

# Variations 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 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 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 also important differences in many clauses and FIDIC 2017 is far more prescriptive and 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).

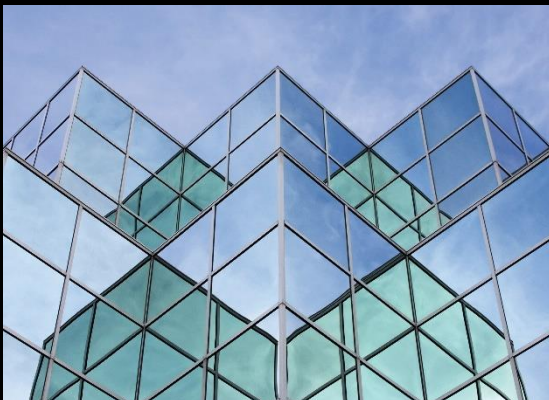
FIDIC 2017 has vastly different requirements for what constitutes a 'Variation', and it is particularly important for contractors to fully understand these differences.

Updated versions of the FIDIC 2017 contracts were issued at the end of 2022.

## 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'):

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 The 'Pink Book' (the multinational development banks version of the FIDIC 1999 'Red Book') is being withdrawn.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



- *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*
- *a 'Notice of 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*
- *there are important differences in how a 'Variation is defined and how a contractor obtains payment and extensions of time for variations.*



## 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"*

*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?*



- 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

*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'.*

*Dissatisfaction' to be given if either the Contractor or the Employer is 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
- 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 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 a 'Variation' under the FIDIC 2017 Silver Book

A 'Variation' under FIDIC 1999 and FIDIC 2017 is defined in the same terms as a “change to the Employer’s Requirements or the Works” but there are critical differences between FIDIC 1999 and FIDIC 2017 in the Contractor’s obligations in respect to the Employer’s Requirements and the Works and these affect the operation of the variation provisions.

Accordingly, consideration must also be given to Sub-Clause 1.3 [Notices and Other Communications], Sub-Clause 3.4 [Instructions], Sub-Clause 3.5 [Agreement and Determination], Sub-Clause 4.1 [Contractor’s General Obligations], Sub-Clause 5.1 [General Design Obligations]; Clause 10.1 [Taking Over the Works and Sections], Clause 11.9 [Performance Certificate], Clause 20 [Employer’s and Contractor’s Claims], and Sub-Clause 21.4 [Obtaining DAAB’s Decision].

To understand what might constitute a Variation under FIDIC 2017, it is necessary to:

- examine the terms “Employer’s Requirements” and the “Works” and their use in the FIDIC 2017 Silver Book General Conditions; and
- consider what might constitute a change to the Employer’s Requirements, or a change to the Works.

A change to the Employer’s Requirements can, therefore, be:

- *a change to the purpose(s) for which the Works are intended; and/or*
- *a change to the scope of the Works; and/or*
- *a change to the design of the Works; and/or*
- *a change to the performance criteria for the Works; and/or*
- *a change to the technical criteria for the Works; and/or*
- *a change to the evaluation criteria for 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 other relief.***

Each of these must be considered in the context of in particular:

- (i) the Contractor’s obligations under the General Conditions which include:
  - *the Contractor must execute the Works in accordance with the Contract;*
  - *the Works, when completed, 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;*
- *the Works must include all works necessary for the stability of the Works;*
- *the Works must include all works necessary for completion, or the safe and proper operation of the Works; and*
- *the Contractor cannot make any significant alteration to the arrangements and methods for executing the Works without submitting this alteration to the Employer; and*

(ii) the Contractor's general design obligations:

- *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;*
- *but the Employer is responsible for any portion of the Employer's Requirements which:*



- *are stated as being unable to be changed;*
- *are stated as the responsibility of the Employer;*
- *define the intended purposes of the Works, or any parts of the Works;*
- *define the criteria for the testing and performance of the completed Works; and*
- *cannot be verified by the Contractor.*



There are, however, some issues related to changes to the Employer's Requirements and changes to the Works which are not addressed in the terms related to Variations in the FIDIC 2017 Silver Book:

- an unreasonably or delayed Notice or other communication from the Employer which affects the sequence or timing of execution of the Temporary Works
  - an unreasonably or delayed Notice or other communication from the Employer which affects the sequence or timing of execution of the Permanent Works
  - an instruction from the Employer's Representative (or an assistant) which the Contractor considers to constitute a Variation, but for which the Employer issues a Notice confirming the instruction and rejecting it as a Variation
- incorrectness in the Employer's Requirements and other data for which the Employer is responsible – such as errors in:
    - information stated in the Contract which cannot be changed, or which is the responsibility of the Employer
    - the definitions of the intended purpose of the Works
    - the criteria for testing of the completed Works
    - the criteria for the performance of the completed Works
    - data or information which cannot be verified by the Contractor
  - a 'Review' by the Employer of the Contractor's Documents (which would include comments on such things as design, working and shop drawings or associated documents) and the incorrect issue of a Notice by the Employer that those Contractor's Documents fail to comply with the Employer's Requirements and/or the Contract



- compliance with changed or new technical standards or regulations which the Employer does not consider constitutes a Variation
- a future event or circumstance (which is the responsibility of the Employer) which is advised may adversely affect the work of the Contractor's personnel, or adversely affect performance of the completed Works, or increase the Contract Price, or delay execution of the Works, and which the Employer chooses not to request the Contractor to submit a proposal to avoid or minimise the effect of that event or circumstance
- a Notice from the Contractor that an instruction issued by the Employer constituted a Variation and ought to have been issued as a Variation and which cannot be executed with due expedition and without delay because:
  - the varied work was 'Unforeseeable' relative to the scope and nature of the Works described in the Employer's Requirements, or
  - the Contractor cannot readily obtain the construction plant, materials or temporary works required for the Variation, or
  - the Variation will adversely affect the Contractor's ability to comply with health and safety and/or environmental protection obligations, or
  - it will have an adverse impact on the achievement of the Schedule of Performance Guarantees, or
  - it may adversely affect the Contractor's obligation to complete the Works, so they are fit for the purpose(s) intended



and the Employer issues a Notice confirming the instruction but incorrectly denies the instruction constituted a Variation.



In each of the foregoing:

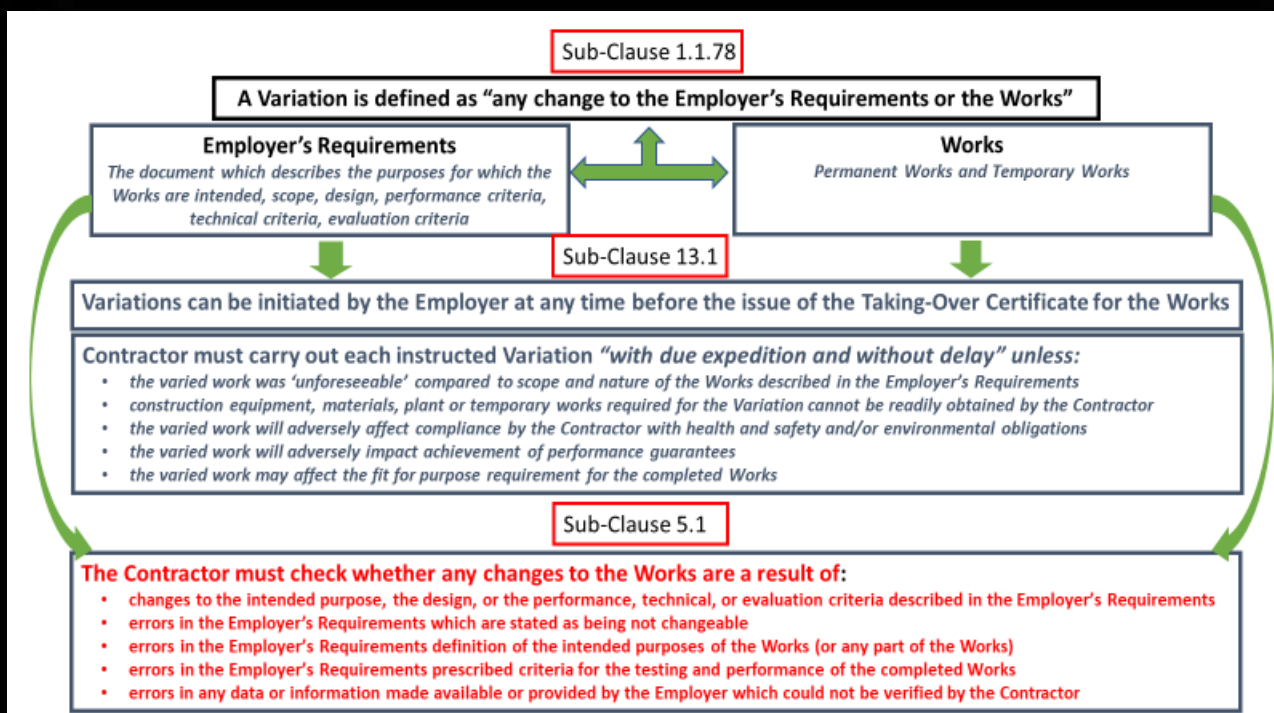
- (a) an issue has arisen, or the Employer or the Employer's Representative has issued an instruction, which the Contractor considers constitutes a Variation;
- (b) the Contractor issues an appropriate Notice to the Employer confirming the requirement or the instruction and requesting the Employer to instruct a Variation
- (c) the Employer refuses to instruct a Variation and requires the Contractor to comply with the instruction issued by him or the Employer's Representative and proceed with the work
- (d) the Contractor proceeds with the work.

In each of the foregoing circumstances the Contractor would have to adopt the following approach:

- issue a Notice under Sub-Clause 20.2 [Claims For Payment and/or EOT] describing why it considers the instruction from the Employer or the Employer's Representative constitutes a Variation and for which the Employer should properly instruct a Variation under Sub-Clause 13.3.1 [Variation by Instruction] or request a proposal under Sub-Clause 13.3.2 [Variation by Request for Proposal]
- maintain all necessary contemporary records required to substantiate the Contractor's position
- submit a fully detailed Claim under Sub-Clause 20.2.4 [Fully detailed Claim] so the Employer's Representative can proceed in accordance with Sub-Clause 3.5 [Agreement or Determination]
- prepare for consultation with the Employer (as required by Sub-Clause 3.5.1 [Consultation to reach agreement])
- if appropriate or necessary, issue a Notice of Dissatisfaction with the Employer's Representative's Determination and proceed under Sub-Clause 21.4 [Obtaining DAAB's Decision].

In the circumstances where an Employer initiated Variation is issued the following procedure should be considered:

### Consideration of Requirements for an Employer Initiated Variation



A simple table of categories of Variations under the FIDIC 2017 Silver Book is shown below:

Categorisation of Variations		
Defined Variations	Variation Category	Examples of Potential Variations
Change to Employer's Requirements	Change to the Purposes for which the Works are Intended	<ul style="list-style-type: none"> <li>• major changes made by the Employer to the use or function of the completed facility (often because of some shift in local or international economic fundamentals)</li> <li>• changes made by the Employer to the Employer's Requirements to enhance performance of the completed facility or to improve the design life of the completed facility</li> <li>• changes made by the Employer to 'Employer's Equipment' to enhance performance of the completed facility</li> <li>• changes made by the Employer to 'Plant' (often by refusing to accept or approve the Plant proposed by the Contractor)</li> <li>• changes made by the Employer to 'Materials' (often by refusing to accept or approve the Materials proposed by the Contractor)</li> </ul>
	Change to the Scope of the Works	<ul style="list-style-type: none"> <li>• major changes to scope of the Works to increase or decrease the scale of the completed facility (often because of some shift in local or international economic fundamentals)</li> <li>• changes to the scope of the Works to better ensure or improve the required operational performance of the facility</li> <li>• changes to the sequence or timing of the execution of the Permanent Works and/or the Temporary Works as a result of the change to the scope of the Works</li> </ul>
	Change to the Design of the Works	<ul style="list-style-type: none"> <li>• changes required by the Employer to the designs submitted by the Contractor under Sub-Clause 5.2 [Contractor's Documents] for reasons which are <u>not</u> failures to comply with the Employer's Requirements and/or the Contract</li> <li>• changes required by the Employer under Sub-Clause 5.4 [Technical Standards and Regulations] to the designs submitted by the Contractor for compliance with revised technical standards and regulations</li> </ul>
	Change to the Performance Criteria for the Works	<ul style="list-style-type: none"> <li>• changes required to the performance criteria set out in the Employer's Requirements which might include: <ul style="list-style-type: none"> <li>○ changes to the required design life of the Works, or some part of the Works</li> <li>○ changes to the specified operating performance of equipment</li> </ul> </li> </ul>
	Change to the Technical Criteria for the Works	<ul style="list-style-type: none"> <li>• changes required to the technical criteria set out in the Employer's Requirements which might include: <ul style="list-style-type: none"> <li>○ changes to propriety equipment, materials, or suppliers</li> <li>○ changes to specified technical standards or regulations</li> <li>○ changes to the requirements for operating or reliability performance</li> </ul> </li> </ul>



Categorisation of Variations		
Defined Variations	Variation Category	Examples of Potential Variations
	Change to the Evaluation Criteria for the Works	<ul style="list-style-type: none"> <li>• changes required to the evaluation criteria set out in the Employer's Requirements which might include:                             <ul style="list-style-type: none"> <li>○ changes to the testing requirements for the Tests on Completion</li> <li>○ changes to the testing requirements for the Tests after Completion</li> </ul> </li> </ul>
Change to the Works	Change to the Permanent Works	<ul style="list-style-type: none"> <li>• changes to the Permanent Works which might include:                             <ul style="list-style-type: none"> <li>○ changes to quantities or quality of workmanship, materials or equipment to be installed in the Permanent Works</li> <li>○ changes to the position of parts of the Permanent Works</li> <li>○ additions or omissions to the Permanent Works</li> </ul> </li> </ul>
	Change to the Temporary Works	<ul style="list-style-type: none"> <li>• changes to the Temporary Works which might include:                             <ul style="list-style-type: none"> <li>○ changes to temporary access or egress arrangements</li> <li>○ changes to working methods or sequence of working for temporary works (such as excavation support, scaffolding, formwork etc).</li> </ul> </li> </ul>





## 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](mailto:kelvin.hingley@highpointpartnership.com)

**London Office**  
M: +44 7827 927 795  
O: +44 203 019 3830  
E: [valerie.howell@highpointpartnership.com](mailto:valerie.howell@highpointpartnership.com)

[www.highpointpartnership.com](http://www.highpointpartnership.com)