

Examination of Common Issues Arising Under the FIDIC 2017 Red and Silver Books – Part A



A SHORT SUMMARY

The 2017 suite of the FIDIC contracts are now increasingly used on international construction projects - either in its unamended form, or as a hybrid version.

Over the last three years HPP has observed:

- how key clauses in these contracts are often significantly amended for tendering purposes;
- how some key terms are being wrongly used by employers and contractors; and
- the impact this is having on entitlements and liabilities.

Sadly, there are many projects where the employer has substantially redrafted various provisions of the FIDIC 2017 contracts, and these have had both unexpected and damaging consequences. These are not considered in this article but will form the subject of a later article.

In this article HPP addresses common issues which have arisen under Sub-Clause 1.3 [Notices and Other Communications], Sub-Clause 3.4 [Instructions and Engineer's Instructions], Sub-Clause 3.5/3.7 [Agreement or Determination], Sub-Clause 4.1 [Contractor's General Obligations], Sub-Clause 4.20 [Progress Reports], and Sub-Clause 5.1 [General Design Obligations].

A follow up article will address common issues which have arisen under Sub-Clause 8.3 [Programme], Sub-Clause 8.7 [Rate of Progress], Sub-Clause 10.1 [Taking Over the Works and Sections], Sub-Clause 18.1 [Exceptional Events], Sub-Clause 20.1 [Claims], and Sub-Clause 20.2 [Claims for Payment and/or EOT].

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 is severely impacting rights and entitlements.

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

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.



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

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.

Some Common Issues Arising Out of FIDIC 2017 on International Construction Projects

FIDIC 2017 has been in use on international construction projects for several years. HPP has been engaged in numerous such projects and has observed a number of common issues arising out of them.

Under FIDIC 2017 there is 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'.*

The redrafting of key terms of FIDIC 2017 is very usual, and the most common major amendments are to:

- *Sub-Clause 2.1 [Right of Access to the Site] of the FIDIC 2017 Silver*

Book – allowing the employer to provide the contractor the right of access to, and possession of, the site at times required by the contractor's Clause 8.3 Programme (and this has caused significant arguments around specifically what that Programme requires).

- *Sub-Clause 3.7 [Agreement or Determination] of the FIDIC 2017 Red Book – removing the requirement of the engineer to act neutrally between the employer and the contractor.*
- *Sub-Clause 4.12 [Unforeseeable Physical Conditions] of the 2017 FIDIC Red Book – removing any entitlement of the contractor to any extensions of time and/or additional payment.*
- *Sub-Clause 5.1 [General Design Obligations] of the FIDIC 2017 Silver Book – removal of the exceptions to the contractor's obligations set out at the end of Sub-Clause 5.1.*
- *Sub-Clause 8.5 [Extension of Time for Completion] of the FIDIC 2017 Red Book and 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?

– removal of entitlements of the contractor to extensions of time for exceptionally adverse climatic conditions, unforeseeable shortages in availability of personnel, contractor's equipment, or materials, or delays caused by other contractors engaged by the employer.

- *Sub-Clause 8.6 [Delays Caused by Authorities] of the FIDIC 2017 Red Book and Silver Book – removal of this as an entitlement to an extension of time for the contractor.*
- *Sub-Clause 15.6/15.7 [Valuation after Termination for Employer's Convenience/Payment after Termination for Employer's Convenience] of the FIDIC 2017 Red Book and Silver Book – removal of these provisions.*

- Sub-Clause 16.1 [Suspension by Contractor] of the FIDIC 2017 Red Book and Silver Book – removal of the right (under Sub-Clause 16.1(b)) of a contractor to suspend or reduce the rate of work if the employer fails to comply with its payment obligations.



- Sub-Clause 20.2 [Claims for Payment and/or EOT] of the FIDIC 2017 Red Book and Silver Book – removal of the obligation of the employer to comply with the requirements of Clause 20 should it seek additional payment from the contractor, or a reduction in the Contract Price, or an extension of the Defects Notification Period.

with the requirements of Clause 20 should it seek additional payment from the contractor, or a reduction in the Contract Price, or an extension of the Defects Notification Period.



These changes have invariably had unexpected effects, often quite detrimental to the optimum completion of the project, and very damaging financial consequences on some participants.

However, where clauses are largely unamended issues commonly have arisen out of:

- failures to comply with the requirements of the terms of the FIDIC 2017 contracts; and/or
- errors in use of the FIDIC 2017 contracts.

These are described below:

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
Sub-Clause 1.3 Notices and Other Communications	<p>Any notice including:</p> <ul style="list-style-type: none"> • a <i>Notice of Dissatisfaction</i> • <i>any submission or request</i> • <i>any reply, acceptance, or acknowledgement</i> • <i>agreement or disagreement</i> • <i>approval, consent, decision, permission, or discharge</i> • <i>certificate or report</i> • <i>Review, Claim or Statement</i> 	<p><i>Both the employer’s representative or engineer and the contractor often fail to identify a communication as a ‘Notice’, and this invariably has led to many arguments. In particular these have been about not recognising the requirement of a ‘Notice’ in respect of:</i></p> <ul style="list-style-type: none"> • <i>the employer not giving right of access to, and possession of the Site either at the Commencement Date or to allow the contractor to proceed in accordance with its Sub-Clause 8.3 Programme (refer Sub-Clause 2.1 Right of Access to the Site)</i> • <i>the employer’s representative or engineer fail to notify the employer and the contractor that no agreement has been reached</i>
Sub-Clause 1.3 Notices and Other Communications	<p><i>stated to be submitted as a ‘Notice’ is to be in writing and identified as a ‘Notice’.</i></p>	

Contract Provision

Specific Requirement Under FIDIC 2017

Common Issues

through the consultation process described in Sub-Clause 3.5.1, thereby avoiding the requirement to proceed with the issue to a determination (refer Sub-Clause 3.5/3.7 Agreement or Determination)

- *the contractor failing to issue a Notice under Sub-Clause 20.2.1 of a Claim in respect of incorrect data and information for which the employer is responsible (refer Sub-Clause 5.1 General Design Obligations)*
- *the contractor failing to advise of a probable event or circumstance which might increase the Contract Price or delay execution of the work and, thereby, avoiding any Notice from the employer or the engineer to require a variation proposal (refer Sub-Clause 8.4 Advance Warning)*
- *the employer or the contractor failing to issue a 'Notice of Claim' within 28 days and, thereby, causing arguments about whether or not there is any entitlement to the 'Claim' (refer Sub-Clause 20.2.1 Notice of Claim)*
- *the contractor failing (within 14 days) to issue a Notice that the employer has failed to give a Notice of Claim, and, thereby, allowing any late Notice of Claim by the employer to be a valid Notice (and, therefore, allowing the employer to maintain its entitlement (refer Sub-Clause 20.2.1 (Notice of Claim)).*

Additionally, often contractors have argued that notes of meetings (including notes of monthly progress meetings in accordance with Sub-Clause 4.20) constitute a 'Notice'. This is clearly wrong.

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
Sub-Clause 3.4 Instructions	<p><i>The Contractor is only to take instructions of the Employer’s Representative (or assistant) or the Engineer (or the Engineer’s Representative) and must comply with those instructions – providing they have the appropriate delegated authority.</i></p>	<p><i>There have been many instances where a contractor has accepted an instruction from:</i></p> <ul style="list-style-type: none"> • <i>an employer’s assistant, or</i> • <i>the employer’s representative, or</i> • <i>assistants to the employer’s representative, or</i> • <i>the engineer, or</i> • <i>the engineer’s representative only to later be informed that the individual did not have the necessary authority to issue that instruction. The contractor, if it is concerned an individual does not have the necessary authority, is required to give ‘Notice’ to the employer (refer Sub-Clause 3.3(b)). A ‘Notice’ under Sub-Clause 3.3(b) gives the employer the opportunity within 7 days to confirm, reverse or vary the instruction.</i>
Sub-Clause 3.5 Engineer’s Instructions	<p><i>The Contractor is required to immediately give a Notice to the Employer’s Representative/the Engineer (or the Engineer’s Representative) if it considers any instruction:</i></p> <ul style="list-style-type: none"> • <i>constitutes a Variation; or</i> • <i>does not comply with applicable laws; or</i> • <i>will reduce the safety of the Works; or</i> • <i>is technically impossible.</i> 	<p><i>Contractors have regularly failed to provide a valid ‘Notice’ when it receives an instruction and not recognised the instruction constitutes a change to:</i></p> <ul style="list-style-type: none"> • <i>the Employer’s Requirements or the Works (under the Silver Book),</i> • <i>the Works (under the Red Book) and, therefore, requiring any such instruction to be made under Clause 13 [Variations and Adjustments].</i>
Sub-Clause 3.5 Agreement or Determination	<p><i>When consulting with the Employer and the Contractor (under Sub-Clause 3.5.1) and when making a determination (under Sub-Clause 3.5.2) the Employer’s Representative is not deemed to act for the Employer.</i></p>	<p><i>Whilst here the employer’s representative is declared “not deemed to act for the Employer” it is clearly difficult for the employer’s representative to act in a fair and impartial manner when, for example, the issue relates to:</i></p> <ul style="list-style-type: none"> • <i>something which might cause the additional payments for something outside the delegated authority of the employer’s representative, or</i> • <i>to a claimed change (‘Variation’) to the Employer’s Requirements or the Works for which the employer’s representative is responsible.</i>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
<p>Sub-Clause 3.7 Agreement or Determination</p>	<p><i>When consulting with the Employer and the Contractor (under Sub-Clause 3.7.1) and when making a determination (under Sub-Clause 3.7.2) the Engineer is required to <u>act neutrally between the Employer and the Contractor and shall not be deemed to act for the Employer.</u></i></p>	<p><i>Whilst here the engineer required to “act neutrally between the Employer and the Contractor” it is clearly difficult for the engineer to act impartially when, for example, the issue relates to:</i></p> <ul style="list-style-type: none"> <i>• something for which the employer simply does not wish to accept liability, or</i> <i>• something which might cause the additional payments for something outside the delegated authority of the engineer, or</i> <i>• a claimed change (‘Variation’) to the Works for which the engineer is responsible.</i>
<p>Sub-Clause 4.1 Contractor’s General Obligations</p>	<p><i>The Contractor is required to execute the Works in accordance with the Contract.</i></p> <p><i>When completed the Works (or any major item of equipment or machinery forming part of the ‘Permanent Works’) must be <u>fit for the purpose(s) for which they are intended as defined and described in the Employer’s Requirements.</u></i></p>	<p><i>On many occasions contractors and the employer have difficulty in determining precisely what is required by the ‘Contract. This is especially so when:</i></p> <ul style="list-style-type: none"> <i>• there is inconsistency or incompatibility between the documents forming the ‘Contract’ - often between documents forming the Employer’s Requirements (particularly between the purposes of the intended Works and the design scope, and performance, technical and evaluation criteria;</i> <i>• those documents are not “mutually explanatory of one another”;</i> <i>• therefore, that inconsistency or incompatibility cannot be resolved by reference to the priority of the documents listed in Sub-Clause 1.5; and</i> <i>• the employer or the employer’s representative do not issue an instruction for a Variation.</i>
<p>Sub-Clause 4.1 Contractor’s General Obligations</p>	<p><i>The Contractor is required to execute the Works in accordance with the Contract.</i></p> <p><i>The Contractor also undertakes that the execution of the Works and the completed Works will be in accordance with the documents</i></p>	<p><i>On many occasions contractors and the employer have difficulty in determining precisely what is required by the ‘Contract. This is especially so when:</i></p> <ul style="list-style-type: none"> <i>• there is inconsistency or incompatibility between the</i>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
Sub-Clause 4.20 Progress Reports	forming the Contract (as altered or modified by Variations).	<p>documents forming the ‘Contract’ - often between contract drawings, the specification, and schedules;</p> <ul style="list-style-type: none"> those documents are not “mutually explanatory of one another”; therefore, that inconsistency or incompatibility cannot be resolved by reference to the priority of the documents listed in Sub-Clause 1.5; and the engineer does not issue an instruction for a Variation.
Sub-Clause 4.20 Progress Reports	<p>The Contractor is required to provide monthly reports which describe:</p> <ul style="list-style-type: none"> the actual working hours of the Contractor’s site management team and labour resources (including those of each subcontractor and supplier) for each activity shown on the submitted Clause 8.3 Programme the actual working hours of the Contractor’s construction plant and equipment for each activity shown on the submitted Clause 8.3 Programme any Notices of Claim under Sub-Clause 20.2.1 given by either the Contractor or the Employer comparison of actual and planned progress details of events or circumstances which may adversely affect completion of the Works in accordance with the Programme and the Time for Completion the measures being (or to be) adopted to overcome delays. 	<p>The submission of a currently completely compliant Sub-Clause 8.3 Programme is crucial here. Often contractors fail to submit a ‘revised Programme’ as required by Sub-Clause 8.3. Accordingly, the validity of the information provided in monthly reports is invariably challenged or disputed (and any Claim for additional payment and/or extension of time, rejected).</p> <p>The most common non-compliances in a revised Clause 8.3 Programme are failures to show:</p> <ul style="list-style-type: none"> actual progress for each activity, delays to progress for which the contractor is responsible, the effects on other activities of delays for which the contractor is responsible, and (in the supporting report) identification of significant changes to the previous programme especially, when those changes are caused by matters for which the contractor is responsible. <p>As a result of these failures the contractor cannot properly detail events or circumstances which may adversely affect progress and completion of the Works. This simply creates significant uncertainty in the ‘Time for Completion’ and, therefore, defeats a primary purpose of the FIDIC 2017 contracts.</p>

Contract Provision

Sub-Clause 5.1
General Design
Obligations

Specific Requirement Under FIDIC 2017

The Contractor is responsible for the design of the Works and for the accuracy of the Employer's Requirements (including design criteria and calculations) except for:

- *definitions of intended purposes of the Works*
- *design information which cannot be verified by the Contractor.*

Common Issues

There have been several instances of:

- *the intended purposes of the Works being inadequately defined in the Employer's Requirements;*
- *design criteria and design calculations provided in the Employer's Requirements being inconsistent with the intended purpose of the Works; and*
- *design criteria and design calculations provided in the Employer's Requirements being inconsistent with the specified performance requirements of the completed project.*

Each of these instances would normally provide an exception to the general overall principle of the contractor being fully responsible for design of 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.



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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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