

Interim and Final Applications for Payment under FIDIC 2017



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 application by contractors for interim and final payments.

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

Key Changes Between FIDIC 2017 and FIDIC 1999

There are many important 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
- a 'Notice' (from either the Employer, the Engineer, the Employer's Representative or the Contractor) is required in some 80 clauses in the FIDIC 2017 Red Book and Silver Book
- 'No-objection' replaces approvals and consents of the Engineer or the Employer

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 The 'Pink Book' (the multinational development banks version of the FIDIC 1999 'Red Book') is being withdrawn.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



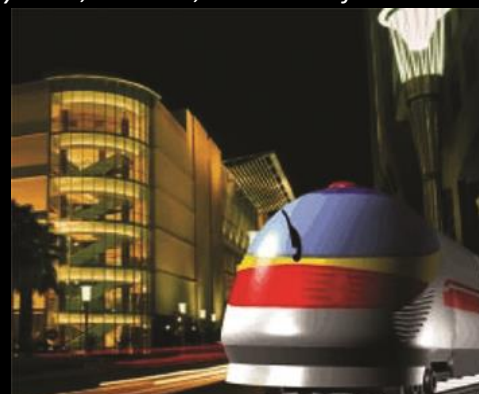
- it contains very substantial requirements for the Contractor's initial programme, and all subsequent revised programmes (and complying with these requirements is vital to entitlements of the Contractor)
- there are important revisions to the requirements for application for interim payments and for 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.

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
- 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 and the Contractor (under the Red Book and the Silver Book), and the Engineer (under the Red Book) are required to advise in advance any event or circumstance which might adversely

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



Under FIDIC 2017 has a clear difference between a 'Claim' and a 'Dispute'. For contractors there is a very precise process to be followed for:

- the giving of a Notice of Claim;
- the collection and submission of contemporary records; and
- the submission of a 'fully detailed Claim.'

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'



- when making a determination under the Red Book of any matter or Claim the Engineer is required to “act neutrally” (this is quite different to the obligation under the FIDIC 2017 ‘Silver Book’ where the Employer’s Representative is 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).

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?

Applications for Interim and Final Payments under FIDIC 2017

Interim Payment Applications

The interim payment application requirements of the FIDIC 2017 Silver Book include:



- provisions whereby quantities can be set out in a Schedule (prepared by the Employer and completed by the Contractor as part of its tender) but these quantities are not to be taken as actual or correct quantities of the Works
- the amount of the advance payment to be set out in the Contract Data (in FIDIC 1999 this was in the clause)
- for the Contractor to provide within the interim application Statement ‘sufficient detail for the Employer to investigate’ the amounts included in the Statement
- the payment for plant or materials shipped or delivered to Site (but not yet installed in the Permanent

Works) is to be determined by the Employer’s Representative in accordance with Sub-Clause 3.5 [Agreement or Determination]

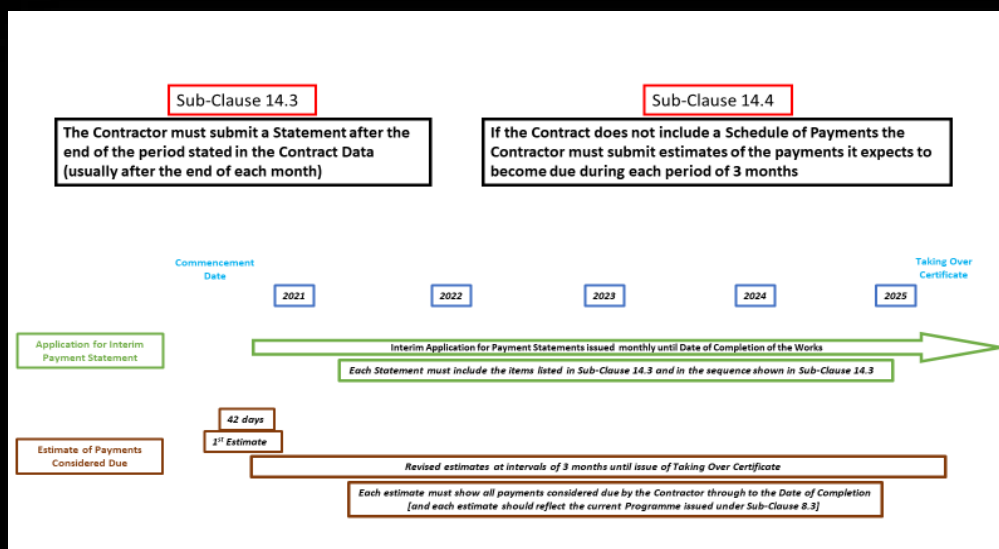
- the Employer must within 28 days of receiving a Statement and supporting documents from the Contractor issue a Notice stating the amount he considers fairly due for interim payment. The Employer must explain any differences with the amounts included by the Contractor in the Statement
- additionally, that Notice of interim payment must include any amounts determined by the Employer’s Representative under Sub-Clause 3.5 [Agreement or Determination], and such determinations might include those for claims of the Employer
- the Employer must give a Notice with supporting particulars to the Contractor of any amounts withheld from an interim payment
- the Contractor is now entitled to refer matters to the Employer’s Representative in accordance with Sub-Clause 3.5 [Agreement or Determination] if the Contractor is unhappy with any adjustments made by the Employer in a Notice of interim payment, providing the Contractor has identified



these amounts separately in the next following Statement and these amounts are then not included by the Employer in the next interim payment

- there is no requirement for any kind of Notice to be given by the Contractor, or for the Contractor to include in any Statement, for payment of interest in the event of late receipt of payment from the Employer
- there are provisions for a ‘Schedule of Payments’ included in the contract by the Employer – but if there is no such schedule the Contractor must submit estimates of the payments which the Contractor expects to become due during each period of 3 months
- if the contract contains provisions for payment of materials or equipment when shipped or delivered to site there is very specific records to be maintained by the contractor, and very specific information to be included in each interim payment application Statement
- any release of retention must be included by the Contractor in the relevant Statement – under FIDIC 1999 release of retention was certified by the Engineer separately to the normal interim certificate process (and, therefore, theoretically was paid immediately it became due) - and hence there is a delay of 56 days (at least) under FIDIC 2017 in the receipt of retention funds.

Interim Application for Payment Statements and Estimates of Payments Timeline Under FIDIC 2017 Silver Book



The interim payment application requirements of the FIDIC 2017 Red Book include:

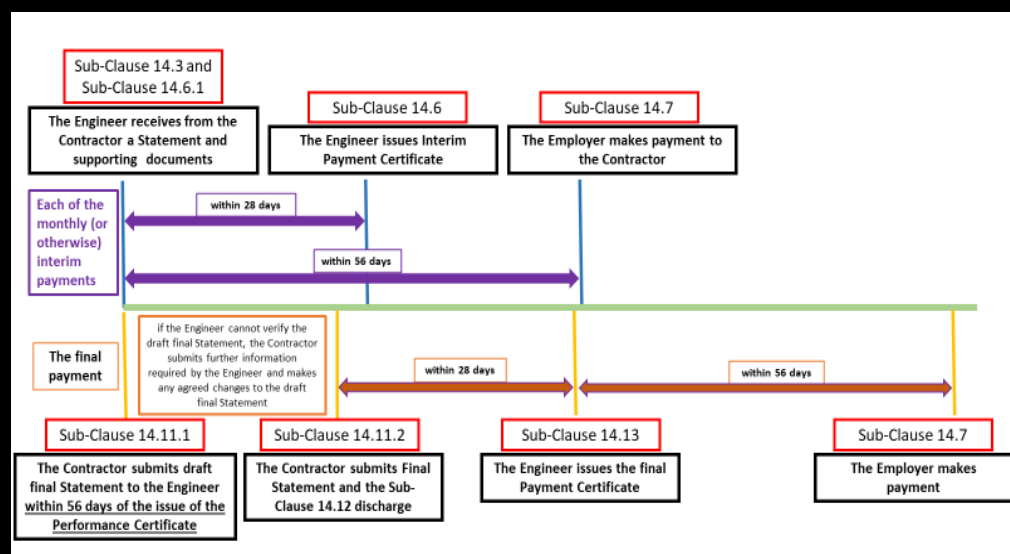
- the term “applications for interim payment certificates” (used in FIDIC 1999) has been removed in FIDIC 2017 and replaced by a “Statement” and an “Interim Payment Certificate” (‘IPC’)
- no need for the Contractor to include in the Statement amounts awarded by the Dispute Avoidance/Adjudication Board
- a new requirement for the Contractor to provide within the Statement ‘sufficient detail for the Engineer to investigate’ the amounts included in the Statement
- payment for equipment or materials shipped or delivered to Site (but not yet installed in the Permanent Works) is to be determined by the Engineer in accordance with Sub-Clause 3.7 [Agreement or Determination]
- the Engineer is required to explain any differences between any amounts included by the Contractor in the Statement and the amount included by the



Engineer in the Interim Payment Certificate. Additionally, the Engineer must explain any amounts which are withheld

- the Interim Payment Certificate must include any amounts determined by the Engineer under Sub-Clause 3.7 [Agreement or Determination] and such determinations include those for claims of the Employer
- the Contractor is now entitled to refer matters to the Engineer if the Contractor is unhappy with any adjustments made by the Engineer in an Interim Payment Certificate
- no requirement for any kind of Notice to be given by the Contractor for payment of interest in the event of late receipt of payment from the Employer
- any release of retention must be included by the Contractor in the relevant Statement – under FIDIC 1999 release of retention was certified by the Engineer separately to the normal interim certificate process (and, therefore, theoretically was paid immediately it became due) - and hence there is a delay of 56 days (at least) under FIDIC 2017 in the receipt of retention funds.

Typical Sequence of Payment Events Envisaged Under FIDIC 2017 Red Book



Final Payment Applications

The final payment application requirements of the FIDIC 2017 Silver Book and the FIDIC 2017 Red Book include:

- a requirement for the Contractor to submit a Statement within 84 days after the Date of Completion of the Works which is to contain:
 - the value of the work done in accordance with the contract
 - any further sums the contractor considers due at the Date of Completion (which would include any fully detailed Claim already submitted by the contractor)
 - an estimate of any further sums the contractor considers will (or may) become due after the Date for Completion (which must include Claims submitted by the contractor under Sub-Clause 20.2, any matter referred to the DAAB, and any decision of the DAAB for which the contractor has issued a Notice of Dissatisfaction)



Some Key Questions for Contractors in Relation to Applications for Interim and Final Payments Under FIDIC 2017

- **what information must be supplied to satisfy the requirement for 'sufficient detail' to enable the amounts included in a Statement to be investigated?** [this is a useful addition but does bring with it subjectivity of what constitutes "sufficient detail" with the potential consequence of delay in receipt of full payment – consideration, therefore, must be given to whether the principles of this requirement can be better defined and incorporated in a "Schedule" included in the contract]
- **FIDIC 2017 requires any amounts awarded by a DAAB to be paid without any certification or Notice from the Contractor (and they are not in the list of items to be included in an application for payment Statement), should the Contractor not include these amounts in a Statement?** [but it might be important to do so to preserve the Contractor's right to interest (from the date of the decision of the DAAB) if the Employer is late in making payment]
- **are there potential delays in the payment of materials and equipment shipped or delivered to site?** [FIDIC 2017, like FIDIC 1999, allows payment to be made for equipment and materials to be paid for when shipped and/or delivered to site (provided the Contractor has the evidence to support the payment). But FIDIC 2017 now requires the Engineer or the Employer's Representative to determine the amount of that payment (and with 84 days to make that determination, and a further 56 days after inclusion in an IPC, and then only payment of 80% of the value of the materials and equipment) – with the consequence that payment is likely to be received after the materials or equipment has been installed into the Works]
- **what is the timing for release of retention?** [under FIDIC 1999 retention was certified for payment outside the interim payment application process (and hence, theoretically, a retention release could be received immediately). However, FIDIC 2017 contains a significant change to FIDIC 1999 in that release of retention is part of an IPC and, therefore, there is a delay of 56 days before payment]
- **what are the different requirements under FIDIC 2017 for the "discharge" to be given by the Contractor?** [under FIDIC 1999 a full and final discharge of the contractor only took effect once all outstanding matters, such as claims, were resolved. Under FIDIC 2017 the discharge covers all amounts agreed, but only certain other unagreed matters. Those matters excluded are limited to those for which a DAAB or arbitration is "in progress" – and, therefore, cannot include claims which are still being prepared, or are the subject of the Employer's Representative's or Engineer's determination. Accordingly, contractors ought to be extremely cautious about issuing any form of discharge (although one is necessary for the issue of the Final Payment Certificate). On the face of it this provision appears unsatisfactory and unworkable and perhaps will be amended in the FIDIC 2017 revisions due out later this year]



- **are there any changes to the cessation of the Employer’s liability under FIDIC 2017?** [under FIDIC 1999 the liability of the Employer was limited to what was included in the Final Statement (unless something new arose after the issue of it). Under FIDIC 2017 the Employer’s liability is limited to matters referenced in either the Final Statement or the Partially Agreed Final Statement and is absolved from any liability unless the Contractor has made a “Claim” within 56 days of receiving the Final Payment Certificate (although it is not clear what is meant by the term “made a Claim”). Contractors must, in any event, ensure they submit their Notice of any Claim promptly and fully comply with the requirements for a “fully detailed Claim”.]

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.



The High-Point Experience

POWER GENERATION

350+
POWER GENERATION PROJECTS



Combined-Cycle
Hydroelectric
Nuclear
Renewable
Thermal

TRANSPORTATION

250+
TRANSPORTATION PROJECTS



Airports
Bridges
Highways
Maritime Facilities
Rail Systems
Tunnels

OIL, GAS AND INDUSTRIAL

450+
OIL, GAS AND INDUSTRIAL PROJECTS



Manufacturing
Mining
Oil & Gas Processing
Pipelines
Utilities

COMMERCIAL AND PUBLIC BUILDINGS

300+
BUILDING PROJECTS



Hotels & Resorts
Institutional Facilities
Offices & Retail
Sports & Leisure

PROCUREMENT TYPE

PPP, PFI, IPP, IWPP and PROJECT PARTNERING, EPC, EPCM, DESIGN AND BUILD, DESIGN, BUILD and OPERATE, EARLY CONTRACTOR INVOLVEMENT and many HYBRID FORMS

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

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

www.highpointpartnership.com