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Awareness-Based Claim Notification under FIDIC and Turkish Public Procurement Framework

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Abstract

The determination of the awareness date for notice is important for claim submission in construction contracts. This research examines the notice mechanisms under the FIDIC Red Book 1999 and 2017 and compares them with the Public Procurement Contracts Law (KİSK), focusing specifically on the interpretation of the phrase "became aware or should have become aware." Under FIDIC contracts, the Contractor may be required to act not only on actual knowledge but also on knowledge it should reasonably have acquired of the relevant event or circumstance. The Turkish public procurement framework does not contain a general awareness-based time-bar mechanism comparable to FIDIC. However, specific notice requirements exist, notably under Article 29 of the General Conditions of Contract for Construction Works ("YİGŞ") for extension-of-time requests, subject to exceptions such as delays caused by the administration. Article 473 of the Turkish Code of Obligations uses the expression 'according to all estimations' ('bütün tahminlere göre') when allowing the employer to withdraw before the delivery date if it clearly becomes evident that the work will not be completed on time; it does not create an awareness-based notice trigger. The comparative analysis demonstrates that this difference between FIDIC and KİSK leads to divergent approaches in determining the correct notice date, claim submissions, and dispute resolution. The research aims to clarify how awareness should be assessed in practice and to evaluate whether the absence of such a concept in KİSK creates legal uncertainty when compared with the FIDIC framework.

1. Introduction

A claim rejected by the other party may develop into a dispute [4], [11], which may need resolution for the construction process to continue. One of the most important provisions in the construction contracts is with regard to claim procedures for additional time or money, for which the first step is to notify claims in a timely and due manner [3]. Failure to comply with the applicable notice requirements may result in loss of entitlement to additional time or payment, subject to the governing law and, under the 2017 edition, the contractual late-notice mechanism [1], [5], [7], [8]. The Turkish public procurement framework does not provide a general awareness-based time bar comparable to FIDIC, although YİGŞ Article 29 imposes a twenty-day written-notice period for specified extension-of-time requests [14], [15]. Freedom of contract is one of the fundamental principles of Turkish Law, as provided in Article 26 of the Turkish Code of Obligations, which states: "The parties may agree on the content of a contract freely within the boundaries provided by law" [6], [13]

In construction contracts, the timing of the event giving rise to a potential claim does not necessarily correspond with the timing of when a claim legally arises. While physical events occur at a specific point in time during a construction project, the commencement of the notice period is linked to the point at which the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim.

The identification of the date of awareness is a critical factor in the implementation of the notice mechanism and, as such, the admissibility of the claims and the outcome of the disputes. Disputes may concern when the Contractor became aware, or should have become aware, of the relevant event or circumstance. The assessment of the Contractor's awareness—extended to the Employer under the 2017 edition—has therefore become a critical factor in construction disputes.

Within the aforementioned framework, the FIDIC Red Book's approach to the issue of awareness is based on the dual concept of actual and constructive awareness through the phrase "became aware or should have become aware" [7], [8], [9], [10]. This approach includes an objective component that can be used to determine when the contractor is deemed aware of the events that can be the basis of claims, despite the lack of actual knowledge. The Public Procurement Contracts Law (KİSK) does not explicitly incorporate the concepts of actual and constructive awareness as a general trigger for claims. While certain notice obligations exist in limited circumstances—such as in cases of force majeure—it does not establish a general awareness-based time-bar mechanism comparable to FIDIC [14], [15].

The distinction between actual and constructive awareness is of particular importance in the context of both notice and claim procedures and dispute resolution processes. Therefore, the objective of the study is to determine when the awareness is deemed to occur in the context of construction contracts and the implications of awareness on the determination of claims through the comparative analysis of the FIDIC and KİSK contractual frameworks.

2. Notice-Claim Mechanism under the FIDIC Red Books

The claim-notice mechanism is a key procedural element in both editions. The express 28-day time bar in Sub-Clause 20.1 of the 1999 Red Book applied to Contractor's claims, whereas the 2017 edition introduced a broadly symmetrical 28-day notice regime for claims by either Party. Non-compliance may result in loss of entitlement, subject to the contractual late-notice provisions and governing law [1], [5], [7], [8], [10], [12].

The 28-day notice requirement is drafted as a contractual time bar or condition precedent; its enforceability and legal characterization depend on the governing law [1], [5], [7], [8], [9], [10], [12]. The mechanism is intended to facilitate timely notification of claimable events during execution of the contract.

2.1. Awareness Date of Claim Events under the 1999 FIDIC Red Book

The obligation is engaged when the Contractor considers itself entitled, while the 28-day period is measured from awareness of the event or circumstance [7], [9]. A careful interpretation of the wording of Clause 20.1 indicates that a relevant stage arises at the point at which the Contractor considers itself entitled to an extension of time and/or additional payment as a result of the relevant event or circumstance.

With respect to the FIDIC Red Book 1999, Clause 20.1 provides that the giving of notice is a condition precedent to the Contractor's right to claim time and money and therefore places the assessment of the date when the Contractor became aware at the heart of the claims process. Under Clause 20.1, the time limit for giving notice runs from the date on which the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim.

In Clause 20.1, the commencement of the notice period is linked to the point at which the Contractor became aware, or should have become aware, of the relevant event or circumstance [7], [9]. Once the Contractor considers that such event may give rise to an entitlement to an extension of time and/or additional payment, a notice is required to be given. Accordingly, the role of the Engineer in the determination of awareness is seen as being indirect but nonetheless important within this framework. Also the Engineer's contemporaneous instructions, determinations, records, and communications may be relevant evidence of when the event or circumstance became recognizable as potentially claimable [1], [7], [9]. In a dispute, the dispute-resolution body will consider whether a reasonable and experienced contractor should have become aware of the claimable nature of an event at an earlier time, in light of the information available at the time and the role of the Engineer.

2.2. Awareness Date of Claim Events under the 2017 FIDIC Red Book

The 2017 Red Book provides a more structured and explicit claims-notice procedure than the 1999 edition [2], [8], [10], [12].

The 2017 edition retains the 'became aware, or should have become aware' trigger inherited from the 1999 edition while making the claims procedure more structured and explicit. The constructive limb invites an objective assessment of the information reasonably available to the claiming Party at the relevant time [1], [2], [8], [10], [12]. The assessment of awareness is carried out on an objective basis, by reference to what an experienced contractor should have known in the circumstances, taking into account the information available to the Contractor at the relevant time.

Table 1. Comparison of FIDIC 1999 and FIDIC 2017

	FIDIC 1999	FIDIC 2017
Awareness trigger	Contractor: became aware / should have become aware Employer: no time bar	Employer and Contractor: became aware / should have become aware
Actual & Constructive Awareness	✓	✓
Constructive-awareness element	✓	✓
Procedural structure	Basic framework	More structured and explicit

Source: Authors' synthesis based on [7], [8], [9], [10], and [12].

This evolution can be seen as an enhancement of the role of awareness within the FIDIC 2017 structure. In highlighting the importance of early awareness and its link to an objective standard, the FIDIC contract is arguably clearer on the allocation of risk and promotes the management of claims during the performance of the contract rather than the justification of claims during the dispute process. As such, it arguably limits the Contractor's reliance on the lack of knowledge and promotes the management of claims as soon as the contractor became aware, or should have become aware, of the relevant event or circumstance.

2.3. Interpretation of "Became Aware or Should Have Become Aware"

The expression "became aware or should have become aware" plays a critical role in the process of claims and notice provisions under FIDIC contracts, as it establishes a two-fold standard of awareness based on actual and constructive knowledge. Actual awareness refers to the Contractor's actual knowledge of the relevant event or circumstance. On the other hand, the expression "should have become aware" is based on the concept of constructive knowledge, which is independent of the Contractor's actual knowledge and is assessed on an objective basis. Constructive awareness is assessed by reference to whether the Contractor should reasonably have become aware in light of the information available at the time [1], [9], [10].

Under the test of constructive awareness, the critical factor is whether the Contractor ought reasonably to have become aware of the relevant event or circumstance in light of the information available at the time. Accordingly, the test of awareness under the FIDIC contract is determined by reference to the point at which the Contractor became aware, or should have become aware, of the relevant event or circumstance.

The awareness date is a fact-sensitive question that may be assessed retrospectively through contemporaneous evidence. Determining the date of actual or constructive awareness is fact-sensitive and may require consideration of contemporaneous project evidence [1], [9], [10]. Actual knowledge is subjective, whereas the constructive limb asks what should have been known from the contemporaneous information. The analysis therefore considers both actual knowledge and external evidence [1], [9], [10].

2.3.1 Actual and Constructive Awareness in FIDIC Contracts

Actual Awareness

Actual awareness occurs when the Contractor has actual knowledge of the event or circumstance giving rise to the claim. Actual awareness may be invoked in disputes, where the Contractor claims that the commencement of the notice period was not possible because of a lack of knowledge of the relevant event or circumstance. Its significance depends on the evidence available. Accordingly, even where the contractor asserts a lack of actual knowledge, contemporaneous records such as site reports, programme updates, meeting minutes, or the Engineer's communications may be relevant to whether the event or circumstance should reasonably have been identified [9], [10].

Constructive Awareness

Constructive awareness is used as an objective test and is utilized as a basis for the allocation of risks in FIDIC contracts. In other words, rather than looking at what the Contractor was aware of, the test of constructive awareness considers what the Contractor should have been aware of based on the information provided at the relevant time. This is important because it prevents the notice system from being undermined by the Contractor's own internal evaluations and strategies. By providing a basis for the determination of the date on which the Contractor was aware of the relevant facts as an objective test, the FIDIC system ensures that the processes for the determination of claims are designed to facilitate the management of risks during the performance of the contract rather than waiting until the consequences of the risk have fully manifested themselves.

In applying the 'should have become aware' limb, contemporaneous records may be relevant to whether the notice period began before actual awareness. Constructive awareness may therefore determine commencement of the notice period [9], [10].

3. Overview of the Notice-Claim Mechanism under Turkish Law

3.1. Notice Mechanisms in Turkish Law

The Turkish public procurement framework differs structurally from the awareness-based claim model used in FIDIC contracts. Under the Public Procurement Contracts Law (KİSK), notice principles are not set out as a general principle in relation to all claimable events. On

the contrary, notice principles are set out under particular conditions within secondary legislation and in contract provisions [14], [15], [17].

Except for employer-caused delays, Article 29 of the General Conditions of Contract for Construction Works (YİGŞ) requires the Contractor to notify the administration in writing within twenty days after the event requiring an extension of time for the specific event or circumstances that is defined in YİGŞ [15].

Article 473 of the Turkish Code of Obligations uses the phrase 'bütün tahminlere göre' (according to all estimations) to assess, before delivery, whether it is clearly evident that the Contractor will be unable to complete the work on time. TCO Article 473(1), subject to stated cumulative conditions, as a legal basis for extension of time; the provision does not itself create a fixed claim-notice period or an awareness-based trigger [13], [16].

Therefore, under the Turkish public procurement framework, there is no express, general, fixed-period awareness-based claim time bar comparable to FIDIC that identifies the moment when the contractor became aware, or should have become aware, of the claimable event. Where no specific notice provision applies, the timing issue may therefore have to be reconstructed from the contract and project records if a dispute arises. This leaves more room for case-specific interpretation [13], [14], [15], [16], [17].

3.1.1. TCO Article 472 & 473

Article 36 of the Public Procurement Contracts Law ("KİSK") provides that, where the law does not contain a relevant provision, the provisions of the Turkish Code of Obligations ("TCO") shall apply [14].

Article 473 uses the phrase 'bütün tahminlere göre' (according to all estimations) in determining whether it is clearly evident, before the agreed delivery date, that the Contractor will be unable to complete the work on time. This is an objective, prediction-based assessment; it does not itself impose a claim-notice obligation or define actual or constructive awareness [13], [16]. A related provision, TCO Article 472(3), requires the Contractor to notify the Employer as soon as a situation endangering the proper or timely completion of the work becomes apparent; however, this is a general duty to warn under good faith rather than a fixed-period, FIDIC-style claim-notice time bar, and it does not define actual or constructive awareness [13].

TCO Article 473 (authors' translation) :

"If the contractor fails to commence the work on time, or delays the work in violation of the contract terms, or if it becomes clearly evident according to all estimations that the contractor will not be able to complete the work within the agreed time due to a delay caused by a reason not attributable to the employer, the employer may withdraw from the contract without having to wait for the specified delivery date.

If, during its execution of the work, it becomes clear that the work will be defective or not in conformity with the contract due to the contractor's fault, the employer may warn the contractor, within a reasonable period of time to be given or caused to be given, to remedy the defect or non-conformity; otherwise, the employer may warn that the repair or continuation of the work will be entrusted to a third party at the Contractor's risk and expense."

Article 473 asks whether, in view of all the circumstances, it is already clear that the work will not be completed on time; it does not identify when the Contractor became or should have become aware of a claimable event. The FIDIC awareness trigger, by contrast, may affect contractual entitlement by starting the claim-notice period [7], [8], [9], [10], [13], [16].

Accordingly, 'bütün tahminlere göre' (according to all estimations) cannot be equated with constructive awareness. Article 473 employs an objective, forward-looking assessment concerning timely completion; it does not start a claim-notice period. It therefore does not supply the Turkish public procurement framework with a general awareness-based time bar comparable to FIDIC [7], [8], [9], [10], [13], [14], [16].

The duty to notify stipulated in Article 472(3) of the TCO must also be interpreted alongside the doctrine of good faith as expressed in Article 2 of the Turkish Civil Code. Though Article 472(3) stipulates that it is the duty of the Contractor to notify the Employer of any circumstance which threatens the appropriate and timely completion of the works, it does not specify a precedent time-bar in which such notification should be made.

The reasonableness of the time taken by the Contractor to make such notification may evaluated in view of the doctrine of good faith in Article 2 & 3 of the Turkish Civil Code ("TCC"). It follows that Articles 472(3) of the TCO and Article 2 & 3 of the TCC should be considered together in tandem and demand that the Contractor should notify within the earliest reasonable time rather than the precedent time-bar as FIDIC [19], [20].

3.1.2. YİGŞ Article 29

Article 29 of YİGŞ permits extensions for (i) listed force-majeure events subject to paragraph 3, (ii) employer-caused delay meeting paragraph 4, and (iii) unforeseen circumstances that make an increase in work necessary [15].

Except for employer-caused delays, the Contractor must give written notice within twenty days after the event requiring an extension. The notice must state the reasons for delay and the extension sought; if the

duration cannot yet be determined, the Contractor must explain why and notify the requested extension promptly once clarified. Untimely notices are disregarded, although a notice made while force majeure continues may be considered for the preceding twenty days [15]. This event-based rule is not a general awareness-based claim-notification regime comparable to FIDIC.

However, the notice requirement under the YİGŞ has certain differences compared to the awareness-based claim system under the FIDIC contracts. Unlike the FIDIC contracts, the YİGŞ does not establish the link between the contractor's claim for the extension of time and the contractor's awareness of the occurrence of the event. Where no specific awareness-based trigger applies, the timing of the claim may need to be reconstructed from the applicable contract and project records if a dispute arises.

3.2. Awareness-Based Mechanisms in Turkish Law

The Turkish public procurement framework does not define actual or constructive awareness as a general claim trigger as FIDIC. Where no specific event-based notice rule applies, the timing of a claim may need to be reconstructed from the contract and project records if a dispute arises. This leaves more room for case-specific interpretation than the FIDIC model [14], [15], [16], [17].

In the absence of a general awareness-based time-bar mechanism, the temporal framework for the admissibility of claims is less clearly defined. In a price-adjustment dispute governed by the YİGŞ, the Court of Cassation held that interim and final payment statements signed without reservation became final against the Contractor because they had not been challenged under the then-applicable Articles 40 and 41. The decision illustrates enforcement of a specific, then-applicable YİGŞ objection procedure; it does not establish a general awareness-based commencement rule [18].

4. Comparison of the FIDIC Red Book and the Turkish Public Procurement Framework

The notice-claim mechanisms stipulated in the FIDIC Red Books and Turkish public procurement framework are based on different sets of assumptions regarding risk management, contractual discipline, and the timing of legal responsibility. The FIDIC mechanism takes a forward-looking process approach, in which claims are anticipated to occur during contract performance through a series of procedural steps. A critical element of this mechanism is the notion of awareness, both actual and constructive, which acts as a trigger mechanism for the submission of claims. In contrast, the Turkish public procurement framework uses event-specific notice rules but no general awareness-based claim trigger.

Under the FIDIC system, the idea of the awareness date serves as a time benchmark that connects the occurrence of the event with the contractual obligations of the Contractor. The start of the notice period is based on the moment when the Contractor became aware, or should have become aware, of the particular event or circumstance that led to the claim. The function of constructive awareness also highlights this proactive character of FIDIC provisions. The objective 'should have become aware' limb limits reliance on subjective lack of knowledge by reference to the information available to the claiming Party. This constructive element encourages the claiming Parties to give timely notice [7], [8], [9], [10].

Table 2. Comparison of FIDIC Red Book & KİSK.

	FIDIC Red Book	**Turkish Public Procurement framework**
Claim management	Forward-looking	Event-specific notice rules; no general awareness-based mechanism
Trigger for claims	Awareness-based	No specific awareness-based trigger for each event
Role of awareness	Procedural trigger for notice	Not used as a general trigger
Types of awareness	Actual and constructive awareness	No general express distinction
Notice mechanism	Linked to awareness date	Notice obligations exist only for specific events
Contract administration	Claims managed during contract performance	Specific notice procedures during execution of contract; no general awareness trigger
Dispute assessment	Focus on when the Contractor became aware or should have become aware	Applicable contract terms, statutory rules, and project evidence
Function of awareness	Risk allocation and dispute prevention	No general statutory or standard-form trigger

Source: Authors' synthesis based on [7], [8], [13], [14], [15], [16], and [17].

These identified differences are not only in terms of conceptual aspects but have substantial practical significance in terms of contract administration. Under the FIDIC model, the awareness-based notice requirements prompt the contractors to consider and report any claimable events early in the process to manage risk effectively and prevent disputes from arising later at the completion of the project. Where no specific notice-claim rules apply for Turkish public procurement framework, timing may need to be

reconstructed from the applicable contract and project records if a dispute arises.

The comparison therefore concerns how the relevant trigger and evidence are defined. Under FIDIC, the issue is whether the claiming Party became, or should have become, aware of the event or circumstance; under the Turkish framework, the applicable event-specific notice rule, contract terms, and project records govern the analysis [7], [8], [13], [14], [15], [16].

5. Conclusion and Evaluation

This study reveals that constructive awareness is a basic part of a claim management system under FIDIC contracts. The introduction of an objective standard of time based upon when a contractor became aware of a claimable event, or should have been aware of a claimable event, ensures that awareness is integrated into the life cycle of a construction contract. This creates a forward-thinking claim management system in which a procedural requirement is triggered at a specific time. This ensures that awareness is a critical part of a risk allocation system, a procedural regime, and a dispute resolution system by encouraging claimable events to be notified.

As discussed in the TCO Article 473 section, Article 473 is a pre-delivery remedial provision rather than a claims-notice mechanism comparable to FIDIC. It does not establish an awareness-based trigger. The Turkish public procurement framework instead contains event-specific notice rules, including YİGŞ Article 29, but no general awareness-based trigger. Where no specific trigger applies, timing may need to be reconstructed from the contract and project records if a dispute arises [13], [14], [15], [16].

As a result, the comparative analysis indicates that the major difference between FIDIC and the Turkish public procurement framework is not only related to the presence of notices in both frameworks, but also to the fact that neither KİSK nor YİGŞ establishes an express, general and fixed-period claim-notice bar triggered by actual or constructive awareness comparable to that under FIDIC. Under FIDIC, notice of claims forms a central part of the contractual process; under the Turkish framework, event-based notice rules exist, but there is no general awareness-based trigger. The comparison indicates that any reform should define the triggering event, the role of constructive awareness, and the consequences of late notice while preserving Article 29(7)'s exception for employer-caused delay and Article 29(8)'s rule for continuing force majeure [15]. Taking into account the findings and comparison in this study, this research recommends amending Article 29 of the General Conditions of Contract for Construction Works (YİGŞ) in order to add a general awareness-based approach to the notice process. The proposal would adapt, rather than wholly adopt, the FIDIC approach.

The originality of this study lies not only in comparing two legal frameworks, but also in demonstrating that awareness functions as a procedural concept with direct implications for claims management and contractual entitlement. This perspective extends the existing literature by analysing awareness-based notice mechanisms through a unified comparative legal framework.

Limitations

This study is essentially based on a doctrinal comparative legal analysis of the FIDIC Red Book and the Turkish public procurement framework. The study focuses on legal and contractual analysis rather than an empirical evaluation of construction practice. While contractual and statutory provisions have been considered to illustrate the comparative analysis undertaken, no comprehensive case law analysis or empirical evidence through project data and practitioners' experience has been provided in this study. The 1999 version of the FIDIC Red Book applied time-bar conditions only to the Contractor, whereas the 2017 version made the time-bar condition applicable to the Employer as well [7], [8], [9], [10]. A detailed comparison of the obligation of the Employer to notify within the time-bar period under the FIDIC 2017 version and Turkish public procurement framework is outside the scope of this study and is reserved for future research. The analytical approaches and evidentiary methods used to assess the notices and claims, particularly in determining entitlement, are beyond the scope of this study and are reserved for further research.

Author contributions

Ahmet Buğra Can: Conceptualization, Writing-Original draft preparation, Methodology, Field study.

Sertaç ORUÇ: Supervision, Writing-Reviewing and Editing, Validation, Investigation.

Conflicts of interest

The authors declare no conflicts of interest.

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