

FIDIC-Green Book: The Short Form of Contract 2nd Edition¹

FIDIC, the International Federation of Consulting Engineers, is publishing its Green Book in January 2022. The 2nd edition has been drafted by experienced experts under the general direction of the FIDIC Contracts Committee. COMINDIS Partner Dr. Eric Decker had the privilege to be one of the friendly reviewers of the draft documents and to provide his remarks to the drafting team.

The FIDIC Green Book has been published in its first edition in the year 1999. So, it is a landmark that after more than 22 years a second edition has been created.

Principle Approach

The FIDIC colour schemes include, inter alia, the FIDIC 2017 Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (Red Book) and the FIDIC 2017 Conditions of Contract for Plant and Design-Build (Yellow Book). In the plant engineering business, the FIDIC Yellow Book plays an important role. FIDIC considers now the Green Book as an alternative also for major projects, where it is not deemed required or relevant to mobilise contract administration and management resources as required under the Yellow and Red Book. The contract mechanisms are simplified, and the wording is shorter. Notwithstanding, also the Green Book is not really a short contract. The Contract Agreement itself and the General and Particular Conditions including the Annexes with Model Forms (e.g. for the Guarantees) comprise 57 pages.

Scope of works

One of the most critical issues in plant engineering and construction contracts is always a concise description of scope of works. The FIDIC Green Book opens a certain flexibility to allocate the design responsibility. In principle, it was drafted to cover the scenario that the Contractor constructs the works in accordance with the Employers design, however, the Contractor might be required to provide some or all of the design. It is worth mentioning, that FIDIC considers the burden of a "fit for purpose" obligation, and strongly recommends a clearly identified, defined and described specific "purpose" for which the facility/works will be used. However, in the absence of such clear description, the Contractor shall be responsible for the Works being fit for their "ordinary purposes". It goes without saying that such fall-

¹ Please be aware that this publication shall not be taken as a legal advice. Any project requires intensive legal review and negotiations with the contractual partner.

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back clause leaves space for interpretation what the “ordinary” purpose of such plant/facility is.

Valuation of works

The Green Book describes different methods of valuation of works, e.g. a lump sum remuneration (single or stage payments or bill of quantities), remeasurement with bill of quantities, cost plus methodology or a combination of such methods.

Variations

The Engineer may either instruct variations bindingly with the required changes at any time prior to taking over or he might request from the Contractor first a proposal including a description of varied works and an adjustment for the time for competition and the Contract price. In case of an instruction, the Contractor must execute the variation, even if the valuation of the variation is not completed or in case a dispute arises. Thus, the instruction of a variation is a sharp sword and might burden a significant risk on Contractor’s side. The Contractor might reject the instruction if it was unforeseeable having regard the scope and nature of works described in the specification or if it will adversely affect Health, Safety and Environment duties.

Time for completion, delays, delay damages and prolongation costs

As usual in plant engineering and construction, the Green Book contemplates delay damages (i.e. liquidated damages for delay) per day, which shall be stated in the contract data. The delay damages shall not exceed the maximum amount stated in the contract data (cap). Delay damages are the only damages due from the Contractor for such default (sole remedy), unless the contract is terminated for cause. In many jurisdictions the liquidated damages amount must be a reasonable and genuine pre-estimate of the anticipated loss likely caused to the Employer. It is highly recommendable – also recommended by FIDIC – to get legal advice on the amount and cap of delay damages to avoid the unenforceability under the applicable substantive law.

The FIDIC Greenbook introduces the first time the concept of “predetermined prolongation costs”, whereas the prolongation costs mean indirect costs for on-site and off-site overhead costs associated with a compensable EoT (Extension of Time). The idea behind this approach is to avoid costly and time-consuming battles of experts in arbitration, especially by the involvement of quantum experts. FIDIC considers such evidentiary complications as incompatible with the nature and size of projects on which the Green Book targets. This way is promising because the parties may focus on the project implementation instead of fighting laboriously and cost-intensively over amounts of overhead whose basis of claim exists in any case on the merits.

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In opposite to a compensable delay, the Green Book foresees for excusable delays (e.g. natural exceptional events, such as floods, earthquakes etc.) an entitlement for extension of time (EoT) only. A further advantage of FIDIC's Green Book is a clear allocation of Employer's risks and corresponding Contactor's entitlements for costs and EoT, costs plus profit and EoT or EoT only. The risk allocation is summarized in a specific table.

Claim procedures

The claim procedure is the same, both for the Employer and the Contractor, with short deadlines (28 days for claims notice and 56 days for full claim). The claims procedure foresees not a waiver or time baring, in case the deadlines have not been met. FIDIC reasoned this deviation to other FIDIC books with the argument that the Parties might not be able to engage the same level of contract administration. However, failing the deadlines might be taken into consideration by the engineer, if and to the extend such delay prevented or prejudiced proper investigation or mitigation of the effects of the claim.

Insurance Requirements

The FIDIC Green Book foresees some new stipulations for insurance related matters. First, a useful table is provided in the contract data, summarizing the insurance requirements. The FIDIC user shall complete this table by inserting the respective insurance sums, the deductibles, and exceptions (if any). It is suggested to get expert advise on insurance law, to avoid ambiguities or loopholes. Second, another new mechanism is the insurance certificated to be issued by the respective insurer. Although certainly a good idea, the practice will show whether insurers in general are willing to confirm the insurance coverage based on such model declarations. We rather believe that insurers will be reluctant to take any risks of a shortfall or discrepancy between the contractual requirements and the insurance policies.

Another critical point is the disclosure of insurance policies itself. The policies - especially liability and professional indemnification and EAR/CAR policies are very comprehensive and highly sophisticated. The policy even might include business secrets, such as commercial conditions, the Contractor doesn't wish to disclose. Therefore, the entitlement of the Employer under the FIDIC Green Book to require the disclosure of the full policy (not only the certificate) should be amended in the Particular Conditions in many cases.

Dispute Resolution Mechanisms

The dispute resolution clause under the FIDIC Green Book is a multi-tier mechanism. It starts with an adjudication proceeding, followed by an ICC arbitration under the expedited rules (independent from the contract value). Given the complexity of project related disputes upon delays and related EoT, concurrency, disruption, and comparable issues, it is rather doubtful whether the Parties should rely upon the

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expedited proceedings in every case. Even the ICC follows a dispute value related determination. Only proceedings not exceeding a value in dispute of USD 3 Mio. (if the arbitration agreement was concluded on or after 1 January 2021)² are to be handled under the expedited proceedings, unless the Parties declare an opt out.

Another issue is the lack of venue. FIDIC explains that the FIDIC Green Book left the venue of arbitration intentionally open, to leave this to the decision of the International Court of Arbitration. It appears rather not consistent at the one side to apply expedited proceedings for any disputes and at the other side to leave the place of arbitration open, to get it determined by a decision of the ICC Court. Thus, it seems recommendable to amend the dispute resolution clause accordingly. This applies also to the adjudication clause if the applicable law either prevents / limits an adjudication or foresees special rules for adjudication like in the UK.

Summary

In summary the FIDIC Green Book constitutes a sound alternative to the more complex Red and Yellow Book, even in more complex projects. It comprises some excellent new mechanisms and clauses supporting the Parties in using a well-balanced and practicable model agreement. In plant engineering projects there are no "one fits all" solutions, consequently an amendment by tailored particular conditions is advisable.

In case of any requests please approach our COMINDIS Partners. COMINDIS is a specialized law firm in plant engineering and infrastructure.

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² The threshold is USD 2,000,000, in case the arbitration agreement was concluded on or after 1 March 2017 and before 1 January 2021.