

## FIDIC's New Green Form - The Missing Link Joanne Clarke Written by Joanne Clarke

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In December 2021 FIDIC issued its 2nd edition of the Green Book. It is not so much an update to the 1st edition as a new and improved, intermediate form of contract. FIDIC is promoting it as a simpler, user-friendly alternative to the FIDIC 2017 Red and Yellow Books, where significant contract administration and management resources are not needed.

The Green Book 2nd edition is recommended to be used by the World Bank for projects up to US\$ 10 million. The Green Book 1st edition was originally intended for projects of US \$500,000 with no more than a 6-month duration. However, the Green Book 1st was sometimes used for larger projects with a duration of up to two years. The Green Book 2nd therefore takes over from where the Green Book 1st left off. This is to be welcomed. The FIDIC 2017 suite of contracts (Red/Yellow/Silver) is unsuitable for smaller projects where less administration is required. The Green Book 2nd will therefore fill a much-needed gap in the FIDIC rainbow and is likely to be attractive to both Contractors and Employers. This article looks at some of the key features of the Green Book 2nd.

### Lots of Diagrams and Flow Charts

Simple charts that explain time periods are to be welcomed. The Green Book 2<sup>nd</sup> has an abundance of simple to follow diagrams. The first diagram identifies the principal events on the project from the issue of tenders to the expiry of the DNP. There are diagrams dealing with the sequence of payment events, of claims management and the variation procedure. There are also charts for suspension and termination, where three possible scenarios are identified. Given that suspension and termination are issues that often result in litigation, any additional clarity is to be welcomed.

### Advance Warning

Sub-Clause 6.3 deals with an Advance Warning. The new version introduces an Advance Warning provision where either party or the engineer is required to advise "of any known or probable future events or circumstances which may delay or disrupt the execution of the Works, or increase the Contract Price." It is not specified what the consequences of failing to comply with this provision will be. However, it may affect when a party can be said to have become aware, or should have become aware, of an event or circumstance giving rise to a claim as, having given an Advance Warning, it may not be possible to argue that a party was not aware of a potential claim.

### Prolongation Costs

Prolongation Costs are a liquidated amount and are a defined term at Sub-Clause 1.1.35. The detail of the amount is set out in the Contract Data. They are related to a compensable EOT. Regard must therefore be had to Sub-Clause 6.4 (Extension of Time for Completion) and Sub-Clause 11.1 that identifies which Employer's Risks are compensable. Delays caused by Variations are compensable events and therefore would be caught by this provision (see Sub-Clause 7.2.3). The Contract Data proposes a scale of Prolongation Costs; however, this is intended as guidance. It should be noted that these costs apply only to prolongation and not disruption. The idea of liquidated Prolongation Costs is not new. However, it is unusual to see such a clause. Reception of this new clause was mixed with employers voicing concern.

There are several issues raised by this clause. The first is whether a Contractor would be entitled to liquidated Prolongation Costs where there is a concurrent Contractor caused delay? Sub-Clause 11.1.1 states that the table which identifies the events that are compensable, applies where the Cost is due to an Employer Risk. If, therefore, the Cost would have been incurred in any event

because of the concurrent delay, then the event giving rise to the EOT might not be compensable despite being identified in the table as one where Cost or Cost plus Profit is recoverable. The notes, however, refer to the applicable law as being relevant. The second issue relates to the definition of Cost. This definition includes overheads. Therefore, if the head office Costs are more than the amount recovered in the Prolongation Costs, would the difference be recoverable? These questions will be examined in more detail in the following newsletter.

### More Liquidated Damages

The Green Book 2<sup>nd</sup> has retained a liquidated amount which is payable for loss of profit in the event of termination. Where there has been a termination by the Contractor then, under Sub-Clause 10.4.1(c), an amount equivalent to 10% of the value of those parts of the Works not executed at the date of termination is payable. Where there has been a termination by the Employer then, under Sub-Clause 10.4.1(b), an amount equivalent to 20% of the value of those parts of the Works not executed at the date of termination is payable.

### Contractor Design or Employer Design?

The Green Book 2<sup>nd</sup> can be used both for employer-designed and contractor-designed works. Where the Contractor takes on the design then it warrants that the Works will be in accordance with the applicable Laws and the documents forming the contract (Sub-Clause 4.7.1). The works that are designed by the Contractor shall be, when completed, fit for the purpose(s) for which they are intended, as defined in the contract (Sub-Clause 4.7.2). Where no purpose is stated then they are required to be fit for their ordinary purposes. This is similar wording to the design obligations that are found in the FIDIC 2017 contract.

### Lump Sum, Re-Measurement or Cost-Plus?

Sub-Clause 8.1 provides that the Works will be valued and paid for as set out in the Contract Data. Like the NEC forms, the Green Book 2<sup>nd</sup> now has an Options clause. Option A is a lump sum price with a

single payment. Option B is a lump sum price with stage payments. Option C is a lump sum price with bill of quantities. Option D is for remeasurement with a bill of quantities. Option E is for cost plus. There is also the possibility of a combination of options.

### The Engineer

Included within the Green Book 2<sup>nd</sup> is an Engineer. This is a reflection of the intent of FIDIC for the contract to be used on larger projects with a greater value. As with many other FIDIC forms the Engineer has an obligation to determine any matter which is referred to it under the contract. The Engineer is required to act neutrally and, when acting under Sub-Clause 3.5, shall not be deemed to be acting for the Employer. If agreement cannot be reached then the Engineer must make a fair determination. The Engineer is required to give notice of each agreement or determination within 42 days of receipt of a detailed claim. Each party is then required to give effect to such agreement or determination until revised under the disputes clause.

### In the Round

The Green Book 2<sup>nd</sup> is three times the length of the Green Book 1<sup>st</sup> (there are 30 pages as opposed to 10 pages in the Green Book 1<sup>st</sup>). However, it is significantly shorter than the 1999 suite of contracts and the 2017 suite, which has over 100 pages. It is an accessible form of contract which unashamedly borrows things from the NEC forms of contract. The style is readable, and the provisions are often less detailed than other FIDIC forms, but they are generally clear and precise. Equally importantly it appears to share risk fairly between the parties and does not place unnecessary and onerous obligations on the Contractor. I have often been critical of the FIDIC forms; however, this contract deserves credit. It is likely to be used not just for contracts up to US\$ 10 million but for contracts with much higher amounts.



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