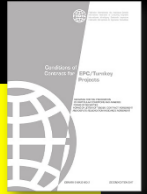


# Major Challenges and Opportunities for EPC Contractors Under the FIDIC 2017 Silver Book



## 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' - MDB's version of FIDIC's 1999 'Red Book' - is being phased out.

FIDIC 2017 is very different to FIDIC 1999 - it is nearly twice as long and has almost double the number of defined terms. A number of those defined terms are very important.

|                         | FIDIC 1999 Silver Book | FIDIC 2017 Silver Book |
|-------------------------|------------------------|------------------------|
| Number of Clauses       | 166                    | 169                    |
| Number of Pages         | 72                     | 123                    |
| Number of Words         | 31,300                 | 58,600                 |
| Number of Defined Terms | 50                     | 80                     |

There are important differences in many clauses and FIDIC 2017 is far more prescriptive and 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).

FIDIC 2017 contains very different requirements in relation to the obligations (and rights) of a contractor and it is particularly important for contractors to fully understand these differences.

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

## What is FIDIC 2017?

FIDIC has issued an updated version of its 'Silver Book' conditions of contract for use on international EPC/Turnkey projects. This 2017 Silver Book edition is very different to the FIDIC 1999 version 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 Employer's Representative, 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*
- *an independent dispute board is required to be 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 (but these are not binding on the Employer).*

*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 EPC/Turnkey Projects (the 'Silver Book'):

- *the conditions in the FIDIC 2017 Silver Book are contained in 123 pages (compared to 68 pages in FIDIC 1999)*



- *there are 80 defined terms in the FIDIC 2017 Silver Book (compared to 48 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 or the Contractor) is required in 80 clauses in the FIDIC 2017 Silver Book*
- *'No-objection' replaces approvals and consents of the Employer's Representative*
- *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' be "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
- the work to be carried out by a member of a joint venture contractor cannot be altered without the prior consent of the Employer

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', and for a 'Review' by 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 Employer's Representative or with a decision of the Dispute Avoidance /Adjudication Board

- the Employer 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

Other significant changes are those related to:

- monthly site reports
- the submission of an initial programme and revised programmes
- the definition of a 'Variation'
- responsibilities of the Contractor and the Employer for design

- 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 Employer's Representative is not deemed to act for the Employer (this is quite different to the obligation under the FIDIC 2017 'Red Book' where the Engineer is required to "act neutrally")

Further major differences in FIDIC 2017 affecting obligations for protecting rights and entitlements are new requirements for obtaining a 'Taking-Over Certificate', for the 'Tests' on completion and after completion, for the rectifying of defects, and the requirements for notification of a 'Claim', and for the contents of a 'fully detailed Claim'.

- 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 Employer
- 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'.

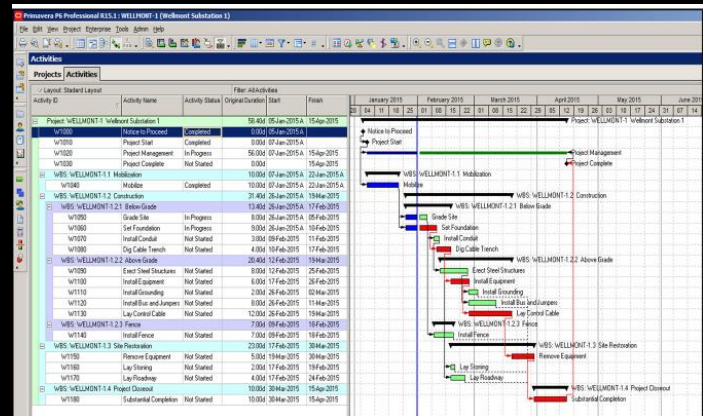




## Some Fundamental ‘Must-Do’ Compliance Requirements

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 Employer of the ‘Contractor’s Documents’



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

- the procedure and limitations of a ‘Review’ by the Employer
- the importance of obtaining a Notice of ‘No-objection’ from the Employer
- 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’.

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.

## Some Specific Challenges for EPC Contractors under the FIDIC 2017 Silver Book

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

- **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*
- *reporting of actual performance (including delays by subcontractors or suppliers) may prejudice entitlements to extensions of time and/or additional payment.*

- **Design [Clause 5] - the Contractor is required to complete the Works so they are “fit for the purpose(s) for which they are intended as defined ... in the Employer’s Requirements” and the Works must include any work necessary “to satisfy the Employer’s Requirements and Schedules, or is implied by the Contract, and .... all works necessary for ... safe and proper operation, of the Works”. The Employer (except in some specific circumstances) is not responsible for “any error, inaccuracy or omission of any kind in the Employer’s Requirements.**



*The Contractor must:*

- *be sure it has fully understood the Employer’s Requirements and ensured the Schedules it completes as part of its tender are consistent with the Employer’s Requirements (and do not impose obligations additional to those in the Employer’s Requirements)*
- *carefully consider any comments made by the Employer’s Representative on any documents submitted by the Contractor (and particularly on design calculations and drawings, and whether any such comments constitute a Variation)*
- *ensure:*
  - *it fully understands the definitions made by the Employer of the purposes of the Works*
  - *it fully understands the criteria specified for testing and performance of the Works*
  - *it is clear the data or information provided by the Employer which cannot be verified prior to submission of its tender.*
- **Programme [Sub-Clause 8.3] – the Contractor is required to submit an initial programme within 28-days of receiving a Notice from the Employer to commence 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 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 difficult.
- **Variations [Sub-Clause 13.1]** – a Variation is a “change to the Employer’s Requirements or 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 by the Employer’s Requirements (and what is the minimum required to fully comply with the Employer’s Requirements)
  - an instruction for a Variation will often be initiated by the Employer by notes on documents (such as drawings or specifications) submitted by the Contractor – and the additional requirements to designs and the Works because of such notes must first be challenged (usually by requesting the Employer’s Representative to make a determination under Sub-Clause 3.5 [Agreement or Determination]).



## Some Specific Opportunities for EPC Contractors under the FIDIC 2017 Silver 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 signing of the Contract Agreement.

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.

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.

- **Programme [Sub-Clause 8.3]** - the Contractor is required to submit an initial programme within 28 days of receiving a Notice from the Employer to commence 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 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 Employer 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]** – both the Employer 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 both the Employer 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 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 if, for example, a subcontractor or supplier will delay that programme).



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#### TYPICAL CLIENTS

INSTITUTIONAL and PRIVATE FUNDERS, GOVERNMENT AGENCIES, PRIVATE SPONSORS, INVESTORS and DEVELOPERS, INSURERS, MAJOR INTERNATIONAL CONTRACTORS, EQUIPMENT VENDORS/SUPPLIERS and OPERATORS

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](mailto:kelvin.hingley@highpointpartnership.com)**

**M: +44 7774 224 895**

**Nigel Bell**

**Managing Partner**

**High-Point Partnership LLP**

**E: [nigel.bell@highpointpartnership.com](mailto:nigel.bell@highpointpartnership.com)**

**M: +44 7887 501 624**

**London Office**

**E: [valerie.howell@highpointpartnership.com](mailto:valerie.howell@highpointpartnership.com)**

**M: +44 7827 927 795**

**O: +44 203 019 3830**

[www.highpointpartnership.com](http://www.highpointpartnership.com)