

Notices under the FIDIC 2017 Conditions



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.

The FIDIC 2017 Red Book and Silver Book are very different to the FIDIC 1999 versions:

Comparison of FIDIC 1999 and FIDIC 2017 Conditions	Red Book		Silver Book	
	FIDIC 1999	FIDIC 2017	FIDIC 1999	FIDIC 2017
No of Clauses	163	168	166	169
Number of Pages	74	128	72	123
Number of Words	35,300	56,900	31,300	58,600
Number of Defined Terms	60	88	50	80

There are also very 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).

FIDIC 2017 contains very different requirements for the giving and receipt of notices and has specifically defined terms for a 'Notice', a Notice of 'No-objection', and a 'Notice of Dissatisfaction'.

Updated versions of the FIDIC 2017 contracts will be issued later in 2022.

Key Changes Between FIDIC 2017 and FIDIC 1999

There are many significant changes introduced in the FIDIC 2017 Conditions of Contract for Construction Projects (the 'Red Book') and the Conditions of Contract for EPC/Turnkey Projects (the 'Silver Book'):

- 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
- 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

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 The 'Pink Book' (the multinational development banks version of the FIDIC 1999 'Red Book') is being withdrawn.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.

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

- *FIDIC 2017 requires a Dispute Avoidance/Adjudication Board to be appointed from the commencement of the Contract*
- *the requirements for a valid 'Notice' is defined and a 'Notice' from either the Employer, the Engineer, or the Contractor is required in some 80 clauses in the FIDIC 2017 Red Book, and a 'Notice' from either the Employer or the Contractor is required in a similar number of clauses in the FIDIC 2017 Silver Book*
- *'No-objection' replaces approvals and consents of the Engineer (under the Red Book) and the Employer (under the Silver Book)*
- *there is an important addition of a 'Notice of Dissatisfaction' related to determinations of the Engineer (under the Red Book) or the Employer's Representative (under the Silver Book).*



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)*

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 (under the Red Book) or the Employer (under the Silver Book), for monthly progress reports, and for the initial and revised 'Programme'.

- *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 requirements for a Notice of 'No-objection'*
- *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 (under the Red Book) or with a determination of the Employer's Representative (under the Silver Book), or with a decision of the Dispute Avoidance/Adjudication Board*
- *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*
- *the Employer, the Engineer, and the Contractor (under the Red Book) and the Employer and the Contractor (under the Silver Book) 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 of 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'



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?

- when making a determination of any matter or Claim the Engineer (under the Red Book) is required to "act neutrally" (this is quite different to the obligation under the FIDIC 2017 'Silver Book' where the Employer's Representative is simply not deemed to act for the Employer)
- 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 initial or revised 'Programme'
- there is a very prescribed process for the preparation of the 'Contractor's Documents' and for the 'Review' of them by the Engineer (under the Red Book) or the Employer (under the Silver Book)
- 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)



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' and 'Tests 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 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 by employers to the standard conditions - these are termed the five 'FIDIC Golden Principles'.



Some Specific Requirements for Notices under FIDIC 2017

A Notice is a defined term under FIDIC 2017 as a “*written communication identified as a Notice and issued in accordance with Sub-Clause 1.3*”.

A Notice must, therefore, state it is a Notice and must be signed by the Contractor’s Representative or the authorised representative of the Employer (usually the Engineer under the Red Book, or the Employer’s Representative under the Silver Book).

Project teams must note here that:

- any notice must be clearly identified as a ‘Notice’ [accordingly, a reference in, for example, the notes of a site meeting will not constitute a valid Notice]
- a Notice must be signed by the named Contractor’s Representative [accordingly, a Notice signed by another of the Contractor’s team might not be accepted as a valid Notice].

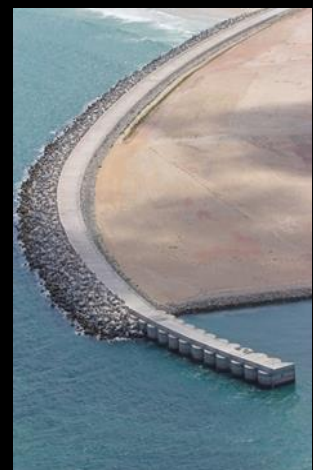
All Notices must “*not be unreasonably withheld or delayed*”.

This is a very important provision for project teams especially where the Employer is required to give a Notice in respect of:

- a Notice of Dissatisfaction with the Engineer’s Determination (under the Red Book) or a Notice with the Employer’s Representative’s Determination (under the Silver Book)
- a Review of the initial programme or revised programme submitted by the Contractor under Sub-Clause 8.3
- instructing a Variation under Sub-Clause 13.3.1
- requesting from the Contractor a proposal for a Variation under Sub-Clause 13.3.2
- a Claim under Sub-Clause 20.2 for additional payment from the Contractor, or a reduction in the Contract Price, or an extension of the Defects Notification Period

Some Key Questions for Contractors in Relation to a Notice, a Notice of No-objection, or a Notice of Dissatisfaction

- **what is an acceptable Notice under FIDIC 2017?** whilst specific requirements will vary from clause to clause each Notice should:
 - be in writing
 - state it is a Notice
 - reference the sub-clause requiring the Notice to be given
 - set out the events or circumstances which have arisen, and which have necessitated the Notice being given
 - comply with any time limits for the giving of the Notice
 - be signed by the Contractor’s Representative
- **what is meant by a Notice of No-objection?** this is a specific Notice issued by the Employer (under the Silver Book) or the Engineer (under the Red Book) identifying they have no objection to the Contractor’s Documents allowing the Contractor to proceed with the Works using those documents



Failure to comply with the requirements for a Notice, a Notice of No-objection, or a Notice of Dissatisfaction will undoubtedly prejudice rights and entitlements to extensions of time and additional payment, or other relief.

- **when must a Notice of Dissatisfaction be issued?** this has two purposes for the Contractor:
 - the Notice given to the Employer advising it is dissatisfied with a determination of the Engineer (under Sub-Clause 3.7 of the Red Book) or the Employer's Representative (under Sub-Clause 3.5 of the Silver Book) – and such Notice must set out reasons for the dissatisfaction
 - the Notice given to the Employer and copied to the Dispute Avoidance/Adjudication Board advising it is dissatisfied with a decision of the DAAB – and such Notice must set out the dispute referred to the DAAB and the reasons for the dissatisfaction
- **what are important Notices for the Contractor to issue?** some of the important Notices to be issued by the Contractor are:
 - late issue by the Engineer or the Employer's Representative of a Notice or other communication which causes disruption or delay to the progress of work
 - an error or defect in a document issued by the Employer and to be used in the execution of the Works
 - modification of a design or Contractor's Documents which have previously been submitted for Review by the Employer
 - the intended start date of a sub-contractor's work, on-site or off-site
 - the submission of Contractor's Documents for Review
 - application for a Taking-Over Certificate
 - challenging a Variation instructed by the Employer
 - a claim for additional payment or extension of time



- **what are the likely effects of a failure by the Contractor to give a proper Notice?** the Contractor would either lose some right to additional payment, an extension of time, or some other benefit or relief – or at least significantly reduce any entitlement
- **when can the issue of a Notice be said to have been unreasonably withheld or delayed?** neither the Red Book nor the Silver Book deal with this very important matter - but it could be argued that a Notice would be unreasonably withheld or delayed if it causes progress of the Works (as shown on the Sub-Clause 8.3 Programme) to be disrupted or delayed.

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

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.

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