

Design Obligations and Entitlements Under the New 2017 FIDIC Silver Book for EPC/Turnkey Projects



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 international 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 (whether amended or additional) 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 these requirements will severely impact rights and entitlements.

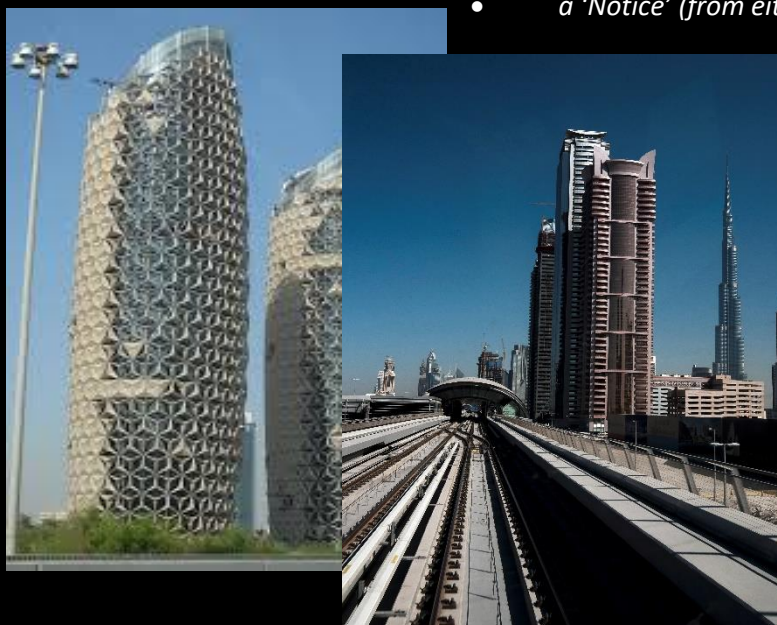
Managing contracts under FIDIC 2017 will require much higher contract administration expertise (with the attendant additional costs).

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

Key Changes Between FIDIC 2017 and FIDIC 1999

There are many important changes introduced in the FIDIC 2017 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 Employer's Representative 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

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 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.

- there are important differences in the Contractor's responsibilities in respect of both design of the Works and for the accuracy and completeness of the Employer's Requirements.

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?

(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

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', for what constitutes a 'Variation', and for the obligations and entitlements of the Contractor in respect of design.

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'



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

- *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")*
- *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 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*

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 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 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 by employers to the standard conditions – these are termed the five 'FIDIC Golden Principles'.*



Some Specific Obligations and Entitlements for 'Design' under the FIDIC 2017 Silver Book

The FIDIC 2017 Silver Book has very general requirements regarding the Contractor's responsibilities for design:

- the Contractor's general obligations under the General Conditions include:
 - *executing the Works in accordance with the Contract (which includes any Variations instructed under the Contract)*
 - *when completed, the Works must be fit for the purpose(s) for which they are intended as defined and described in the Employer's Requirements*
 - *the Works must include any work necessary to satisfy the Employer's Requirements and the 'Schedules' completed by the Contractor and included in the Contract*



- *the Works must include any work implied by the Contract, all works necessary for the stability of the Works, and all works necessary for completion, or the safe and proper operation of the Works*
 - the Contractor's responsibilities for design are:
 - *the Contractor is deemed to have scrutinised the Employer's Requirements (including any design criteria and calculations)*
 - *the Employer is not responsible for any error, inaccuracy, or omission of any kind in the Employer's Requirements included in the Contract*
 - *the Contractor is responsible for verifying and interpreting all data made available by the Employer both before and after the Base Date.*

But there are some important issues related to these general requirements:

- *the Contractor is not responsible for incorrectness in the Employer's Requirements and other data for which the Employer is responsible:*
 - *information stated in the Contract which cannot be changed, or which is stated to be the responsibility of the Employer*
 - *errors in the definitions of the intended purpose of the Works*
 - *errors in the criteria for testing of the completed Works*
 - *errors in the criteria for the performance of the completed Works*
 - *data or information which cannot be verified by the Contractor*
- *the Contractor is entitled to compensation for complying with changed or new technical standards or regulations (the Contract will specify those standards applicable at the Base Date, but the Works must be completed in accordance with those standards in force when the Works are taken over by the Employer)*

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.

The fit for purpose requirement is to be as defined and described in the Employer's Requirements. These purposes may include such things as:

- the design life of the Works, or some part of the Works; or
- the particular function of a part of the Works, and how it interfaces with other parts of the Works.

[Problems often occur when documents are prepared by different design consultants on behalf of the Contractor (or indeed the Employer). For example – sometimes different design consultants use different design terminology, different design standards, or different design, technical or performance criteria, and this can lead to disputes concerning whether a failure to meet operating performance requirements is caused by errors in the Employer’s Requirements or by errors by the Contractor’s design team].



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.

Sometimes changes to proposed designs are initiated by way of comments by the Employer on documents submitted by the Contractor. Such comments may be a change to the Employer’s Requirements in causing a change to:

- the purpose(s) for which the Works are intended
- the performance criteria for the Works
- the technical criteria for the Works
- the evaluation criteria for the Works

Under FIDIC 2017 the Contractor must carefully examine all such comments and when appropriate issue a Notice that such comments constitute a Variation and cannot be executed with due expedition and without delay if:

- the change(s) will adversely affect the Contractor’s ability to comply with health and safety and/or environmental protection obligations, or
- the change(s) will have an adverse impact on the achievement of the Schedule of Performance Guarantees, or
- the change(s) may adversely affect the Contractor’s obligation to complete the Works, so they are fit for the purpose(s) intended.



Contractors should note FIDIC recommends the Silver Book should not be used if:

- *there is insufficient time or information for tenderers to check the Employer's Requirements*
- *the Works involves substantial work underground*
- *the Works are in areas which cannot be inspected by tenderers.*

Accordingly, a contractor should ensure it is clear if there is data or information made available by the Employer which cannot be verified prior to submitting its tender. Sub-Clause 5.1 of the FIDIC 2017 Silver Book provides that in this instance the Employer remains responsible for that data or information.

Whilst that sub-clause does not specify how the Employer takes responsibility, and resolves issues arising from the data or information, an instruction for a Variation to the Employer's Requirements would arguably be the simplest solution.



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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

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