



Commencement and Delays 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 related to both commencement of the Works under the Contract, and for delays to the progress of the Works and delays to completion of the Works.

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

Some Key Changes Between FIDIC 2017 and FIDIC 1999

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

- FIDIC 2017 has much greater detailed processes for establishing entitlements to additional payment and/or extensions of time and FIDIC 2017 contains numerous new time-bars
- a 'Notice' now has a specific definition and is required in some 80 clauses in the FIDIC 2017 Red Book and Silver Book
- a 'Notice of No-objection' replaces approvals and consents of the Employer
- 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)
- FIDIC 2017 includes an "early warning" procedure for events likely to cause delay or additional costs
- 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.



- *FIDIC 2017 requires a Dispute Avoidance/Adjudication Board to be appointed from the commencement of the Contract.*

Some Important Issues Arising from the Changes

These changes raise a number of important issues which require particular attention:

- *there are important revised definitions for a 'Claim', 'Compliance Verification System', 'Contract Data', 'Cost Plus Profit', 'Date for Completion', 'Dispute', 'Programme', 'Review', 'Schedule of Performance Guarantees', 'Statement', and 'Special Provisions'*
- *an 'Exceptional Event' replaces the term "force majeure" used under FIDIC 1999*
- *there is an amended definition of what constitutes 'Unforeseeable'*
- *there are new requirements for the giving of a 'Notice', and how a 'Notice' is to be identified*
- *FIDIC 2017 contains a requirement that any 'Notice' is "not to be unreasonably withheld or delayed"*
- *the work to be carried out by a member of a joint venture contractor cannot be altered without the prior consent of the Employer*

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?

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 Employer, for monthly progress reports, for submissions of the initial and revised 'Programme', and for what constitutes a 'Variation'.

- *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*



- *the Employer now has the same obligations as the Contractor 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'*
- *under the Red Book version of FIDIC 2017 the Engineer is required to "act neutrally" when making a determination of any claim or matter*
- *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.*

FIDIC 2017 includes very extensive requirements for submissions of the initial and revised 'Programme' (and for securing entitlements for extensions of time and additional payment this is, perhaps, the most important provision for contractors.

- 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)
- recommendations are included for any amendments made by employers to the general conditions – these are termed the five 'FIDIC Golden Principles' (but these are not binding and have no legal effect)

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 the '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'.

Some Specific Requirements for Commencement and Delays under FIDIC 2017



The following are particular changed or additional requirements in relation to commencement of work and delays to the progress or completion of work:

What is Commencement and Progress?

- a Notice of the Commencement Date requires the Contractor to commence execution of the Works "as soon as is reasonably practicable" – and because the definition of the Works includes both the Temporary Works and/or the Permanent Works this obligation would be satisfied by the Contractor installing such things as access roads and site offices

FIDIC 2017 requires the initial 'Programme' to be submitted within 28 days after the Notice of the Commencement Date - this will not be an updated tender programme. This initial programme must include procurement, manufacture and delivery of equipment and materials and show all activities logically linked.

[Contractors might find obtaining this information from subcontractors and suppliers/vendors very challenging and will need to plan for this during the tendering process].

- upon receipt of that Notice of the Commencement Date the Contractor must also proceed with the Works "with due expedition and without delay". This will require the Contractor to start and proceed with its work such that the Works will be completed within the Time for Completion
- revised programmes must include "the actual progress to date, any

delay to such progress and the effects of such delay on other activities (if any), and a supporting report") – and these delays to progress must include those delays for which the Contractor is responsible.

What happens if progress is not in accordance with the Programme under Sub-Clause 8.3?

- there is a more detailed mechanism requiring a Notice to be given by the Contractor when progress differs from the progress shown on the programme submitted under Sub-Clause 8.3 and a 14-day period for the Contractor to submit a revised programme.

What happens if the Employer or the Contractor are aware of potential delays?

- the introduction of an 'advance warning' process for known or future events which affect the Contractor, or the Employer, extends the requirements which were included in FIDIC 1999.

Can the Employer require the Contractor to accelerate the Works?

- FIDIC 2017 now requires the Employer to instruct a variation for revised methods including acceleration if the Employer requires the Contractor to reduce delays for which the Contractor would be entitled to an extension of time

Failure to comply with the requirements for the initial and revised programme under Clause 8 will undoubtedly prejudice rights and entitlements to extensions of time and additional payment.



Some Key Questions for Contractors in Relation to Commencement and Delays Under FIDIC 2017

- has the Employer given the right of access and possession of the Site as required by the Contract?** [access and possession of the Site is required to be as stated in the Contract Data but if nothing is stated in the Contract Data access and possession is required to be given at the Commencement Date (under the Silver Book) or in accordance with the Contractor's initial programme (under the Red Book)]
- what does the Contractor need to do to comply with the requirement to "proceed with the Works with due expedition and without delay"?** [the phrase arguably refers to critical and near critical activities and obliges the Contractor to overcome its own delays and to mitigate any delays for which the Contractor is entitled to an extension of time]
- how can the Contractor obtain sufficient information from subcontractors and suppliers to satisfy the requirements for the submission of the initial programme under Sub-Clause 8.3 within 28 days of the Notice of the Commencement Date?** [it will be crucial for tendering contractors to engage with major sub-contractors and suppliers and ensure they are fully aware of the requirements for the initial programme to be submitted under Sub-Clause 8.3 and can demonstrate they can provide all necessary information to allow that initial programme to be submitted within 28 days of the Commencement Date]
- does the initial or revised programme submitted by the Contractor under Sub-Clause 8.3 continually accurately demonstrate the actual progress of the work?** [contractors often fail to maintain programmes which accurately represent progress - this invariably leads to arguments about whether or not a delay to an activity has actually occurred, or whether an activity delay will delay completion of the Works, and whether the contractor's own delays are the 'controlling delays' – and these arguments are regularly fatal to obtaining proper entitlements to extensions of time and additional payment]
- is this progress also properly reflected in the progress reports submitted under Sub-Clause 4.20?** [it is important for contractors to comply with the requirements for its monthly reports to include comparisons of actual and planned progress and detailing events or circumstances which may adversely affect completion of the works in accordance with the programme submitted under Sub-Clause 8.3 – and this report is also important for proper payment under Clause 14 of FIDIC 2017]
- can these programmes accurately demonstrate the effect of any event or circumstance which will delay progress of the Works entitling the Contractor to additional payment?** [this can only be achieved if the programme submitted under Sub-Clause 8.3 properly reflects the actual progress at the time of the delaying event or circumstance – if the Sub-Clause 8.3 programme does not reflect actual progress there will always be arguments about whether (or to what extent) an event or circumstance has delayed progress of the Works]



- **can these programmes accurately demonstrate the effect of any event or circumstance which will delay completion of the Works entitling the Contractor to an extension of time?** [this can only be achieved if the programme submitted under Sub-Clause 8.3 properly reflects the actual progress at the time of the delaying event or circumstance – if the Sub-Clause 8.3 programme does not reflect actual progress there will always be arguments about whether (or to what extent) an event or circumstance has delayed completion of the Works]
- **have the requirements of Sub-Clause 8.3 (for submitting revised programmes whenever a previous programme fails to accurately reflect the actual progress of work) been fully complied with?** [the requirement to submit a revised programme is not limited to occasions where progress has been

Compliance with the requirements for the initial programme and revised programme is perhaps the greatest challenge for contractors under FIDIC 2017, and most important to avoid prejudicing rights and the entitlements.



affected by delays for which the Contractor is entitled to extensions of time – properly a revised programme is necessary if a progress on a previous programme has been affected by delays of the Contractor, or its subcontractors and/or suppliers]

- **can the precise nature of impacts of events on progress, labour and construction plant productivity, subcontractor cost and performance, and material and equipment procurement and delivery be clearly demonstrated?** [this will depend on the quality of the daily records of the Contractor

and its subcontractors and suppliers, and whether the programme submitted by the Contractor complies with the requirements of Sub-Clause 8.3 – historically many contractors have not produced the extent or quality of contemporary evidence necessary to fully demonstrate the true impacts of events on progress – but the prescriptive nature of FIDIC 2017 may bring about improvements]

- **would any event or circumstance have justified the giving of an advance warning under Sub-Clause 8.4?** [the ability of the Contractor to identify events or circumstances which might increase the Contract Price or delay execution of the Works is an important test of the Contractor’s real understanding of where it is in progressing the Works (which would be reflected in the quality of its Sub-Clause 8.3 programme), and the events or circumstances likely to impact completion of the Works].

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 some 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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