

## Some Important Amendments to the FIDIC 2017 Red Book and Silver Book Published by FIDIC in 2022



### A SHORT SUMMARY

The FIDIC 2017 conditions are being increasingly used on major international projects. The use of FIDIC 2017 is supported by all multilateral development banks ('MDB's'), replacing the 1999 version of FIDIC which has been extensively used for more than 20 years. We might anticipate FIDIC 2017 being with us for a similar period.

The FIDIC 2017 Red Book and Silver Book are, perhaps, the contract forms most seen. They 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 very important differences in the drafting of many clauses and FIDIC 2017 is far more prescriptive than FIDIC 1999. This has delivered significant challenges to owners and contractors alike, but also considerable opportunities and benefits.*

Over the last two years or so we have observed several regular issues with projects utilising FIDIC 2017 and these might be summarised as:

- *there is a general lack of understanding of FIDIC 2017 (particularly in relation to the new obligations for the giving of a 'Notice', the requirements for a fully compliant initial and revised 'Programme', and the obligations for the proper notification, justification, and valuation of a 'Claim'*
- *these and other failures have severely impacted the correct rights and entitlements.*

Sadly, these problems have regularly resulted in greater uncertainty for all project participants, investors, directors, shareholders, and the public - precisely the opposite to that expected by the introduction of FIDIC 2017.

At the end of 2022 FIDIC published amendments to the earlier editions, including for the Red Book and the Silver Book versions. These amendments (which are similar in both editions) have sought to clarify some of the issues in earlier versions. Some of the most important ones impacting project teams are addressed in this article. This article also considers some of the other matters in FIDIC 2017 which perhaps ought to have been examined and included in the amendments.





## Some Key Amendments Introduced to FIDIC 2017

In late 2022 FIDIC published amendments to its 2017 suite of construction conditions. In this article those important amendments to the Red Book (for general construction projects where design is fundamentally carried out by the owner) and the Silver Book (for EPC and turnkey projects where the contractor has much wider responsibilities) are discussed.

*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 General Observations

There are many commentaries on the FIDIC 2017 forms – most of which have been published by lawyers, claims consultants, and the like. These commentaries heavily focus upon the drafting of clauses and how they might be interpreted, with specific analysis of the provisions related to the submission of claims under FIDIC 2017.

Perhaps many of the amendments published by FIDIC in late 2022 reflect the criticisms of FIDIC 2017 included in some of those commentaries.

There is, unfortunately, little commentary on the practical challenges brought by a number of the terms, and particularly whether some of the provisions of FIDIC 2017 could be amended to better deliver the benefits they were said to bring.

### The FIDIC 2017 Red Book

The amendments to the FIDIC 2017 Red Book published by FIDIC include changes to:

- *the definition of a 'Claim' which now excludes the request or assertion of relief or an entitlement of any one of the following matters to be agreed or determined by the Engineer under Sub-Clause 3.7 [Agreement or Determination] and disagreements in relation to:*
  - *the rectification of errors in original survey control points and lines and levels of reference [Sub-Clause 4.7.3]*
  - *the Employer taking over a part of the Works [Sub-Clause 10.2]*
  - *the cost of rectifying defects [Sub-Clause 11.2]*
  - *the measurement of the Works [Sub-Clause 12.1]*



- *the valuation of the Works [Sub-Clause 12.3]*
- *the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]*
- *the valuation of dayworks [Sub-Clause 13.5]*

*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'.*



- *revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]*
- *the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]*
- *the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]*
- *the valuation following termination for default by the Contractor [Sub-Clause 15.3]*
- *the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]*

- *the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]*
- *the definition of a 'Dispute' which now means:*
  - *a 'Claim' made by either the Employer or the Contractor in relation to one of the following matters, or where one of the following matters is yet to be agreed or determined under Sub-Clause 3.7:*
    - *the rectification of errors in original survey control points and lines and levels of reference [Sub-Clause 4.7.3]*
    - *the Employer taking over a part of the Works [Sub-Clause 10.2]*
    - *the cost of rectifying defects [Sub-Clause 11.2]*
    - *the measurement of the Works [Sub-Clause 12.1]*
    - *the valuation of the Works [Sub-Clause 12.3]*
    - *the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]*
    - *the valuation of dayworks [Sub-Clause 13.5]*
    - *revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]*
    - *the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]*
    - *the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]*



- the valuation following termination for default by the Contractor [Sub-Clause 15.3]
- the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]
- the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]
- under Sub-Clause 3.7 [Agreement or Determination] the Engineer is required to proceed to agree:
  - any Claim made by the Contractor or the Employer under Sub-clause 20.2 [Claims for Payment and/or EOT]; or
  - any of the following matters:
    - the rectification of errors in original survey control points and lines and levels of reference [Sub-Clause 4.7.3]
    - the Employer taking over a part of the Works [Sub-Clause 10.2]
    - the cost of rectifying defects [Sub-Clause 11.2]
    - the measurement of the Works [Sub-Clause 12.1]
    - the valuation of the Works [Sub-Clause 12.3]
    - the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
    - the valuation of dayworks [Sub-Clause 13.5]
    - revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]
    - the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]
    - the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]
    - the valuation following termination for default by the Contractor [Sub-Clause 15.3]
    - the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]
    - the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]



*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.*

*[and the Engineer must comply with the process in Sub-Clause 3.7.1 (consult with both the Employer and the Contractor and encourage discussion between them), and if agreement is not reached, make a determination within the timelines described in Sub-Clause 3.7.3]*

- under Sub-Clause 3.7.3 [Time limits] if the Engineer fails to determine any of the following matters within 42 days of the commencement of the time limit:



- the rectification of errors in original survey control points and lines and levels of reference [Sub-Clause 4.7.3]
- the Employer taking over a part of the Works [Sub-Clause 10.2]
- the cost of rectifying defects [Sub-Clause 11.2]
- the measurement of the Works [Sub-Clause 12.1]
- the valuation of the Works [Sub-Clause 12.3]
- the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
- the valuation of dayworks [Sub-Clause 13.5]



- *revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]*
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- *the valuation following termination for default by the Contractor [Sub-Clause 15.3]*
- *the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]*
- *the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5] the matter will be deemed to be a 'Dispute' which may be referred (by either the Employer or the Contractor) to the Dispute Avoidance/Adjudication Board for its decision without the need for a Notice of Dissatisfaction.*

- *under Sub-Clause 4.7.3 [Agreement or Determination of rectification measures, delay and/or Cost] the Engineer now must proceed under Sub-Clause 3.7 to agree or determine whether an experienced contractor would have discovered an error in the original survey control points and lines and levels of reference provided by the Employer:*
  - *if those survey control points and lines and levels of reference were specified on the drawings and specification included in the Contract*
  - *taking account of the time and cost an experienced contractor would reasonably spend in examining those survey control points and lines and levels of reference during preparation of its tender*
  - *if the error(s) was found and notified by the Contractor within 28 days of the Commencement Date.*
- *under Sub-Clause 14.2.1 [Advance Payment Guarantee] the advance payment guarantee to be provided by the Contractor is now to be in the form included at Annex E of the Particular Conditions (previously the form at Annex E was described as a sample of what was required).*
- *under Sub-Clause 14.13 [Issue of FPC] the Engineer is now required to issue an interim payment certificate if the Contractor has not submitted a discharge (as required by Sub-Clause 14.12) but has:*
  - *submitted a 'Partially Agreed Final Statement' under Sub-Clause 14.11.2, or*
  - *the Engineer considers that a draft final Statement issued by the Contractor to be a 'Partially Agreed Final Statement'.*
- *under Sub-Clause 18.1 [Exceptional Events] an exceptional event must now be an 'exceptional event or circumstance' – previously the event or circumstance did not have to be exceptional to qualify as an 'Exceptional Event' under FIDIC 2017.*

*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?*

- Sub-Clause 20.1 [Claims] now provides that if there is a Claim by the Employer for entitlement or relief which is not for additional payment from the Contractor, or for a reduction in the Contract Price, or for an extension of the Defects Notification Period and that Claim has been rejected by the Contractor or the Engineer:



- a 'Dispute' will not be deemed to have arisen,
- except if:
  - there is a non-payment of the amount due under any payment certificate
  - the Contractor is entitled to receive finance charges and does not receive them within 28 days of the written request for their payment
  - the Employer has given a Notice of intention to terminate the Contract and the Contractor has agreed the Employer was entitled to give that Notice
  - the Employer has given a Notice to terminate the Contract and the Contractor has agreed the Employer was entitled to give that Notice

then the Employer can refer that Dispute to the DAAB without the need for a determination by the Engineer or a Notice of Dissatisfaction from the Employer.

- similarly, now under Sub-Clause 20.1 [Claims] if there is a Claim by the Contractor for entitlement or relief which is not for additional payment from the Employer, or for an extension of time and that Claim has been rejected by the Employer or the Engineer:

- a 'Dispute' will not be deemed to have arisen,
- except if:
  - there is a non-payment of the amount due under any payment certificate
  - the Contractor is entitled to receive finance charges and does not receive them within 28 days of the request for their payment
  - the Contractor has given a Notice of intention to terminate the Contract and the Employer has agreed the Contractor was entitled to give that Notice
  - the Contractor has given a Notice to terminate the Contract and the Employer has agreed the Contractor was entitled to give that Notice

then the Contractor can refer that Dispute to the DAAB without the need for a determination by the Engineer or a Notice of Dissatisfaction from the Contractor.

- Sub-Clause 21.4 [Obtaining DAAB's Decision] now provides that a 'Dispute' will also be deemed to arise if:

- there is a delay of 42 days or more in the payment of an interim payment certificate
  - there is a failure to pay the Contractor finance charges properly due within 28 days of the Employer being requested to make that payment
  - the Employer or the Contractor has issued a 'Notice' of an intention to terminate the Contract and the other party has agreed there was an entitlement to issue that Notice
  - the Employer has issued a 'Notice' of to terminate the Contract and the other party has agreed there was an entitlement to issue that Notice
- and in any of these circumstances the Dispute can be referred directly to the DAAB.

#### FIDIC 2017 contains significant changes 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

- in the Contract Data under Sub-Clause 2.1 [Right of Access to the Site] there is now a requirement for the right of access to and possession of all the Site and parts of the Site to be stated separately as a number of days after the Contractor receives the Letter of Acceptance.

## The FIDIC 2017 Silver Book

The amendments to the FIDIC 2017 Silver Book published by FIDIC include changes to:

- the definition of a 'Claim' which now excludes the request or assertion of relief or an entitlement of any one of the following matters to be agreed or determined by the Employer's Representative under Sub-Clause 3.5 [Agreement or Determination] and disagreements in relation to:
  - the Employer taking over a part of the Works [Sub-Clause 10.2]
  - the cost of rectifying defects [Sub-Clause 11.2]
  - the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
  - the valuation of dayworks [Sub-Clause 13.5]
  - revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]
  - the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]
  - the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]
  - the valuation following termination for default by the Contractor [Sub-Clause 15.3]
  - the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]
  - the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5].
- the definition of a 'Dispute' which now means:
  - a 'Claim' made by either the Employer or the Contractor in relation to one of the following matters, or where one of the following matters is yet to be agreed or determined under Sub-Clause 3.5:
    - the cost of rectifying defects [Sub-Clause 11.2]
    - the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
    - the valuation of dayworks [Sub-Clause 13.5]
    - revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]
  - the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]
    - the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]
    - the valuation following termination for default by the Contractor [Sub-Clause 15.3]
    - the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]

FIDIC 2017 contains many additional definitions including those for a 'Claim', 'Compliance Verification System', 'Contract Data', 'Cost Plus Profit', 'DAAB or Dispute Avoidance/Adjudication Board', 'No-objection', 'Notice of No-objection or NOD', 'QM System' and 'Schedules'.



- the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]
- under Sub-Clause 3.5 [Agreement or Determination] the Employer's Representative is required to proceed to agree:
  - any Claim made by the Contractor or the Employer under Sub-clause 20.2 [Claims for Payment and/or EOT]; or
  - any of the following matters:
    - the cost of rectifying defects [Sub-Clause 11.2]
    - the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
    - the valuation of dayworks [Sub-Clause 13.5]
    - revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]
  - the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]
    - the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]
    - the valuation following termination for default by the Contractor [Sub-Clause 15.3]
    - the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]
    - the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]

FIDIC 2017 requires the contractor to issue a 'Statement' (in effect an application for payment) and there are three categories of final statement - a "draft Final Statement", an "agreed Final Statement", and a "Partially Agreed Final Statement".

[and the Employer's Representative must comply with the process in Sub-Clause 3.5.1 (consult with both the Employer and the Contractor and encourage discussion between them), and if agreement is not reached, make a determination within the timelines described in Sub-Clause 3.5.3].

- under Sub-Clause 3.7.3 [Time limits] if the Employer's Representative fails to determine any of the following matters within 42 days of the commencement of the time limit:
  - the cost of rectifying defects [Sub-Clause 11.2]
  - the adjustment to be made to the Contract Price or the extension of time to be granted because of an instructed Variation [Sub-Clause 13.3.1]
  - the valuation of dayworks [Sub-Clause 13.5]
  - revisions to be made to a Schedule of Payments included in the Contract [Sub-Clause 14.4]
  - the amounts to be included in applications for payment for equipment and materials shipped or delivered to site, and the deductions to be made when the equipment or materials have been incorporated in the Works [Sub-Clause 14.5]
  - the correction or modification to any interim payment certificate [Sub-Clause 14.6.3]
  - the valuation following termination for default by the Contractor [Sub-Clause 15.3]
  - the valuation following termination for 'Employer's Convenience' [Sub-Clause 15.6]
  - the valuation of the work done if substantial progress is prevented by an 'Exceptional Event' [Sub-Clause 18.5]





the matter will be deemed to be a 'Dispute' which may be referred (by either the Employer or the Contractor) to the Dispute Avoidance/Adjudication Board for its decision without the need for a Notice of Dissatisfaction.

- under Sub-Clause 14.2.1 [Advance Payment Guarantee] the advance payment guarantee to be provided by the Contractor is now to be in the form included at Annex E of the Particular Conditions (previously the form at Annex E was described as a sample of what was required).
- under Sub-Clause 14.13 [Issue of FPC] the Employer is now required to issue an interim payment certificate if the Contractor has not submitted a discharge (as required by Sub-Clause 14.12) but has:
  - submitted a 'Partially Agreed Final Statement' under Sub-Clause 14.11.2, or
  - the Employer considers that a draft final Statement issued by the Contractor to be a 'Partially Agreed Final Statement'.
- under Sub-Clause 18.1 [Exceptional Events] an exceptional event must now be an 'exceptional event or circumstance' – previously the event or circumstance did not have to be exceptional to qualify as an 'Exceptional Event' under FIDIC 2017.
- Sub-Clause 20.1 [Claims] now provides that if there is a Claim by the Employer for entitlement or relief which is not for additional payment from the Contractor, or for a reduction in the Contract Price, or for an extension of the Defects Notification Period and that Claim has been rejected by the Contractor:
  - a 'Dispute' will not be deemed to have arisen,
  - except if:
    - there is a non-payment of the amount due under any payment certificate
    - the Contractor is entitled to receive finance charges and does not receive them within 28 days of the request for their payment
    - the Employer has given a Notice of intention to terminate the Contract and the Contractor has agreed the Employer was entitled to give that Notice
    - the Employer has given a Notice to terminate the Contract and the Contractor has agreed the Employer was entitled to give that Notice

then the Employer can refer that Dispute to the DAAB without the need for a determination by the Employer's Representative or a Notice of Dissatisfaction from the Employer.
- similarly, now under Sub-Clause 20.1 [Claims] if there is a Claim by the Contractor for entitlement or relief which is not for additional payment from the Employer, or for an extension of time and that Claim has been rejected by the Employer:
  - a 'Dispute' will not be deemed to have arisen,
  - except if:
    - there is a non-payment of the amount due under any payment certificate
    - the Contractor is entitled to receive finance charges and does not receive them within 28 days of the request for their payment

FIDIC 2017 includes significantly amended requirements for the issue of a Taking-Over Certificate including that contractors must receive a 'Notice of No-objection' for as-built records and provisional operation and maintenance manuals.



- the Contractor has given a Notice of intention to terminate the Contract and the Employer has agreed the Contractor was entitled to give that Notice
  - the Contractor has given a Notice to terminate the Contract and the Employer has agreed the Contractor was entitled to give that Notice
- then the Contractor can refer that Dispute to the DAAB without the need for a determination by the Employer's Representative or a Notice of Dissatisfaction from the Contractor.
- Sub-Clause 21.4 [Obtaining DAAB's Decision] now provides that a 'Dispute' will also be deemed to arise if:
    - there is a delay of 42 days or more in the payment of an interim payment certificate
    - there is a failure to pay the Contractor finance charges properly due within 28 days of the Employer being requested to make that payment
    - the Employer or the Contractor has issued a 'Notice' of an intention to terminate the Contract and the other party has agreed there was an entitlement to issue that Notice
    - the Employer has issued a 'Notice' of to terminate the Contract and the other party has agreed there was an entitlement to issue that Notice
 and in any of these circumstances the Dispute can be referred directly to the DAAB.
  - in the Contract Data under Sub-Clause 2.1 [Right of Access to the Site] there is now a requirement for the right of access to and possession of all the Site and parts of the Site to be stated separately as a number of days after the Contract has come into full force.



## Some Further Amendments Which May be Necessary with FIDIC 2017

Whilst FIDIC 2017 and the amendments introduced late in 2022 have brought some significant improvements to FIDIC 1999 there are numerous areas where the FIDIC suite of contracts could bring considerable practical benefits to the delivery of construction projects.

### Some Real Issues Creating Unacceptable Uncertainty in Most Major Projects

In the experience of High Point over many years there are a number of issues which regularly affect major projects and cause cost overruns and delays. We addressed these in an earlier article but repeat them below:

- **inadequate sponsor/owner budgets and contractor tender prices** [often deliberately pitched low to secure funding or approval to proceed, or to secure the contract for the project].
- **unrealistic completion schedules** [which were never deliverable].

- **budgets and tenders based upon incomplete, imprecise, or wrong information** [particularly so where civil engineering and building works is being developed alongside high technology where designs are incomplete and interface requirements and conflicts not fully known or understood].
- **insufficient definition of requirements** [leading to significant scope creep, variations, and claims].
- **incomplete, inconsistent, and incompatible project documents** [noticeably between contract conditions, specifications, and drawings].
- **lack of understanding of the impacts of the combination of design, engineering, construction, scheduling, contracting and financial risks** [many understand each of those risks individually but very rarely are they considered in combination].
- **lack of real understanding of risks being assumed and insufficient consideration of capacity and capability to carry and manage risks, lack of transparency of who is carrying those risks, and critically how risks cascade through the contracting structure** [and this is most noticeable in projects with high technology content, often with poor clarity in contract documents management of design development, and subcontractor and supplier deliverables and continued use and reliance upon totally inadequate, inefficient, and unfocused 'risk registers'].
- **unexpected circumstances or challenges** [such as major scope changes, exceptional weather, 'force majeure' events, and supply chain failures].
- **the drafting of contracts with programming and scheduling requirements which are beyond the capability of many contractors, subcontractors, and suppliers** [and, therefore, all programmes and schedules lack the necessary quality or reliability].
- **contracts focused on reporting historical progress rather than outturn forecasting** [and this manifests in poor management of physical, schedule and contractual conflicts and interfaces, and often wildly inaccurate completion and 'costs to completion' predictions].
- **lack of impartiality of project teams and lack of accuracy and transparency in project information** [leading to emotional attachment to critical issues and inability to make objective assessments of them, accurate project reporting being secondary to protecting contractual entitlements or denying contractual liability, and inaccurate project outturn forecasts, and often creating very poorly structured and evidenced claims].
- **project reporting focused largely upon historical events** [resulting in inaccurate completion programmes becoming increasingly unrealistic (often manifesting in increasingly shorter periods for the most complex and often least understood activities such as commissioning, testing and trial running)].



**ALL OF THE FOREGOING ULTIMATELY RESULTS IN:**

- **site decisions (based upon late, incorrect and inadequate information) commonly failing to optimise the time for project completion**
- **greater costs in completing the project at site level for all project participants**



- *significant wasted costs in claims justification and/or rejection being based upon incorrect facts (and hence incorrect arguments)*
- *executives being ill-informed and unaware of the true issues affecting the project and their financial expectations*
- *regular surprises for investors, directors, shareholders, and the public*
- *a severe lack of predictability in project outturns.*

### Do the Terms of FIDIC 2017 [as Amended in 2022] Deliver Improved Certainty in Project Outturn?

At High Point we consider there are three fundamental matters which ought to be fully addressed by any contract:

- *integrity of information*
- *integrity of communication*
- *integrity of forecasting*

Without these in place there is little chance of certainty in project outturn.

*Under the FIDIC 2017 Silver Book any "fitness for purpose" requirement is to be defined in the Employer's Requirements (under FIDIC 1999 this could be defined and described anywhere in the contract documents), and under the FIDIC 2017 Silver Book the Contract Price will not be adjusted for any 'Unforeseeable or unforeseen difficulties or costs' (under FIDIC 1999 dealt with only 'unforeseen difficulties or costs'.*

#### Integrity of Information

- *tender documents are regularly incomplete, or they contain inconsistencies or incompatibilities (and this is most notable between contract conditions, specifications, and drawings)*
- *there is little true understanding of where risks are being carried and how they are best managed*
- *record keeping and other systems significantly differ between contractors (and even more so between subcontractors and suppliers) and their capacity and capabilities are equally different*
- *site progress reports are often inaccurate and inconsistent, and produced and discussed long after the period to which they relate*
- *the requirements in contracts for the submission of programmes fail to recognise the inability of subcontractors and suppliers to provide information in the requested form and detail*
- *initial and revised programmes are often produced to protect potential or actual contractual entitlements, or to defer identification of liabilities.*

#### Integrity of Communication

- *partly as a result of these problems with information directions, instructions, and the like are regularly incorrect or insufficient and delivered too late to bring optimum efficiency and effectiveness*
- *lack of transparency and availability of native information in the reporting of performance of subcontractors, suppliers and off-site works is regularly observed*
- *the terms requiring monthly progress reports are often inadequate, and the quality of these reports is invariably questionable (at best)*
- *executives are required to make key decisions based upon inaccurate or misleading information.*

## Integrity of Forecasting

- *project reporting requirements focus, almost exclusively, upon historical progress and performance*
- *project reports are usually submitted, and discussed, some weeks after the period to which they relate*
- *forward programmes, schedules and budgets are invariably excessively optimistic and often formulated to protect contractual positions rather than real expectations.*



**Sadly, no commonly used contracts adequately deal with these matters, and neither does FIDIC 2017 and results in:**

- *site instructions and directions decisions are commonly sub-optimal (at best) in relation to delivering the most efficient project completion*
- *incorrect and/or inadequate site reporting invariably leads to notifications of claims, for additional payment and/or extensions of time, which cannot be factually justified*
- *corporate expectations are very often overly optimistic, or unrealistic.*



## 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.

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