

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



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.

This article addresses 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].

The previous article of HPP addressed 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].

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

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 – 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.*



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 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.*

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
<p>Sub-Clause 8.3 Programme</p> <p>Sub-Clause 8.3 Programme</p>	<p><i>The Contractor is required to issue a ‘revised Programme’ whenever the previously submitted programme ceases to reflect actual progress. That ‘revised Programme’ is required to include:</i></p> <ul style="list-style-type: none"> • <i>for each activity the actual progress to date</i> • <i>the effects of such delay on other activities</i> • <i>a supporting report which must include:</i> <ul style="list-style-type: none"> ○ <i>any significant changes to the previously submitted programme</i> ○ <i>the Contractor’s proposals to overcome the effects of any delays on the progress of the Works.</i> 	<p><i>More issues arise related to Sub-Clause 8.3 than any other provision in the FIDIC 2017 contracts. This is most often because:</i></p> <ul style="list-style-type: none"> • <i>there are arguments from the onset that the programmes submitted by the contractor do not comply with the requirements of Sub-Clause 8.3, and accordingly there is no valid ‘Programme’;</i> • <i>the contractor does not submit a ‘revised Programme’ when actual progress is inconsistent with what is shown on its existing programme (but does so only when it receives instructions from the employer’s representative or the engineer;</i> • <i>the contractor only submits a ‘revised Programme’ when excusable delays (those for which it might be entitled to extensions of time) have occurred. But does not submit a ‘revised Programme’</i>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
<p>Sub-Clause 8.7 Rate of Progress</p> <p>Sub-Clause 8.7 Rate of Progress</p>	<p><i>The Employer (under the Silver Book) or the Engineer (under the Red Book) may instruct the Contractor to submit a ‘revised Programme’ under Sub-Clause 8.3 if:</i></p> <ul style="list-style-type: none"> • <i>actual progress is too slow to complete the Works (or a Section of the Works) by the Time for Completion</i> • <i>progress has fallen (or will fall) behind the Sub-Clause 8.3 Programme.</i> 	<p><i>when for inexcusable delays (the contractor’s own delays);</i></p> <p><i>As a consequence, any supporting report is flawed, or wrong, and the monthly progress report (submitted under Sub-Clause 4.20) will also be incomplete and wrong.</i></p> <p><i>Any instruction from the Employer or the Engineer must be predicated upon clear evidence that:</i></p> <ul style="list-style-type: none"> • <i>the current progress by the contractor is too slow to complete the work by the contracted time for completion (as adjusted for awards of extensions of time); or</i> • <i>progress by the contractor is not in accordance with that shown on the Sub-Clause 8.3 Programme; or</i> • <i>something has happened (for which the contractor is responsible) which will prevent future progress in accordance with that shown on the Sub-Clause 8.3 Programme.</i>
<p>Sub-Clause 10.1 Taking Over the Works and Sections</p>	<p><i>The Works are to be taken over by the Employer when, amongst other things:</i></p> <ul style="list-style-type: none"> • <i>the Works are complete in accordance with the Contract</i> 	<p><i>The issues often arising from any such instruction are:</i></p> <ul style="list-style-type: none"> • <i>the contractor considers progress has been affected (or will be affected) by events or circumstances for which the employer is responsible; or</i> • <i>the contractor is entitled to extensions of time but the amount has not yet been determined by the employer’s representative under Sub-Clause 3.5, or by the engineer under Sub-Clause 3.7; and</i> • <i>consequently, the contractor argues that the instruction is, in effect, requiring the contractor to accelerate progress to reduce excusable delays for which it should be entitled to extensions of time.</i> <p><i>Major arguments regarding completion include:</i></p> <ul style="list-style-type: none"> • <i>the Works not being completed in accordance with the contract including arguments about:</i>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
<p>Sub-Clause 10.1 Taking Over the Works and Sections</p>	<p><i>and have passed the Tests on Completion</i></p> <ul style="list-style-type: none"> • <i>the Employer has given a Notice of No-objection to the “as-built records” submitted by the Contractor</i> • <i>the Employer has given a Notice of No-objection to the final O&M Manuals submitted by the Contractor</i> • <i>the Contractor has carried out any Training required under the Contract.</i> 	<ul style="list-style-type: none"> • <i>the work not complying with all the requirements of the specification or the ‘Employer’s Requirements;</i> • <i>there being defects in the completed work;</i> • <i>the completed work not satisfying testing or performance requirements;</i> • <i>the “as-built records” and/or the O&M manuals are incomplete, or are inconsistent;</i> • <i>training has not been completed (even though this is partly or fully because the employer’s staff to be trained are not available, or trained staff have left the employer thereby requiring training of new staff).</i> <p><i>Failure to achieve completion to allow the employer to take-over the Works has major repercussions – not the least of which is leaving the contractor exposed to delay damages.</i></p> <p><i>By far the most common argument put forward by contractors is that some exceptional event had occurred and that event has caused the works to:</i></p> <ul style="list-style-type: none"> • <i>be more costly to complete; or</i> • <i>be more difficult, and hence longer, to complete.</i> <p><i>There have been two events regularly claimed by contractors to be “exceptional” and seeking relief under Sub-Clause 18.1 – the effects of Covid19 and the effects of large scale increased project costs caused by one or more global circumstances.</i></p> <p><i>But these claims fail because whilst they might qualify as exceptional events or circumstances:</i></p> <ul style="list-style-type: none"> • <i>a valid exceptional event under Sub-Clause 18.1 must prevent the contractor from performing obligations under the contract; and</i> • <i>it is not, therefore, sufficient that an exceptional event makes those</i>
<p>Sub-Clause 18.1 Exceptional Events</p> <p>Sub-Clause 18.1 Exceptional Events</p>	<p><i>An ‘Exceptional Event’ is described as an exceptional event or circumstance which:</i></p> <ul style="list-style-type: none"> • <i>is beyond control of the Employer or the Contractor</i> • <i>the Employer or the Contractor could not reasonably have provided against it before entering the contract and could not have avoided or overcome it</i> • <i>is not substantially attributable to the Employer or the Contractor</i> <p><i>and to secure any entitlement either the Employer or the Contractor <u>must be prevented from performing any obligations under the Contract.</u></i></p>	<p><i>Failure to achieve completion to allow the employer to take-over the Works has major repercussions – not the least of which is leaving the contractor exposed to delay damages.</i></p> <p><i>By far the most common argument put forward by contractors is that some exceptional event had occurred and that event has caused the works to:</i></p> <ul style="list-style-type: none"> • <i>be more costly to complete; or</i> • <i>be more difficult, and hence longer, to complete.</i> <p><i>There have been two events regularly claimed by contractors to be “exceptional” and seeking relief under Sub-Clause 18.1 – the effects of Covid19 and the effects of large scale increased project costs caused by one or more global circumstances.</i></p> <p><i>But these claims fail because whilst they might qualify as exceptional events or circumstances:</i></p> <ul style="list-style-type: none"> • <i>a valid exceptional event under Sub-Clause 18.1 must prevent the contractor from performing obligations under the contract; and</i> • <i>it is not, therefore, sufficient that an exceptional event makes those</i>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
<p>Sub-Clause 20.1 Claims</p> <p>Sub-Clause 20.1 Claims</p>	<p><i>Under both the Silver Book and Red Book of FIDIC 2017 a ‘Claim’ is defined as a request or assertion by either the Employer or the Contractor for:</i></p> <ul style="list-style-type: none"> • <i>an entitlement or relief under any clause of the FIDIC conditions</i> • <i>an entitlement or relief in connection with, or arising out of, the Contract</i> • <i>an entitlement or relief in connection with, or arising out of, the Works.</i> <p><i>There are four circumstances in either the FIDIC 2017 Silver Book or Red Book under which a ‘Claim’ can arise:</i></p> <ul style="list-style-type: none"> • <i>where the Employer considers it is entitled to:</i> <ul style="list-style-type: none"> ○ <i>additional payment from the Contractor; or</i> ○ <i>a reduction in the Contract Price; or</i> ○ <i>an extension of the Defects Notification Period.</i> • <i>where the Contractor considers it is entitled to:</i> <ul style="list-style-type: none"> ○ <i>any additional payment from the employer; and/or</i> ○ <i>an extension of time.</i> • <i>where the Employer considers it is entitled to another entitlement or relief against the Contractor</i> • <i>where the Contractor considers it is entitled to another entitlement or relief against the Employer.</i> 	<p><i>obligations more difficult to perform; and</i></p> <ul style="list-style-type: none"> • <i>it is not, therefore, sufficient that an exceptional event makes those obligations more costly to perform.</i> <p><i>This Sub-Clause 20.1 is invariably amended by deleting any requirement for the employer to follow the procedure for making a ‘Claim’ against the contractor.</i></p> <p><i>This has caused many unexpected repercussions, including involving increased management time (of both the contractor and employer teams) on factual and other issues which were intended to be avoided with the unamended drafting.</i></p> <p><i>The common issues arising from a contractor’s assertion of a ‘Claim’ have been:</i></p> <ul style="list-style-type: none"> • <i>the contractor not recognising the notification requirements for entitlements other than additional payment or extensions of time;</i> • <i>the engineer arguing that the contractor has failed to give a proper ‘Notice’ under Sub-Clause 20.2.1;</i> • <i>the contractor not preparing adequate “contemporary records” or seeking to rely on records which are not ‘contemporary’ with the event or circumstance which gave rise to the Claim; and</i> • <i>the contractor failing to submit adequate detailed supporting particulars as part of its ‘fully detailed Claim’.</i> <p><i>And as a result, the employer’s representative (under the Silver Book) or the engineer (under the Red Book) argues that it cannot proceed with agreement or determination under Sub-Clause 3.5 or Sub-Clause 3.7.</i></p>
<p>Sub-Clause 20.2</p>	<p><i>In making a ‘Claim’ the Employer or the Contractor is required to:</i></p>	<p><i>These requirements are far more prescriptive than in previous versions of the FIDIC contracts.</i></p>

Contract Provision	Specific Requirement Under FIDIC 2017	Common Issues
<p>Claims for Payment and/or EOT</p> <p>Sub-Clause 20.2 Claims for Payment and/or EOT</p>	<ul style="list-style-type: none"> • <i>keep such contemporary records necessary to substantiate the ‘Claim’ (and contemporary records are records “prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim”);</i> • <i>submit a “fully detailed Claim” within 84 days of the claimant becoming aware or should have become aware of the event or circumstance giving rise to the Claim;</i> • <i>any “fully detailed Claim” must include:</i> <ul style="list-style-type: none"> ○ <i>a detailed description of the event or circumstance which gave rise to the Claim;</i> ○ <i>a statement of the contractual and/or other legal basis of the Claim;</i> ○ <i>the contemporary records relied upon;</i> ○ <i>detailed supporting particulars of:</i> <ul style="list-style-type: none"> ▪ <i>the additional payment or reduction of the Contract Price claimed by the Employer;</i> ▪ <i>the additional payment and/or extension of time claimed by the Contractor.</i> 	<p><i>This has had the effect of causing contractors to realise:</i></p> <ul style="list-style-type: none"> • <i>the vital importance of appropriate contemporary on-site and off-site records (including those for subcontractors and suppliers);</i> • <i>they require much greater and better project commercial support (with its attendant additional costs);</i> • <i>the employment of claims consultants and/or lawyers to structure claims long after the event or circumstance giving rise to the ‘Claim’ will be pointless; and</i> • <i>the employment of programming consultants to restructure programmes submitted by the contractor long after the event or circumstance giving rise to the ‘Claim’ will be pointless.</i> <p>Contractors must realise above all else the critical importance of:</p> <ul style="list-style-type: none"> • full and accurate contemporary records of all on-site and off-site activities; and • fully compliant Clause 8.3 programmes.

There is nothing more important than the quality of contemporary project 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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