

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



A SHORT SUMMARY

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

Part I of these articles addressed timelines related to submission of design and other documents by the contractor, the submission of the initial and revised programmes, the process for delay claims and additional payment claim submissions, and the process for the recovery of damages for delayed completion.

This article now addresses further important timelines in the FIDIC 2017 Silver Book.

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 Red Book is very different to FIDIC 1999 - it is nearly twice as long and has 28 additional defined terms, and a number of these are especially 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 significant 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. 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's Representative 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.

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?

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

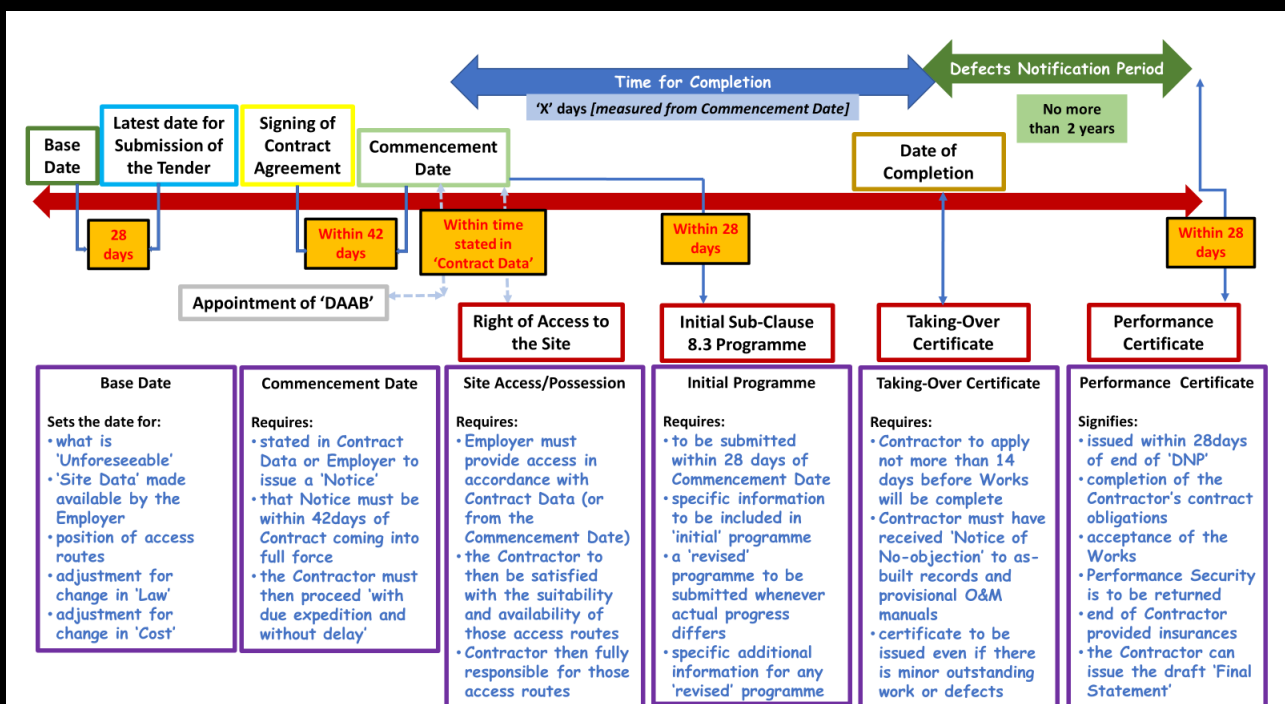


Other Important Timelines in the FIDIC 2017 Silver Book

(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 Silver 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 Employer 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'.*



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:

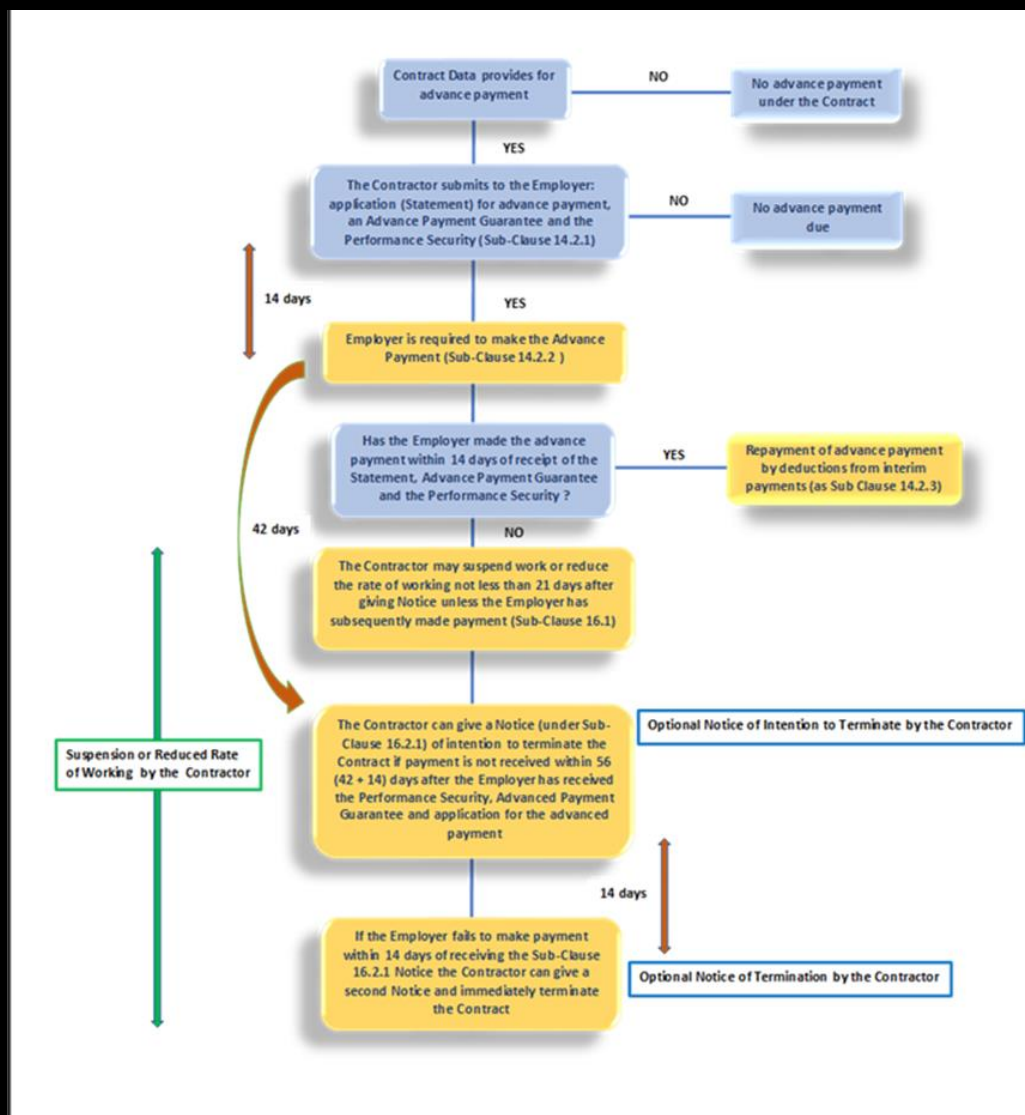
- the giving of a Notice of Claim;
- the collection and submission of contemporary records; and
- the submission of a 'fully detailed Claim'.

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) Process for Advance Payment

The following chart addresses the requirements for the application by the Contractor for an advance payment. The following are highlighted:

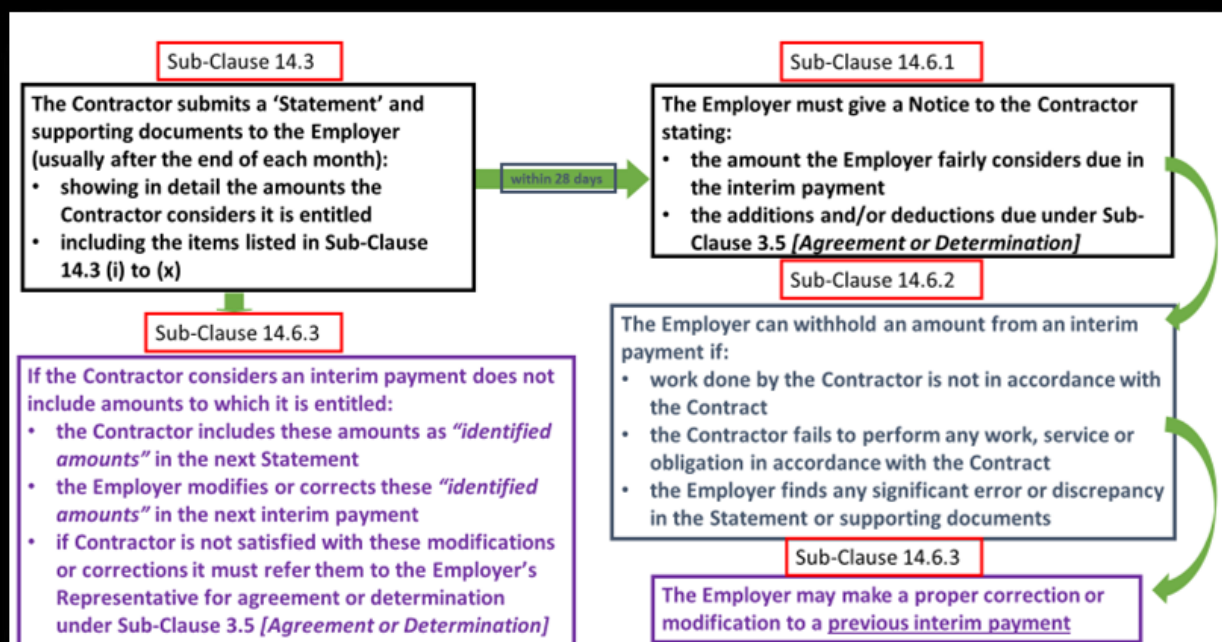
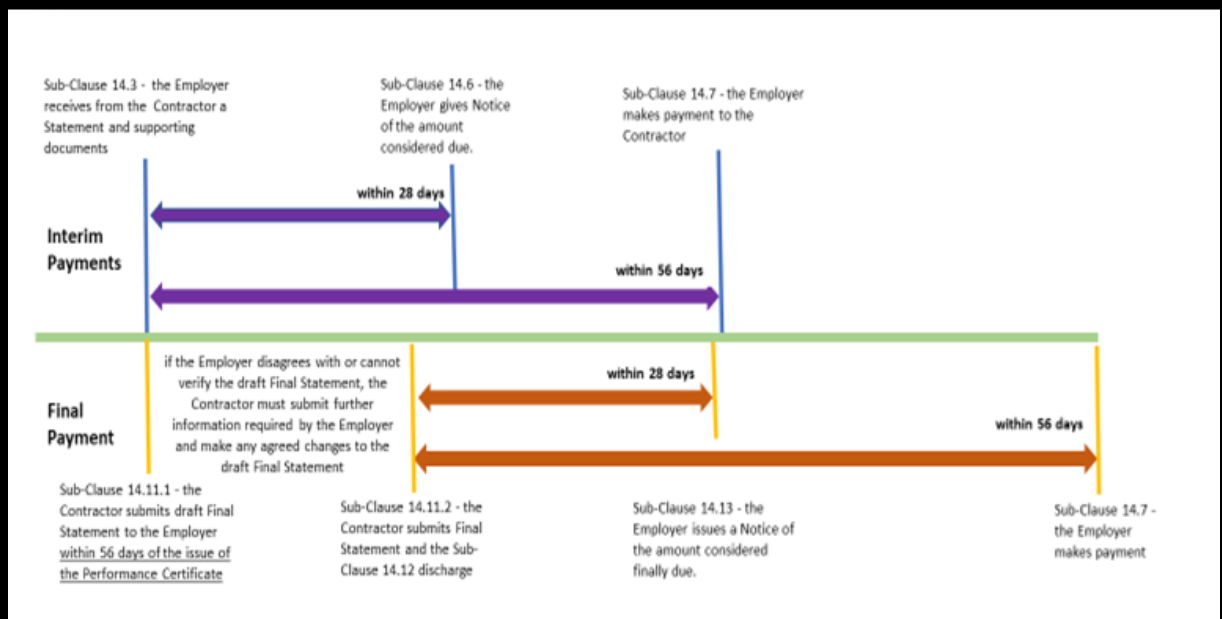
- any application for an advance payment requires the Contractor to first submit to the Employer:
 - an 'Advance Payment Guarantee' in the prescribed format; and
 - the specified 'Performance Security';
- the obligation of the Employer to then make payment of the advance payment; and
- actions by the Contractor if the Employer fails to pay the advance payment amount.

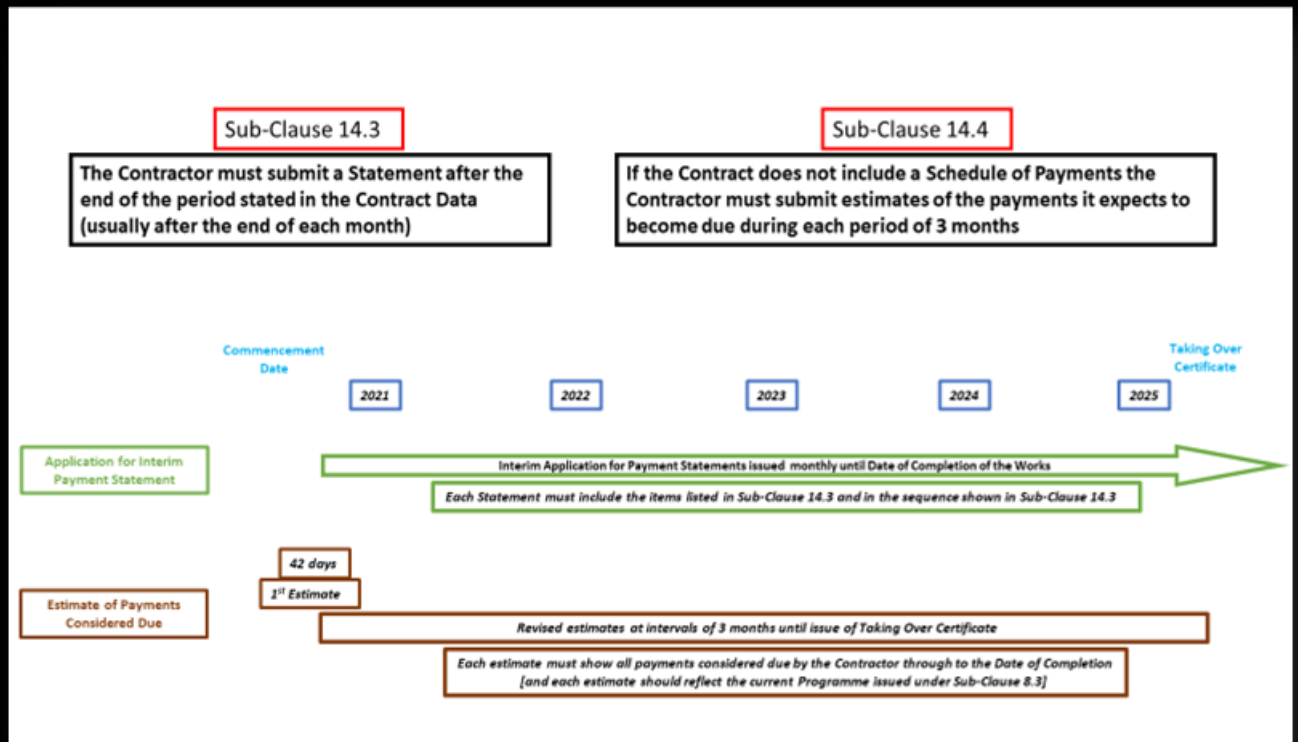


(3) Process for Interim Payment Application, Certification and Payment

The following chart addresses the typical sequence for interim payment applications, certification, and payment. The following are highlighted:

- the requirement for the Contractor to submit a 'Statement' and all specified supporting documents;
- the obligation of the Employer to issue an 'Interim Payment Certificate' within 28 days (providing the Contractor has submitted a fully compliant 'Statement' and 'supporting documents'); and
- the obligation of the Employer to make payment to the Contractor within 56 days of submission of a fully compliant 'Statement' and 'supporting documents'.





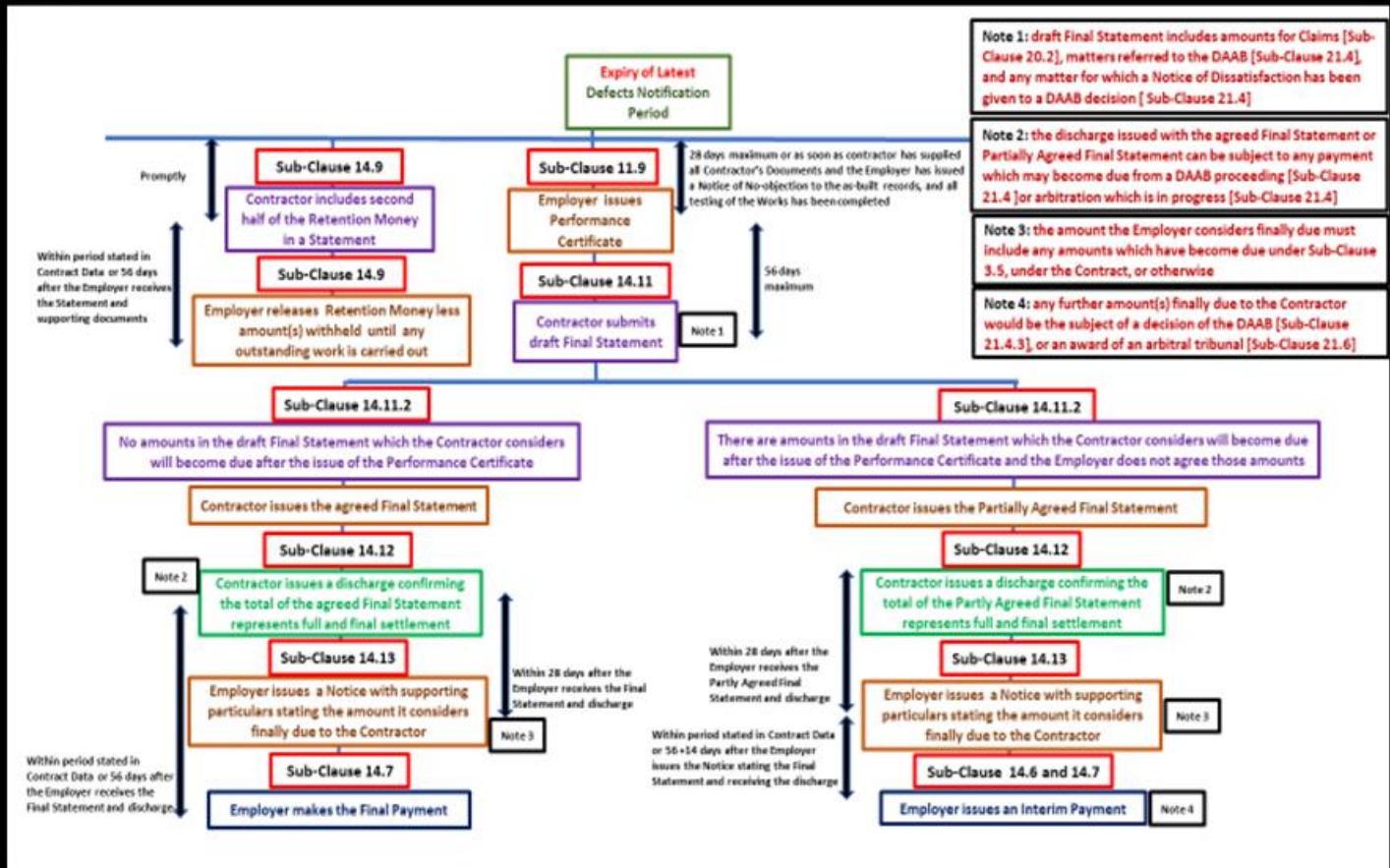
(4) Typical Process for Final Payment

The following chart addresses the requirements for the submission, certification and payment of the final payment. The following are highlighted:

- the end of the latest 'Defects Notification Period' sees the commencement of the process for the final payment to the Contractor;
- this process starts with the Employer issuing the 'Performance Certificate' (within 28 days of the end of the latest 'Defects Notification Period');
- the Contractor (within 56 days) then submits its draft final Statement [the second half of the retention money is dealt with quite separately with the Employer (within 28 days)



- required to certify this retention amount for payment];
- the Contractor then is required to decide whether it will issue a written discharge (essentially confirmation that the draft final Statement represents the full and final amounts due under the Contract); and
- if the Contractor does not issue the written discharge, it must submit a 'Partially Agreed Final Statement' (which will, for example, include unagreed claims and/or variations).



[It is likely most contractors will have not initially been able to submit the required discharge – invariably there will be a combination of agreed amounts, estimated amounts and disagreed amounts in its draft final Statement. Great care, therefore, needs to be taken in preparing the draft final Statement to ensure it complies with the requirements of Sub-Clause 14.11].

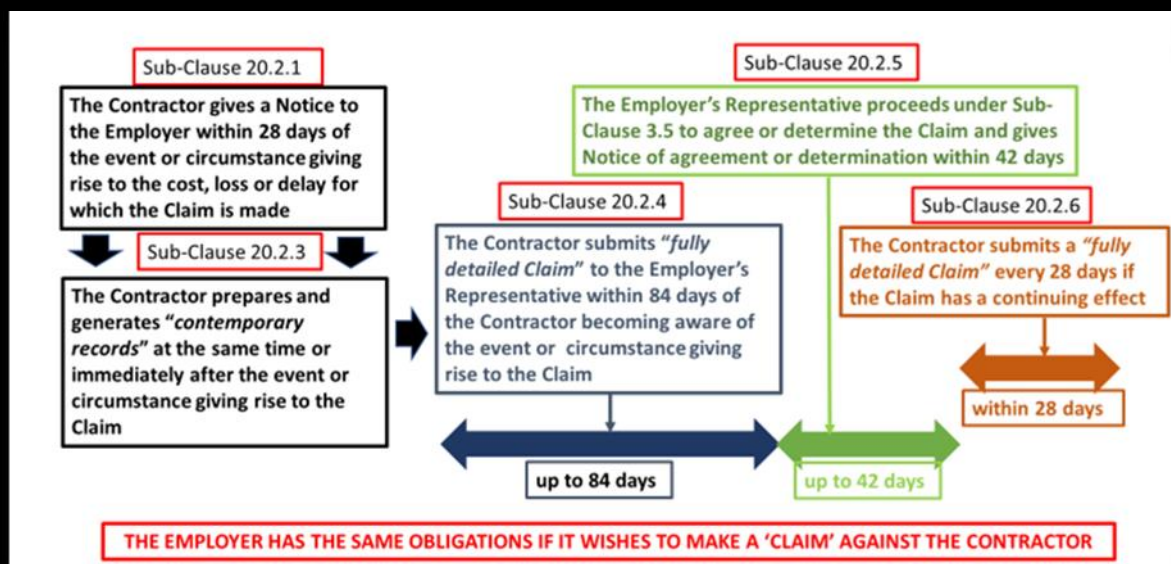
Further major differences in FIDIC 2017 affecting obligations for protecting rights and entitlements and for which particular attention must be given are new requirements for the submission of an initial programme and a revised Programme, obtaining a 'Taking-Over Certificate, for the 'Tests on Completion' and 'Tests after Completion', and for the rectifying of defects.

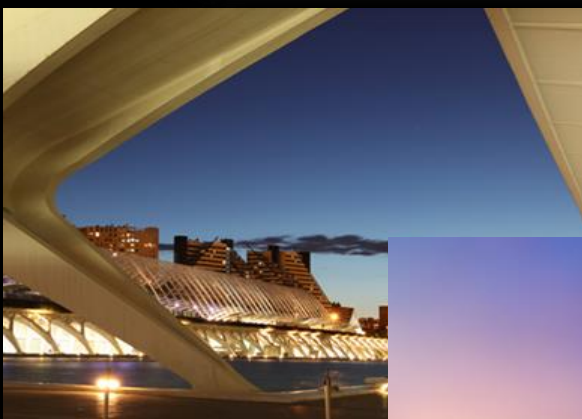
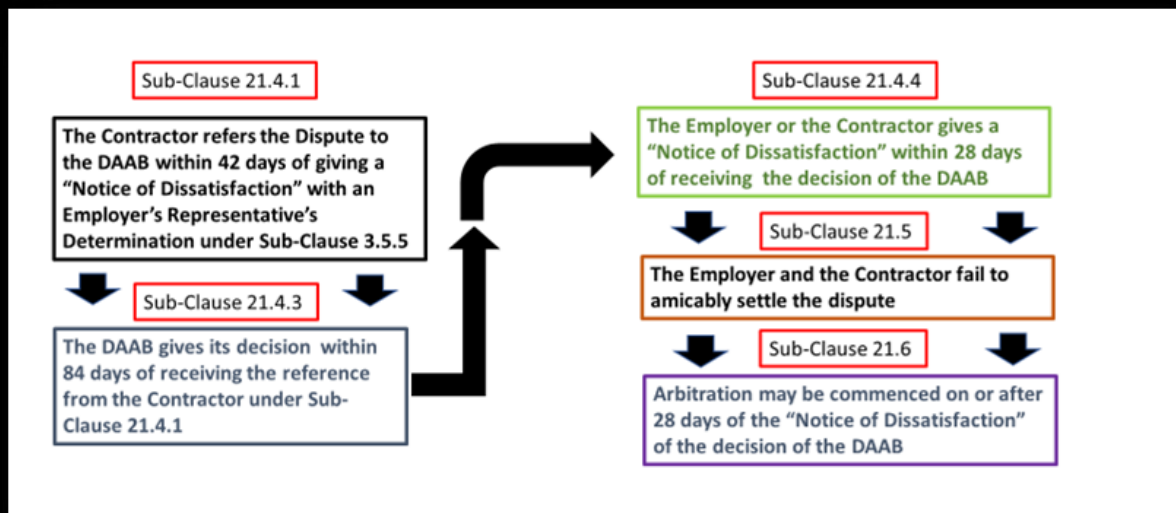
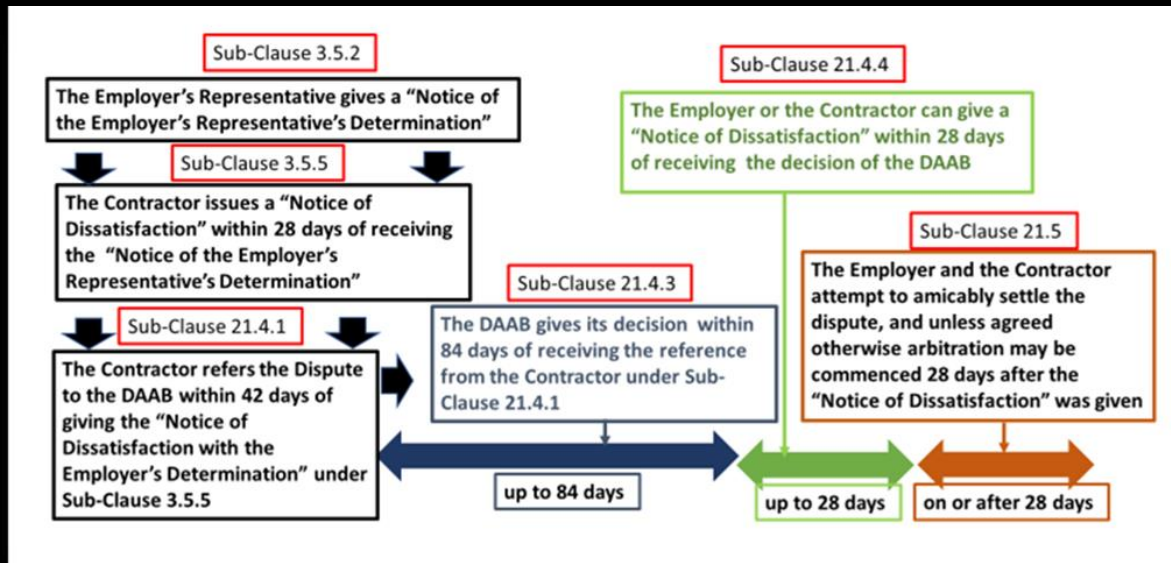


(5) Process for Disputes

The following chart addresses the process for resolution of a 'Dispute' (which has a specified meaning under the FIDIC 2017 Silver Book). The following are highlighted:

- *the Employer's Representative gives a determination on a 'Claim' made by either the Contractor or the Employer;*
- *the Contractor, or the Employer, notifies the Employer's Representative it is not satisfied with that determination (and this establishes the 'Dispute');*
- *within 42 days of the giving of that notification the Contractor, or the Employer, refers the 'Dispute' to the Dispute Avoidance/Adjudication Board (DAAB);*
- *the DAAB gives its decision within 84 days;*
- *if dissatisfied with that decision the Contractor, or the Employer, notifies the other (and copies that notification to the DAAB);*
- *the Contractor and the Employer then attempt to amicably settle that 'Dispute'; and if after 28 days, they do not amicably settle the Claim either the Employer or the Contractor can refer the 'Dispute' to arbitration.*







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PROCUREMENT TYPE

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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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