



**International Federation of Consulting Engineers**  
The Global Voice of Consulting Engineers

FIDIC GUIDANCE  
MEMORANDUM – COVID-19  
IMPACT TO THE  
CONSULTANT'S SERVICES  
UNDER THE FIDIC SUITE OF  
CONTRACTS & AGREEMENTS

FIDIC Guidance Memorandum

September 2021

## Contents

About FIDIC .....	3
FIDIC priorities.....	3
Purpose .....	4
Common Scenarios. ....	6
Conclusion and recommendations .....	14

## About FIDIC

FIDIC, the International Federation of Consulting Engineers, is the global representative body for national associations of consulting engineers and represents over one million engineering professionals and 40,000 firms in more than 100 countries worldwide.

Founded in 1913, FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of its Member Associations, and with disseminating information and resources of interest to its members.

FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and model agreements for client/consultant, sub-consultancy, joint ventures and representative services, together with related materials such as standard pre-qualification forms.

FIDIC also publishes business practice documents such as policy statements, position papers, guidelines, training manuals and training resource kits in the areas of management systems (quality management, risk management, business integrity management, environment management, sustainability) and business processes (consultant selection, quality based selection, tendering, procurement, insurance, liability, technology transfer, capacity building).

FIDIC organises the annual FIDIC International Infrastructure Conference and an extensive programme of seminars, capacity building workshops and training courses.

### FIDIC priorities

- Leading the consultancy and engineering industry visibly and effectively.
- Strengthen FIDIC's position in the overall construction industry.
- Connect with and support our members more effectively.
- Adopt and improve the governance of the federation.
- Innovate the way the secretariat operates to be more effective and efficient.

This Guidance Memorandum was written by the FIDIC Contracts Committee which now comprises Vincent Leloup (Chair), Kiri Parr (Vice Chair), Husni Madi (Vice Chair), Peter Collie, Eoin Cullinane, Deryl L. Earsom, Siobhan Fahey (currently in sabbatical), Mahmoud Abu Hussein, Jafar Khan, Keith Leung, Adriana Spassova together with Tony Barry, FIDIC Board Member and primary liaison to the Contracts Committee, and Sarwono Hardjomuljadi, FIDIC Board Member and secondary liaison to the Contracts Committee.

FIDIC wishes to record its appreciation of the time and effort devoted by all the above.

## Purpose

COVID-19 continues to present an extraordinary challenge and FIDIC commends all members of the construction community for remaining focused on the successful delivery of the projects before them in a way that sustains the long-term viability of the construction community.

COVID-19 continues to have material and global impact on the delivery of construction projects across the world. Many of those projects are being delivered under FIDIC standard forms of contract including model services agreements.

FIDIC's core purpose of drafting this Guidance Memorandum is to help Clients and Consultants understand how the General Conditions of the Client/Consultant Model Services Agreement ("FIDIC White Book" or "WB", 2017 Edition) and the Model Joint Venture (Consortium) Agreement ("FIDIC JV Agreement" or "JVA", 2017 Edition) will respond to a range of scenarios that have and are continuing to arise<sup>1</sup>. COVID-19 pandemic is a unique broad scale, long term and extraordinary event which should be recognized as such.

In line with its Golden Principles<sup>2</sup>, FIDIC commends all members of the construction community to particularly keep in mind that FIDIC:

- promotes cooperation and trust between contracting Parties;
- does not support any Party taking undue advantage of its bargaining power;
- discourages adversarial attitudes and encourages dispute avoidance; and
- encourages timely and adequate payment in accordance with the Contract to maintain cashflow.

The approach taken by this Guidance Memorandum is to look at common scenarios that may arise on projects related to the impact of COVID -19 as they relate to role of the Consultant and provide an outline of the provisions in the FIDIC White Book and the JV Agreement which are relevant with regards to that scenario.

This Guidance Memorandum must also be considered in the light of the specific context that governs each project, including, the health and safety of people, the position being taken by international organizations as well as the national and/or local governments and authorities, the applicable laws and the entire contract agreed between the Parties (including any amendments made to the FIDIC standard forms).

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<sup>1</sup> The substance of this Guidance Memorandum shall be the following:

FIDIC Client/Consultant Model Services Agreement 5<sup>th</sup> Ed (the "White Book 2017" or "**WB 2017**")

FIDIC Model Joint Venture (Consortium) Agreement 2<sup>nd</sup> Ed (the "JV Agreement 2017" or "**JVA 2017**")

White Book provisions are to a wide extent similar to those found under the Sub-Consultancy Agreement (SCA) 2017 Edition, and therefore no specific reference to the SCA provisions was made in this Guidance Memorandum.

<sup>2</sup> Freely accessible on FIDIC Web Site: [https://fidic.org/sites/default/files/golden\\_principles\\_1\\_12.pdf](https://fidic.org/sites/default/files/golden_principles_1_12.pdf) A specific version for FIDIC Services Agreements is currently under preparation by FIDIC.

Words and expressions in this Guidance Memorandum, particularly definitions having their first letter capitalized, shall have the same meanings as are respectively assigned to them in the FIDIC forms of contract/model services agreements which are here considered.

This Guidance Memorandum has been prepared to assist users understand the contractual mechanisms that operate in the FIDIC model services agreements and does not provide advice specific to any project. The comments in this Guidance Memorandum are not exhaustive. They should not be relied upon in a specific issue or situation. Expert legal advice should be obtained whenever appropriate. Neither FIDIC nor the persons named in this Guidance Memorandum accept any responsibility or liability arising from any use of this Guidance Memorandum or of any other publication named herein.

As the international federation of consulting engineers, FIDIC cannot undertake to give legal advice. For this reason, and because the legal interpretation of a contract will depend upon such matters as the precise wording of the various documents comprising the particular contract, as well as upon the governing law, FIDIC cannot assist in the interpretation of individual contracts. This Guidance Memorandum is made in isolation of any specific legal system or jurisdiction. Parties to a FIDIC contract are therefore recommended to seek specific advice (legal advice in particular) so as to cater for the aforementioned specific context before taking actions and making decisions.

## Common Scenarios.

There are many factors which come into play with regards to COVID-19's impact on construction projects and their related consultancy services agreements, resulting in numerous possible scenarios and interrelationships.

This Guidance Memorandum takes the approach of outlining several possible scenarios and the most likely relevant contractual responses. Users can decide which scenario(s) and response(s) is (are) most applicable to their case at hand.

### **A. The Consultant's personnel do not have access to the Project area due to lockdown or border closure Covid-19 measures imposed by the authorities of the Country**

1. This will require ascertaining the actual effects of such Covid-19 measures on the performance of the Services by the Consultant.
2. Some Services, such as master planning, feasibility studies or design, may to a large extent be performed from a distance, for example from the Consultant's own offices. Efficient means of communication between Client's and Consultant's personnel may also be preserved, through the usual written forms set out under Cl.<sup>3</sup> 1.3 WB 2017 but also through oral form by means of online conferencing digital platforms (Zoom, MS Teams, etc.) which have significantly grown in use since the start of the pandemic.
3. In the event that the Consultant's personnel do not have access to the Project area, the effect of such Covid-19 measures imposed by the Country's authorities on the performance of such type of Services would be minimal in comparison with Services which require a Consultant to have a significant presence on the Project site – such as when the Consultant is acting as the FIDIC Engineer in a Works Contract, and holds construction administration duties under Cl. 3.9 WB 2017.
4. The effect will also depend on the nature of the Consultant. For an international Consultant mobilising a significant number of foreign personnel into the Country, such Covid-19 measures may have a higher impact than if the Consultant is local with its personnel based in the Country, as they may in the latter case have a greater degree of flexibility to still be able to physically visit the Project site and the Client's premises.
5. Dealing with the effects of Covid-19 measures imposed by the Country's authorities, under the FIDIC White Book, requires consideration of the following questions:
  - a) ***Were those measures in force prior to the date of the Consultant's offer/proposal in relation to the Agreement?***
    - i. ***If no***
6. Typically, if the offer was issued prior to the start of the pandemic in early 2020, the time and cost impact of those Covid-19 measures may be handled under Cl. 1.5 WB 2017. This Sub-Clause addresses the effect of changes in legislation on the Services themselves (under

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<sup>3</sup> Cl = Clause

SC<sup>4</sup> 1.5.1), as well as on the costs incurred by the Consultant (under SC 1.5.2) if they qualify as Exceptional Costs, as defined under SC 1.1.12 WB 2017: “costs, not otherwise compensated under the Agreement, arising out of any necessary work, cost, expense or delay incurred by the Consultant which is additional to the Services (or Variations) and which is necessarily and unavoidably performed under the Agreement and in each case identified as such in the Agreement”.

7. Owing to the broad definition of “changes in legislation” which is contemplated under SC 1.5 WB 2017<sup>5</sup>, it can be expected that such Covid-19 measures would qualify as “changes in legislation” which, when causing delay and/or additional cost and expense to the Consultant, would give rise to Exceptional Costs under SC 1.5.2 WB 2017 and permit the Consultant to claim for time and additional payment entitlements under, respectively, Cl. 4.4 WB 2017 and SC 7.1.2 WB 2017. As an example, if the foreign personnel of the Consultant are prevented from accessing the Country and cannot therefore perform Services which are required to be executed on site, then this can delay the completion of the Services and consequently give rise to prolongation costs incurred by the Consultant. Such “costs” arising out of a “delay” may be held to be Exceptional Costs.
8. As a result of those measures, it might also well be that the “scope, extent, nature or type of Services” is affected, as set out under SC 1.5.1 WB 2017 which provides that such change to the Services shall in that case be treated as a Variation to the Services under Cl. 5.1 WB 2017. As an example, some site investigations and data collection activities (geotechnical surveys, topographical surveys, water quality analysis, etc.) which were foreseen under the Agreement (ref. Appendix 1 [*Scope of Services*]), in connection with a feasibility study, might not be possible to execute any longer. This could be seen as *de facto* omission of a part of the Services when having due regard to the Time for Completion, to be treated as a Variation pursuant to Cl. 1.5.1 WB 2017 and SC 5.1.2(b) and (e) WB 2017, or the Client may deliberately instruct such Variation as an omission, and provide for an alternative way to perform the Services (for example: reliance on other sources of data). In both cases, the scope of the Services will be adjusted through a Variation and there would be a downward adjustment of the remuneration to the Consultant because of such omission of part of the Services, in conjunction with a possible upward adjustment in case of any substitute Services that may be instructed by the Client.
9. Alternatively, if such site activities are just temporarily suspended, and can be undertaken at a later time, then it is more likely that such delay in performing the Services (given that, in such example, the “scope, extent, nature or type” of those remain unaffected) would be handled under SC 1.5.2 WB 2017 as described above.
10. As can be seen from the above, the matrix of facts pertaining to each situation encountered by the Parties will determine if and to what extent the provisions under SC 1.5.1 or SC 1.5.2 WB 2017 will become applicable.

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<sup>4</sup> SC = Sub-Clause

<sup>5</sup> As stipulated in SC 1.5.2 WB 2017: “national (or state) legislation, any statute, statutory instrument, order, regulation, bylaw, code or other legislation in any country in which the Services are required by the Client”

**ii. If yes**

11. Typically if the offer was issued during the pandemic, then the provisions of Cl. 1.5 WB 2017 may not apply given that they operate only if a “change in legislation” occurs “*after the date of the Consultant’s offer/proposal in relation to the Agreement*”. I.e., not before. This is to reflect the expectation that the Parties, when forming the Agreement, should have accounted for the time and cost of complying with any relevant legislation, regulation or bylaw in force at the time of the Consultant’s offer/proposal.
12. An exception to the above would be if the Covid-19 measures that were in force on the “*date of the Consultant’s offer/proposal in relation to the Agreement*”, are changed by the authorities during the implementation of the Agreement, leading to either a change in the Services required, or a change in the time and/or cost of undertaking the Services. In such a case, similar consideration shall be given to the matters set out under A.a)i. above, noting, however, that the baseline to consider, i.e. the situation at the date of the Consultant’s offer/proposal, would of course be different, as it needs to take into account the measures already in force on the “*date of the Consultant’s offer/proposal in relation to the Agreement*”.

**b) *Can those authorities’ Covid-19 measures be considered as an Exceptional Event under the Agreement?***

13. To qualify as an Exceptional Event, such Covid-19 measures must be held to be an event or circumstance which cumulatively satisfies the following conditions set out under SC 1.1.13 WB 2017, i.e. an event or circumstance which:
  - (a) is beyond a Party’s control;
  - (b) such Party could not reasonably have provided against before entering into the Agreement;
  - (c) having arisen, such Party could not reasonably have avoided or overcome; and
  - (d) is not substantially attributable to the other Party.
14. Conditions (a) and (d) would appear to be satisfied.
15. Regarding condition (b), similar consideration shall be given as under A.a) above to the time the Consultant’s offer/proposal was made (before or during the pandemic start) so as to ascertain whether any reasonable measure could have been provided by a Party before entering into the Agreement. Note that this condition is not subjected to a foreseeability test. In other words, it does not matter whether a Covid-19 measure could have been foreseeable by either Party before entering into the Agreement – even if foreseeable, if there is nothing that a Party could have reasonably provided against it, then condition (b) would be satisfied. As an example, with an Agreement formed in late 2020, one may argue that the subsequent closure of borders in the Country due to a coronavirus new infection wave could have possibly been foreseeable by the Consultant, but if the Services absolutely require the Consultant to be physically present on the Project site and can only be performed by foreign personnel, then it appears that there is no alternative the Consultant could have reasonably provided for. Condition (b) would therefore be satisfied.



16. As to condition (c), whether the affected “*Party could not reasonably have avoided or overcome*” the local authorities Covid-19 measures when they are in force, depends on the circumstances. For example, the implementation of remote working practices, with the use of relevant digital communication means (online conferencing, sharepoint, etc.), may allow the affected Party to continue performing its Services.
17. Finally, it is important to note that arguing an Exceptional Event case under the FIDIC White Book not only requires ascertaining whether all of the above four above conditions are met. It also requires consideration if and to what extent the Exceptional Event prevents the affected Party from performing any of its obligations under the Agreement, as provided for under SC 4.6.1 WB 2017. For example, a country deciding to close its borders may have no impact whatsoever on the performance of Services by a local Consultant not relying on any foreign resource. In such a case, an Exceptional Event having no impact on the performance of the Services shall naturally not generate any entitlement under the Agreement.
18. Accordingly, depending on the matrix of facts pertaining to each situation encountered by the Parties, and the considerations set out above, the local authorities’ Covid-19 measures could then possibly qualify as an Exceptional Event and trigger the time and cost remedies contemplated under Cl. 4.4 and SC 4.6.2 WB 2017.
19. Like for many events or circumstances in a project, there is not necessarily a single way forward to address such a situation under the FIDIC White Book. The above reveals that, whilst changes in legislation provisions appear to be the more specifically connected to the factual root of this case (Covid-19 measures from local authorities), hence arguably the most applicable and relevant provisions, a further or alternative remediation path can be found under the auspices of the Exceptional Event provisions under Cl. 4.6 WB 2017.

***c) Is the performance of the Services partly or fully prevented?***

20. Depending on the type of the Services, the performance of those might be affected by Covid-19 measures from local authorities to various degrees. The matters considered under A.a) and A.b) above define remedies for the delay and disruption caused by Covid-19 measures on the performance of the Services. The Client or the Consultant may also consider formally acknowledging the suspension of all or part of the Services by issuing a Notice to that effect under respectively SC 6.1.1 or SC 6.1.2(b). For the latter case, this is if the said measures have been determined to amount to an Exceptional Event. It should indeed be emphasized that suspension of the Services, as contemplated under SC 6.1.2, does not necessarily apply to all of the Services. It can apply to a part of the Services, i.e. the part for which the Consultant, despite its reasonable endeavours, could not “*avoid or minimize such suspension*” as set out under SC 6.1.2(b), last sentence.
21. Managing the time and money effects of such suspension will require the Parties to proceed under Cl. 6.3 WB 2017.
22. If performance of the Services is fully prevented, and if therefore all of the Services are suspended because of such Covid-19 measures, termination of the Agreement may even

be contemplated if such suspension continues over more than one hundred and sixty-eight (168) days. It can be triggered either under SC 6.4.1 (e) (by the Client) or SC 6.4.2(e) (by the Consultant), and such termination will be treated as a termination for no fault of either Party under SC 6.5.3 WB 2017.

**B. The Project area is freely accessible to the Consultant, but the Consultant and/or the Client's health and safety internal policies prevent any Consultant's personnel presence on the Project site or at the Client's premises**

23. Such a case will require consideration as to what extent:

- The performance of the Services will be affected by such internal policies;
- The implementation of relevant methods of working (such as digital means of remote working) can mitigate the effects of such internal policies; and
- The internal policies of the Consultant, and the resulting unilateral decision it took not to mobilise its personnel to the Project area was reasonable given the circumstances, and was in accordance with its standard of care as set out under Cl. 3.3,

in order to ascertain whether the situation qualifies as an Exceptional Event.

24. The key difference with the case discussed under A.b) above, is that there is no supervening local authority's decision to consider. Passing the test set out under SC 1.1.13 WB 2017 could be difficult on the account of:

- a. condition (b) (an event or circumstance which the Consultant "*could not reasonably have provided against before entering into the Agreement*") if the Covid-19 pandemic was in effect at the time of tender. In such a case, and unless the Consultant can argue about new pandemic circumstances (aggravation of the pandemic and its effects) resulting in new health and safety internal policies, it can be argued that the Consultant, when tendering, made a representation that it would have the capacity to mobilise the required personnel on the Project site/the Client's premises (if such presence was indeed required under the Agreement) despite the pandemic, as otherwise it should have declined submitting a tender, or qualified its tender accordingly. It would therefore be bound by its representation, and its Exceptional Event argument would therefore be likely to be dismissed; and/or
- b. condition (c) (an event or circumstance "*which having arisen, such Party could not have reasonably avoided or overcome*"), as one may argue that the implementation of a combination of the right health and safety measures (physical distancing, face mask, sanitizers, etc.), plus remote working practices can allow the Consultant to overcome the difficulties caused by the Covid-19 pandemic and to continue performing the Services.

25. Notwithstanding the above, if an Exceptional Event argument is successful under Cl. 4.6 WB 2017 then this would trigger the time and cost remedies contemplated under SC 4.6.2 WB 2017, or alternatively for the Consultant to proceed with a suspension of all or part of the Services under the combined effect of SC 3.8.1 and 6.1.2(b) WB 2017. Ultimately, the Services may also be terminated as referred to in paragraph 22 above.

26. Note that under SC 3.3.1 WB 2017 the standard of care expected from the Consultant in the performance of the Services would typically require consideration of what a "*consultant experienced in the provision of such services for projects of similar size, nature*

*and complexity*” would do in a similar situation, and that if ultimately the Consultant is of the opinion that the health and safety of its personnel would be compromised, then the Consultant is entitled to suspend all or part of the Services. Notwithstanding this, such opinion is to be “reasonable” as set out under SC 3.8.1 WB 2017, for which the standard of care test set out under SC 3.3.1 WB 2017, of what an experienced consultant (not the Consultant) would have done in such situation, will be instrumental in determining whether the act of the Consultant to call upon SC 3.8.1 and suspend all or part of the Services was reasonable or not given the circumstances.

27. If restrictions of access to the Project site or Client’s premises are as a result of the Client’s own internal health and safety policies, then it should be noted that the Client has discretion in:
- Suspending the Services or terminating the Agreement at its convenience under, respectively, SC 6.1.1 and SC 6.4.1(d), with remedies provided to the Consultant under Cl. 6.3 and 6.5 WB 2017.
  - Instructing a Variation as per SC 5.1.1 WB 2017 to omit part of the Services (SC 5.1.2(b) WB 2017), or changing their sequence or timing of execution (SC 5.1.2(c) WB 2017), or their method of implementation (SC 5.1.2(d) WB 2017).
28. The Client can also try to run the argument of Covid-19 pandemic being an Exceptional Event which would excuse performance of its obligations in accordance with SC 4.6.1 WB 2017. This will require similar consideration as to what is set out under paragraph 24 above.

### C. What are the key duties of a Consultant acting as FIDIC Engineer or Employer’s Representative in a Works Contract under Covid times?

29. A specific key role of the Engineer/Employer’s Representative is to assist the Parties to a Works Contract reach agreement on any claim and, if such agreement cannot be reached, to make a fair and binding determination, taking due regard of all relevant circumstances.<sup>6</sup> In doing so, the Consultant shall be mindful of its construction administration duties under the FIDIC White Book, and in particular those set out under SC 3.9.3 WB 2017 which provide that: “*If the Consultant is authorised under the Works Contract to certify, determine or exercise discretion in the discharge of its duties then **the Consultant shall act fairly as go between the Client and the contractor, exercising independent professional judgement and using reasonable skill, care and diligence***” (emphasis added).
30. Another key role of the Engineer/Employer’s Representative is to supervise the execution of the Works by a Contractor, and in particular to verify that it complies with its health and safety obligations<sup>7</sup>. This would typically include verifying that the right Covid-19 measures

<sup>6</sup> Red Book 1999, Yellow Book 1999, Silver Book 1999, Pink Book and Gold Book: SC 3.5 / Red Book 2017, Yellow Book 2017 and Emerald Book: SC 3.7.2 / Silver Book 2017: SC 3.5.2

<sup>7</sup> Typically under Red Book, Yellow Book, Silver Book, Emerald Book, Gold Book and Pink Book SC 4.1, 4.8 and 6.7 / Green Book 1999 SC 1.6

are being implemented by the Contractor on site (physical distancing, face masks, availability of sanitizers, etc.).

31. Note that the Engineer/Employer's Representative has the ultimate power to direct the suspension of the Works<sup>8</sup>; a power which it may wish to exercise in the event of the Contractor's material breach of its health and safety obligations.

#### **D. What are the FIDIC White Book contract administration practices to be observed by the Parties?**

32. The Parties to a FIDIC White Book are reminded that, in order to exercise their rights and remedies as described in this Guidance Memorandum, they have to comply with various contract administration duties which are summarized below and which, if not complied with, may defeat the enforcement of their rights:
- WB sets out several notification requirements. Notices are to be sent in accordance with SC 1.3 WB 2017, and as required by the relevant Agreement provision. For example, if the Consultant incurs Exceptional Costs as a result of a change in legislation, then it shall inform the Client by Notice as soon as reasonably practicable pursuant to SC 1.5.2 WB 2017. A specific time limit is set if either Party wishes to argue that an Exceptional Event has occurred – this is fourteen (14) days *“from when the Party becomes aware, or should have become aware, of the event or circumstance constituting an Exceptional Event”* according to SC 4.6.1 WB 2017.
  - The Client shall give its decisions or instructions *“within a reasonable time and with regard to the Programme so as not to delay the Services”* as set out under Cl. 2.2 WB 2017
  - Likewise, the Consultant shall perform the Services with the *“reasonable...diligence to be expected from a consultant experienced in the provision of such services for projects of similar size, nature and complexity”* as provided for under SC 3.3.1 WB 2017.
33. The Parties are encouraged to keep contemporary records of the delay and/or loss they suffer, in order to substantiate their claims. Though not expressly specified under the White Book, the usual standard position at law in many jurisdictions is that the burden of proving an entitlement to a remedy lies with the claimant.
34. Should the Parties fail to agree on their respective rights and remedies under the Agreement as a result of Covid-19, and enter into a dispute, the FIDIC White Book Clause 10 contains a three-stage dispute resolution mechanism based on amicable settlement, adjudication and finally international arbitration.
35. Finally, the Parties to a White Book Agreement are reminded of their overarching good faith obligations under SC 1.16 WB 2017 which provide that *“In all dealings under the Agreement the Client and the Consultant shall act in good faith and in a spirit of mutual trust”*.

<sup>8</sup> Red Book 1999, Yellow Book 1999, Silver Book 1999, Pink Book: SC 8.8/ Gold Book: SC 9.7 / Red Book 2017, Yellow Book 2017, Silver Book 2017 and Emerald Book: 8.9

**E. What if my joint venture partner can no longer meet its commitments under the FIDIC JV Agreement 2017 Edition (JVA 2017) and threatens the delivery of our joint performance obligations to the Client?**

36. As a preamble, Joint Venture Members are reminded of the meaning and significance of their joint and several liability to their Client, pursuant to SC 12.4 JVA 2017. If their Services Agreement with their Client is based on the FIDIC White Book, then such a liability is also set out under SC 1.11.2 WB 2017. Joint and several liability means that should a Member default, the non-defaulting Member(s) will be required to perform the defaulting Member's share of the Services and ensure the performance of the whole of the Services for the benefit of their Client.
37. If a Joint Venture Member defaults, there may be preliminary questions regarding the true financial situation of the Member and its capacity to meet its obligations to perform its share of the Services. Whilst the aforementioned joint and several liability of Members implies that, before entering the JVA, , each Member has a strong interest to consider and, if appropriate, to investigate, the financial position and resources of each other Member, and to satisfy itself that such other Member has all the financial and other resources necessary to perform its contractual obligations, such financial situation may nevertheless have now become compromised owing to the effects of the pandemic on businesses. Parties to a Joint Venture should first support a transparent due diligence exercise as to the impact of Covid-19 on their respective organisations to establish the true situation and preferably led by the Joint Venture's governance body (the Steering Committee under the JVA). That process should focus on openness, respect, and solutions.
38. A Joint Venture can explore negotiated solutions between themselves and/or with the Client which include:
- What claims can be made under the Client/Consultancy Agreement (the Services Agreement under the JVA)
  - What relief might the Client be willing to entertain outside of the Agreement
  - Altering the Joint Venture , for example by rebalancing the resources and inputs between Members, shifting to a lead and subconsultant relationship, bringing in another member, another subconsultant, or by considering the withdrawal of a Member altogether.
39. In the absence of a negotiated solution, if a Member defaults in its performance then:
- the non-defaulting Member(s) may reassign the work concerned (SC 12.4 JVA 2017).
  - the defaulting Member is obliged to not obstruct the non-defaulting Member(s) and provide all documents and information necessary for the performance of that work (SC12.6 JVA 2017) and the Joint Venture shall be entitled to compensation from the defaulting Member (SC 12.7-12.10 JVA 2017) .
40. The JVA also contains a three-stage dispute resolution mechanism based on amicable settlement, mediation and finally arbitration (SC 22.2 JVA 2017).

## Conclusion and recommendations

COVID-19 continues to present an extraordinary challenge and FIDIC commends all members of the construction community for remaining focused on the successful delivery of the projects before them in a way that sustains the long-term viability of the construction community.

As has been emphasized in this Guidance Memorandum, a significant range of FIDIC contractual provisions in the FIDIC White Book 2017 Edition are relevant and can be considered in the ongoing COVID-19 pandemic situation, such as:

- Changes in Legislation
- Good faith
- Standard of Care
- Safety and Security of Consultant's Personnel
- Construction Administration
- Delays
- Exceptional Event
- Variations to Services
- Suspension of Services and Termination of Agreement

For Consultants, if a Project is being delivered through a joint venture structure, that may impose additional complexity which is to be addressed through the provisions of the FIDIC JV Agreement, 2017 Edition. Consultants are also reminded of their expected adherence to the FIDIC Code of Ethics (accessible at <https://fidic.org/fidic-code-ethics>).

Users are recommended to consider the matrix of facts applying to their particular case so as to assess if and to what extent the aforementioned provisions are applicable, and/or whether additional ones also become relevant.

FIDIC would however remind its Contracts & Services Agreements users that solutions to project difficulties are not only to be found within the four corners of any contract. Care should be given to the following:

- Impact of the governing law of the Contract - as an example, the definition at law of Force Majeure in some civil law jurisdictions may differ from what is provided in the FIDIC Suite of Contracts/Services Agreements.
- Decisions and recommendation from governments/authorities - as an example, FIDIC notes that various governments are currently recommending public authorities on public funded works to stay away from a literal or rigid application of contract terms which may significantly harm their supply chain, and instead to implement jointly agreed alternative contract terms providing for COVID-19 specific relief regimes so as to preserve cashflow and keep the supply chain alive over this crisis.
- Social responsibility – as this crisis progressively impacts everyone globally, if every business shelters behind hard-line and rigid approaches, this can lead to a booming escalation of insolvency cases, with a severe knock-on negative social effect on societies at large.
- Long-term vs short-term views - little or nothing can be recovered from an insolvent business. Enforcing strict and rigidly contractual rights may not be in one's long-term interest if that means bringing one's own supply chain to collapse.

As a corollary of the above, FIDIC encourages users to:

- familiarise themselves with the terms of their specific contract;
- understand the specific nature of local government policy and actions;
- seek legal advice specific to the relevant jurisdiction;
- seek, through cooperation, negotiation and open dialogue, practical and realistic solutions to the challenges we are all facing together;
- uphold the FIDIC Golden Principles, bearing in mind the considerations underpinning those, the FIDIC Code of Ethics, and their acting in good faith;
- not only consider contractual and legal matters to handle their projects throughout this crisis, but also consider long-term business interests, social responsibility, long-term health of supply chains and of societies at large; and
- keep an objective view: although this crisis calls for specific/fit-for-purpose remedies and a rather lenient and open-minded approach, causation is as always critical and one should be able to differentiate difficulties caused by the COVID-19 crisis from those which would have been experienced in any case, but for the crisis.

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