

Some Important Timelines in the FIDIC 2017 Silver Book [Part I]



A SHORT SUMMARY

There are several very important timelines in the FIDIC 2017 Silver Book. Compliance with many of these timelines is crucial to either maintaining rights or avoiding liabilities.

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' - the MDB's version of FIDIC's 1999 'Red Book' - is being phased out.

FIDIC 2017 Silver is very different to the FIDIC 1999 Silver Book - it is nearly twice as long and has 30 additional defined terms, and a number of these are very important.

	<i>FIDIC 1999 Silver Book</i>	<i>FIDIC 2017 Silver Book</i>
<i>Number of Clauses</i>	163	168
<i>Number of Pages</i>	74	128
<i>Number of Words</i>	35,300	56,900
<i>Number of Defined Terms</i>	60	88

There are also many important differences in the drafting of many clauses and FIDIC 2017 is far more prescriptive than FIDIC 1999. This has delivered significant challenges to owners and contractors alike, but also considerable opportunities and benefits.

At the end of 2022 FIDIC published amendments to the earlier editions of FIDIC 2017, including for the Red Book and the Silver Book versions. These amendments (which are similar in both editions) have sought to clarify some of the issues in earlier versions.

The printed FIDIC conditions contain examples of only four different timelines but does not include others which are perhaps equally, or indeed far more important.

The following article addresses numerous other timelines in the FIDIC 2017 Silver Book.

Failure to comply with the requirements contained within these timelines will severely impact rights and entitlements.

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

COMPLIANCE WITH THE PRESENTED TIMELINES IS OFTEN A PRE-CONDITION TO ENSURING THE RIGHT TO ENTITLEMENTS TO ADDITIONAL PAYMENT AND/OR EXTENSIONS OF TIME

Timelines in the Printed FIDIC 2017 Silver Book

There are four timelines included in the printed FIDIC 2017 Silver Book. These appear immediately after the 'Notes' at the beginning of the document.

These four timelines relate to:

- **Typical Sequence of Principal Events During Contracts for Construction** [and encompassing some key events from the issue of tender documents through to return of the contractor's performance security]
- **Typical Sequence of Payment Events Envisaged in Clause 14** [and encompassing some key events from receipt by the employer of the contractor's interim payment application through to payment by the employer]
- **Typical Sequence of Dispute Events Envisaged in Clause 21** [and encompassing some key events from the contractor receiving the Letter of Acceptance and the appointment of a Dispute Avoidance/Adjudication Board through to the appointment of an arbitrator]
- **Typical Sequence of Events in Agreement or Determination under Sub-Clause 3.5** [and encompassing some key events from the Employer's Representative commencing a consultation between the employer and the contractor, through to a notice of determination by the Employer's Representative (or a Notice of Dissatisfaction from either the employer or the contractor)]

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.

Whilst these are valuable timelines to highlight, they are not the only important timelines – and arguably not the most important.

Further important timelines in the FIDIC 2017 Red Book are addressed below.



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

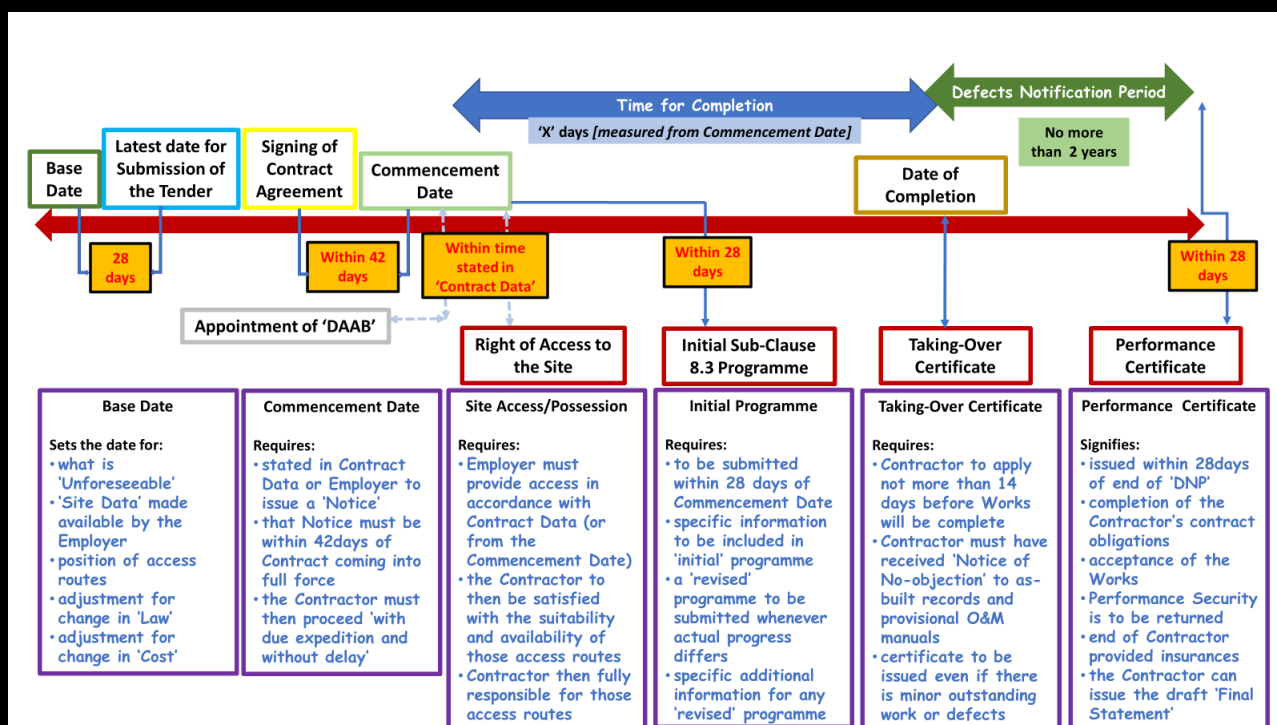
Contract administration under FIDIC 2017 will cost contractors far more than under FIDIC 1999. Requirements and processes under FIDIC 2017 are much more complex and prescriptive. This is particularly the case with the specific requirements for the initial and revised programmes, and for submission of 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?

Other Important Timelines in the FIDIC 2017 Silver Book

(1) A Simple General Timeline

The following chart includes a timeline from the submission of a tender and highlights some important provisions of the FIDIC 2017 Red Book including:

- *key elements related to the 'Base Date';*
- *the requirements for the 'Commencement Date' (and the appointment of the Dispute Avoidance/Adjudication Board, the provisions for site access and possession, and the submission to the Engineer of the initial programme;*
- *the requirements for completion and issue of the 'Taking-Over Certificate; and*
- *the requirements for the 'Defects Notification Period' and the issue of the 'Performance Certificate'.*



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

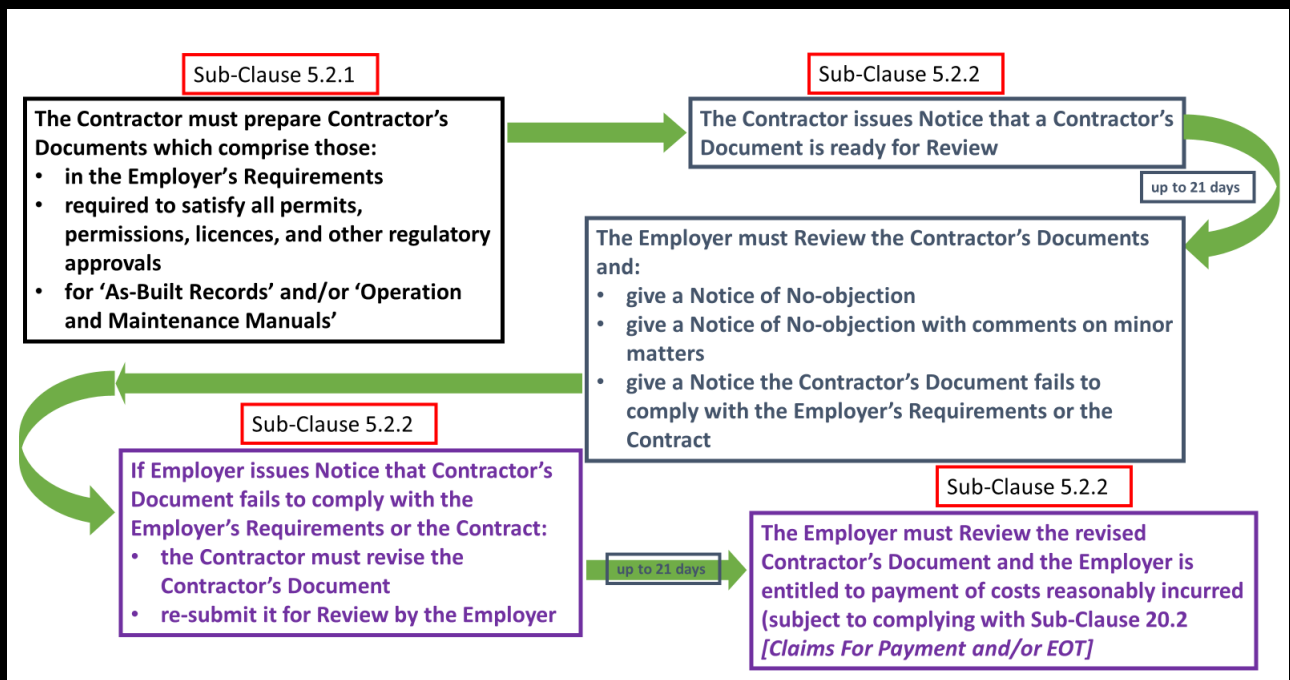


(2) Submission of the Contractor's Design and Other Documents

The following chart addresses the requirements for the submission by the Contractor to the Employer of what are termed 'Contractor's Documents' (which include documents relating to the Contractor's design). The following requirements under *Clause 5 Design* are highlighted:

- *the Contractor is responsible for the accuracy of the design criteria and calculations in the Employer's Requirements and the Employer is not responsible for any error, inaccuracy or omission in the Employer's requirements, except where:*
 - *definitions of the intended purposes of the Works, or any parts of the Works*
 - *criteria for the testing and performance of the completed Works*
 - *portions, data or information which cannot be verified by the Contractor (and which are not excluded from such by other provisions of the Contract)*
- *the Contractor is required to:*
 - *submit the 'Contractor's Documents' which are described as those documents which are:*
 - *specified in the Employer's Requirements*
 - *required to satisfy permits, permissions, licences and other regulatory proposals*
 - *required for "As-Built Records" and "Operation and Maintenance Manuals"*
 - *issue a "Contractor's Notice" issuing 'Contractor's Documents' for review by the Employer. (And the Employer has to give a 'Notice' to the Contractor within what is termed the "Review Period" either having no objection to those Contract Documents or specify how they fail to comply with the Employer's Requirements or the Contract)*
- *construction cannot commence until the Employer issues a Notice of No-objection to the Contractor's Documents submitted for review*
- *the Contractor is required to ensure its design and Contractor's Documents comply with the documents forming the Contract which typically will include the Employer's Requirements, the Schedules completed by the Contractor as part of its tender, and documents submitted and accepted as the Tender*
- *the design and the Contractor's Documents are required to comply the relevant technical standards and laws, and any other standards specified in the Employer's Requirements*
- *the technical standards, laws and other standards included in the Tender are deemed (unless otherwise stated) to be those applicable 28 days prior to submission of the Contractor's tender. However:*
 - *the Works are to be constructed to those technical standards, laws and other standards in force when the Works are taken over by the Employer*
 - *but the Contractor is entitled to a Variation if changed or new standards come in to force provided that:*
 - *the Employer considers compliance with the changed or new standards is required*
 - *such compliance requires changes to execution of the Works*
 - *the Contractor's proposals for compliance constitute a Variation.*





OFTEN MAJOR CAUSES OF DELAY TO PROGRESS OR TO COMPLETION ARISE BECAUSE OF DISAGREEMENTS OVER THE SUBMISSION OF BY THE CONTRACTOR OF DESIGNS AND OTHER MANUFACTURING AND CONSTRUCTION DOCUMENTS REQUIRING ACCEPTANCE FROM THE EMPLOYER. FULLY UNDERSTANDING THE REQUIREMENTS OF CLAUSE 5 IS, THEREFORE, CRUCIAL

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.

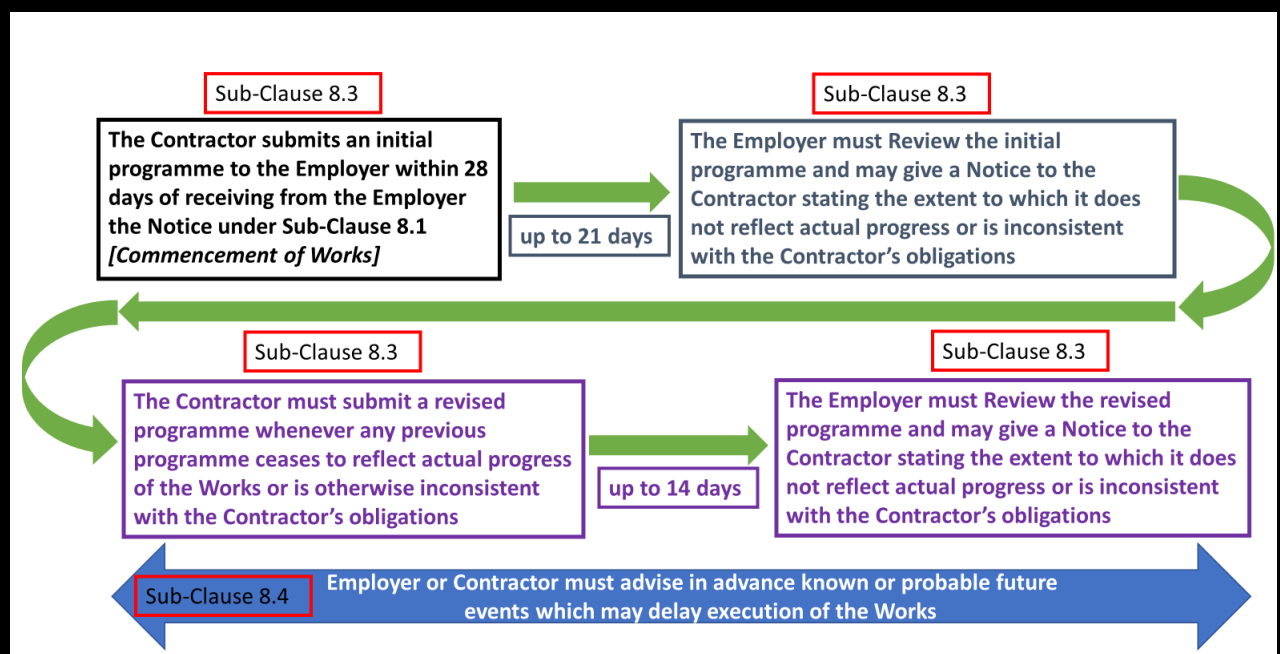


(3) Submission of the Initial Programme and a Revised Programme

The following chart addresses the requirements for the submission to the Employer of the initial programme and revised programmes under Sub-Clause 8.3. the following are highlighted:

- *the submission of an initial programme within 28 days of receipt from the Employer of a Notice stating the 'Commencement Date' of the Works;*
- *the obligation of the Employer to (within 21 days) review that initial programme;*
- *the submission of a revised programme whenever any previous programme ceases to reflect the actual progress being made by the Contractor, or whenever the previous programme is inconsistent with the Contractor's obligations;*
- *the obligation of the Employer to (within 14 days) review that revised programme; and*
- *the requirement upon both the Employer and the Contractor to advise of any future events which may delay the progress or completion of the Works.*

These are, perhaps, the most important requirements for contractors.



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:

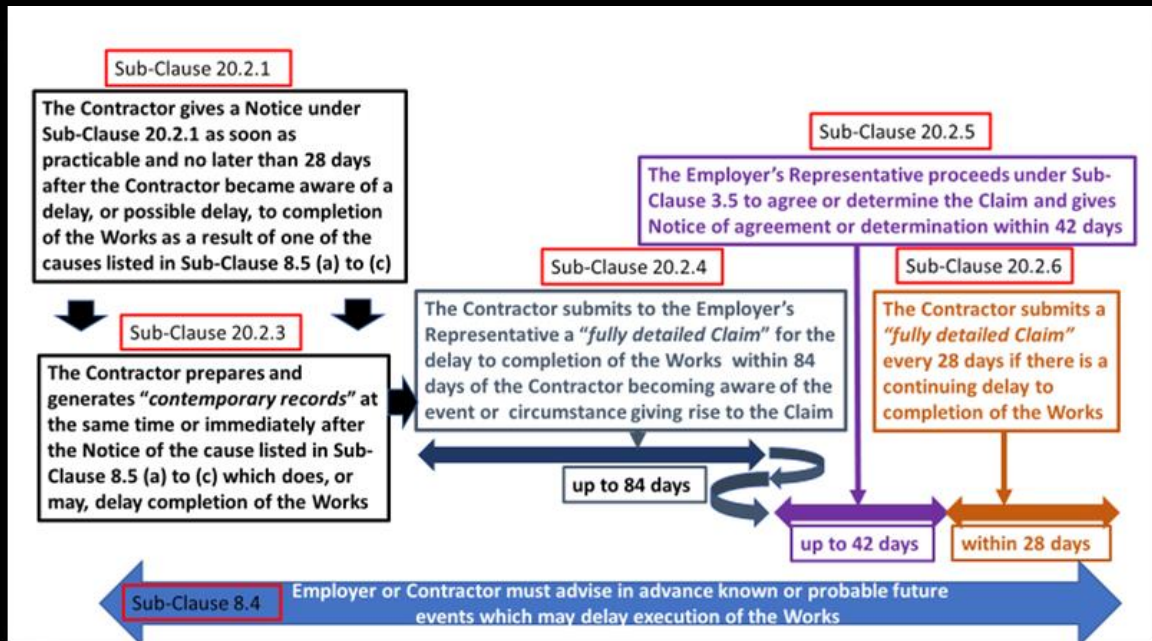
- the giving of a Notice of Claim;
- the collection and submission of contemporary records; and
- the submission of a 'fully detailed Claim'.

(4) Process for Delay Claim Submission

The following chart addresses the requirements for the submission of a claim for extension of time when there has been an excusable delay to completion of the Works. The following are highlighted:

- *the obligation to give a 'Notice' under Sub-Clause 20.1 (including the cause of the delay giving the Contractor the right to an extension of time);*
- *the requirement for the Contractor to have "contemporary records" of the delay and the effects of the delay;*

- the obligation upon the Contractor to submit a “fully detailed Claim” within 84 days of becoming aware of the right to claim;
- the requirement for the Employer’s Representative to agree or determine the ‘Claim’ within 42 days of receipt of the “fully detailed Claim”; and
- the potential importance of the notification (under Sub-Clause 8.4) of known or probable future events which may delay the progress or completion of the Works.



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.

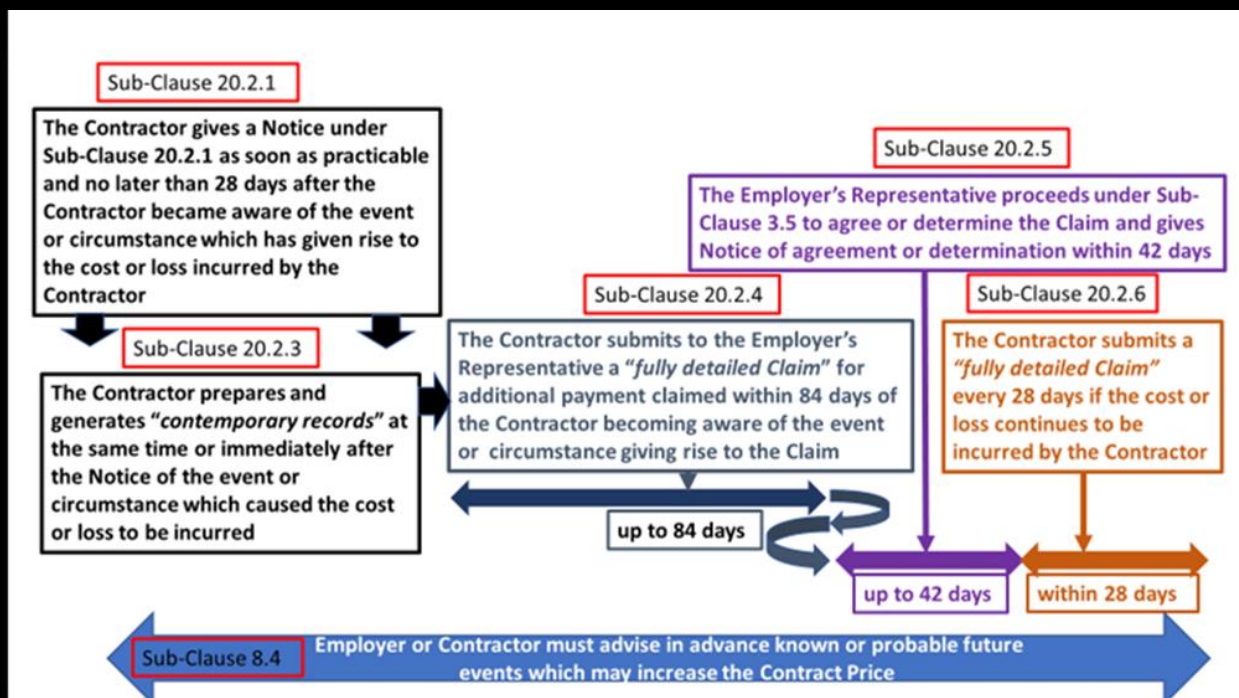
(5) Process for Additional Payment Claim Submission

The following chart addresses the requirements for the submission of a claim for additional payment. The following are highlighted:

- the obligation to give a ‘Notice’ under Sub-Clause 20.1 (including the cause of the additional cost or losses giving the Contractor the right to claim additional payment);
- the requirement for the Contractor to have “contemporary records” of the costs and/or losses incurred;
- the obligation upon the Contractor to submit a “fully detailed Claim” within 84 days of becoming aware of the right to claim;
- the requirement for the Employer’s Representative to agree or determine the ‘Claim’ within 42 days of receipt of the “fully detailed Claim”; and



- *the potential importance of the notification (under Sub-Clause 8.4) of known or probable future events which may delay the progress or completion of the Works.*



(6) Process for Delay Damages Recovery

The following chart addresses where the Contractor fails to complete the Works within the Time for Completion and becomes liable for 'Delay Damages'. The following are highlighted:

- *the obligation upon the Employer to give a 'Notice' under Sub-Clause 20.1 of the reasons giving the Employer the right to impose 'Delay Damages';*
- *the requirement for the Employer to have "contemporary records" of the delay to the Time for Completion;*
- *the obligation upon the Employer to submit a "fully detailed Claim" within 84 days of becoming aware of the right to claim recovery of 'Delay Damages';*
- *the requirement for the Employer's Representative to agree or determine the 'Claim' within 42 days of receipt of the "fully detailed Claim"; and*
- *any 'Delay Damages' imposed by the Employer are the only damages for delay payable by the Contractor (except where there is a termination of the Contract because of default by the Contractor).*





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

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

www.highpointpartnership.com