the Contract Price or cause delay on the Contractor's programme (but equally the Contractor is obliged to advise the Employer and the Engineer if, for example, a subcontractor or supplier will delay that programme).*

A major problem with the FIDIC 2017 suite of contracts (and all previous versions of FIDIC) is the failure to specify the form and content for contemporary records and any detailed supporting particulars to be kept and submitted by the Contractor. This is surprising when:

- *Employers have many different views of what constitutes adequate contemporary records, and what they accept as sufficient detailed supporting particulars;*
- *historically the lack of adequate evidence has been by far the single largest cause of claims for extensions of time and additional payment being rejected or significantly reduced; and*
- *FIDIC 2017 has majored on the need for better information and improved contract management but has not addressed this most important requirement.*

There is nothing more important than the quality of contemporary site records in determining the entitlement to extensions of time and/or additional payment, or other relief.



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TYPICAL CLIENTS

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If you require any further discussion or explanation of the matters described above, then please let us know.

Kelvin Hingley
Managing Partner
High-Point Partnership LLP
E: kelvin.hingley@highpointpartnership.com
M: +44 7774 224 895

Nigel Bell
Managing Partner
High-Point Partnership LLP
E: nigel.bell@highpointpartnership.com
M: +44 7887 501 624

London Office

E: valerie.howell@highpointpartnership.com
M: +44 7827 927 795
O: +44 203 019 3830

www.highpointpartnership.com