

Claims Under the FIDIC 1999 and FIDIC 2017 Red and Silver Books



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 the requirements under FIDIC 2017 are far more prescriptive. 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)

Claims under both the Red and Silver Book of FIDIC 2017 contains very different requirements to those in the FIDIC 1999 Red Book and Silver Book.

Updated versions of the FIDIC 2017 contracts were issued at the end of 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);



- there are important changes for reporting by 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; and
- 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 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.

Some Important Issues Arising from the Changes

There are a number of important issues which require particular attention:



- 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 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’

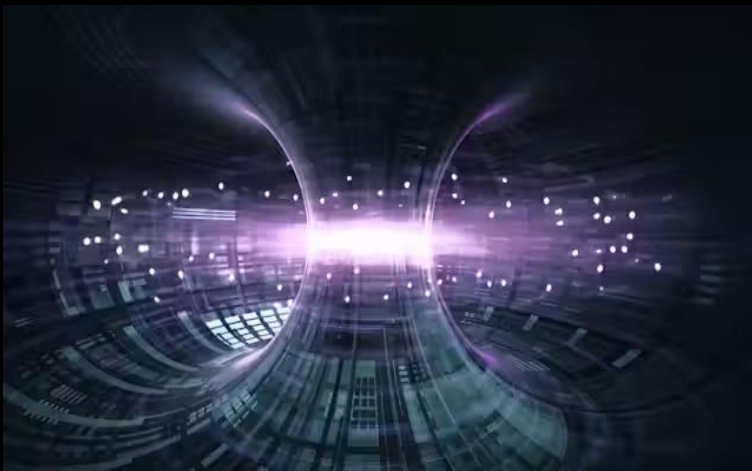
FIDIC 2017 is far lengthier than FIDIC 1999 and is much more complex. It might, therefore, likely find most use on very large projects.



- 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 affect performance of the completed Works, increase the Contract Price, or delay execution of the Works

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'.



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 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)
- monthly progress 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'



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 the submission of an initial programme and a revised Programme, obtaining a 'Taking-Over Certificate, for the 'Tests on Completion' and 'Tests after Completion', and for the rectifying of defects.

- there is a very prescribed process for the preparation of the 'Contractor's Documents' and for the 'Review' of them by the Engineer (under the Red Book) or the Employer (under the Silver Book)

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 '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)
- 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'.



Claims under FIDIC 1999 and FIDIC 2017

There are substantial differences between how claims are described and how they are dealt with under FIDIC 1999 and FIDIC 2017.



Some of the key changes might be categorised as:

Contract Provision	FIDIC 2017	FIDIC 1999
Definitions	<p><i>a 'Claim' is specifically defined as a request or assertion (by the Contractor or the Employer) for an entitlement or relief under any clause in the conditions, in connection with or arising under the contract, or in connection with or arising out of execution of the Works.</i></p>	<p><i>no specific definition of a claim.</i></p>
Sub-Clause 20.1 [Claims]	<p><i>a 'Dispute' is specifically defined as any situation where:</i></p> <ul style="list-style-type: none"> <i>• either the Employer or the Contractor has made a Claim or there has been a matter to be agreed or determined by the Engineer (under the Red Book) or the Employer's Representative (under the Silver Book) and which has been rejected; or</i> <i>• there has been a notice of dissatisfaction with the determination of the Engineer or the Employer's Representative</i> <p><i>a Claim can be made by the Employer or the Contractor</i></p> <ul style="list-style-type: none"> <i>• an Employer's Claim can be for additional payment from the Contractor, or a reduction in the Contract Price, or an extension of the Defects Notification Period, or for any other entitlement or relief against the Contractor.</i> <i>• a Contractor's Claim can be for any additional payment and/or an extension of time, or for any other entitlement or relief against the Employer.</i> 	<p><i>no specific definition of a dispute.</i></p>
Sub-Clause 20.1 [Contractor's Claims]		<p><i>a Contractor's claim is where the Contractor considers itself entitled to an extension of time and/or any additional payment under any clause in the conditions, or otherwise in connection with the contract.</i></p>
Sub-Clause 20.1 [Contractor's Claims]		<p><i>notice of the claim to be given by the Contractor no later than 28 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim.</i></p>

Sub-Clause 20.2
[Claims for Payment
and or EOT]

Sub-Clause 20.2.3
[Contemporary
records]

Sub-Clause 20.2.4
[Fully detailed
Claim]

these are specifically defined as “records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim”.

this is specifically defined as a submission (by either the Employer or the Contractor) which includes:

- *a detailed description of the event or circumstance giving rise to the Claim*
- *a statement of the contractual and/or legal basis of the Claim*
- *all contemporary records relied upon by the Employer or the Contractor*
- *detailed supporting particulars of:*
 - *the amount of additional payment or extension of time claimed (by the Contractor); or*
 - *the amount of the reduction of the Contract Price or extension of the Defects Notification Period claimed (by the Employer).*

and this ‘Fully detailed Claim’ has to be submitted by either the Employer or the Contractor (unless agreed otherwise) within 84 days of becoming aware, or should have become aware, of the event or circumstance giving rise to the Claim.

Clause 20.1
[Contractor’s
Claims]

notice (to be given by the Employer or the Contractor) no later than 28 days after the Employer or the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the ‘Claim’.

the Contractor is required to keep contemporary records necessary to substantiate a claim but no specific definition of contemporary records.

there is no specific definition of a Contractor’s fully detailed claim other than it has to include “full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed”.

and the Contractor must send its fully detailed claim to the Engineer (under the Red Book) or the Employer’s Representative (under the Silver Book) within 42 days of becoming aware, or should have become aware, of the event or circumstance giving rise to the Claim.

There are twenty-one (21) sub-clauses in both the Red Book and Silver Book versions of FIDIC 2017 entitling the Contractor to an extension of time and/or additional payment.

Failure to comply with the requirements of Sub-Clause 20.2 of FIDIC 2017 will undoubtedly prejudice rights and entitlements of the Employer or the Contractor.

Some Key Questions for Contractors in Relation to Submission of a Claim under FIDIC 2017

- **does the initial or revised programme submitted by the Contractor under Sub-Clause 8.3 continually accurately demonstrate the actual progress of the work?** [this is, perhaps, the most important issue in FIDIC 2017 for the entitlement of a contractor to extensions of time and/or additional payment]
- **is this progress also properly reflected in the progress reports submitted under Sub-Clause 4.20?**



[if the Contractor fails to submit accurate comparisons of actual and planned progress this may prejudice its ability to produce a “fully detailed Claim” as required by Sub-Clause 20.2)

- **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? [a revised programme must be submitted whenever the progress of work is delayed or is too slow to complete the Works by the Time for Completion (irrespective of whether the delay has been caused by the Employer or the Contractor). If the delay is caused by events for which the Contractor is entitled to an extension of time the revised programme should show a revised Time for Completion]

- **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?** [historically many contractors did not have adequate



record collection systems enabling them to comply with the requirement for contemporary records under the FIDIC 1999 contracts. FIDIC 2017 contain very specific requirements for the Contractor to produce daily records of working hours for all contractor's personnel, construction equipment, temporary works, and quantities and types of materials used for each work activity shown on the programme. These requirements will demand appropriate record collection systems. This should be a fundamental focus for any contractor. Failure to produce these records will severely prejudice the Contractor's ability to meet the requirements of a "fully detailed Claim".



- **would any event or circumstance have justified the giving of an advance warning under Sub-Clause 8.4?** [failure, by the Contractor, to give advance warning of known or probable future events which will cause delay, increase the Contract Price or adversely affect the work or performance of the Works may prejudice any Claim subsequently made by the Contractor]
- **are impacts on progress of work clear by reference to the Sub-Clause 8.3 programmes?** [the Contractor must be able to demonstrate and evidence the progress of work on relevant work activities immediately before the delay events occurred, the impacts on progress during the various periods of delay, and the ends of each of the delaying events. The actions taken by the Contractor to mitigate the delays, and the effects of any concurrent delays of the Contractor must also be demonstrated and considered]
- **can the costs incurred because of those impacts be fully evidenced and supported?** [the Contractor will need an integrated cost management system linked to programme activities to identify and evidence the cost of each of the resources impacted by delays, disruption and additional work. Many contractors do not have such cost systems and must therefore rely on

semi-manual processes which are time consuming and expensive, and often inaccurate]



- **have proper Notices (and further Notices) been given as required by Sub-Clause 20.2.1?** [If a Notice of Claim has not been given as soon as practicable and no later than 28 days after the Contractor became aware, or should have become aware, of the event, the Contractor would not be entitled to

additional payment, or an extension of time and the Employer will be discharged from any liability



- **have contemporary records, as required by Sub-Clause 20.2.3, been prepared?** [FIDIC 2017 does not specify exactly what ‘contemporary records’ are required to substantiate a “fully detailed Claim”. However, these will include daily resource records (Sub-Clause 6.10), progress records (Sub-Clause 4.20), and all necessary cost records
- **have sufficient detailed supporting particulars been prepared for inclusion**

in the “fully detailed Claim” under Sub-Clause 20.2.4? [‘supporting particulars’ include the detailed calculations of any additional payment claimed, the demonstration of delay, and the extension of time claimed (usually in the form of an actual delay analysis and supporting report), any measurement of additional or changed work, design or technical supporting details or calculations]

- **is the Contractor’s team fully prepared for discussion with the Employer as required as a part of the process of agreement or determination of the Claim by the Engineer (under the Red Book) or the Employer’s Representative (under the Silver Book)?** [the consultation with the Engineer/Employer’s Representative and the Employer is a crucial opportunity for the Contractor to present its case, and to convince the Engineer/Employer’s Representative to not make a negative determination].



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.



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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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