FIDIC Green Book 2021 – Short and Simple?

Written by Edward Corbett

As one of the drafters of the Green Book 1999, the author of this article is biased in favour of the Green Book 2021. Despite that, it seems a pity that the Green Book 2021 did not get its own colour and title, such as the Intermediate Form of Contract. There is room in the market for both an updated short form and an intermediate form.

The stand-out feature of the Green Book 2021 is the Prolongation Cost provision. This liquidates the Contractor's entitlement. This is a simple and attractive solution to an often-complex question but raises some questions: -

- Are the amounts payable appropriate?
- What about concurrency?
- What about damages for breaches causing delay?

The Scheme – appropriate?

20% of the Contract Price is treated as time-related preliminaries. This amount is divided by the Time for Completion to produce a daily rate. The project is divided into three equal parts by value: -

- First third, the Contractor gets 60% of the daily rate;
- Middle third, it gets 125%; and
- Final third and beyond, it is back to 60%.

This assumes that the indirect site costs and overheads will be greatest in the middle of the project, over twice the amount at the beginning and end. The Guidance Notes do not say what sort of project the drafters had in mind[1]. Buildings, for example, tend to need the most supervision at the end, but the tower cranes can be demobilised once the building is weathertight. The curve of indirect costs on civil projects tends to be relatively flat.

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Where Bills of Quantities include Preliminary and General sections, the time-related costs are normally quoted for the planned duration of the project. So, it is difficult to see the justification for the 60/125/60 regime.

FIDIC reminds users that parties can adjust the scheme. But the question lingers as to why the complexity of a variable percentage of the daily rate was introduced in the first place – in a form aiming for simplicity. A standard daily rate would have been fine.

What about Concurrency?

When a Contractor's own problems mean that it would complete late anyway, it is now generally accepted that it gets Prolongation Cost only from the date it would have finished "but for" the Employer delays. Otherwise, the recovery of Prolongation Cost is a windfall, not a loss caused by the Employer delay. The Contractor normally receives an extension of time ('EOT') but no money.

[1] Other than it is intended for projects where the perceived level of risk is low, and/or where the parties wish to use a form which is simple and does not require significant contract administration and management resources.

How does the Green Book 2021 deal with this issue? The general conditions do not refer to concurrency. The Guidance Notes to Clause 11 refer users to the governing law of the contract and point out that the applicable rules on concurrency may impact the operation of the scheme. This seems like a cop-out, particularly if the express terms provide for payment regardless of concurrency.

The express terms of Clause 11 seem clear:

> "… when the Contractor's entitlement is for "Cost Plus Profit and/or EOT" or for "Cost and/or EOT", then the Contractor is entitled to an EOT, and to Cost or Cost Plus Profit (as the case may be) which include Prolongation Cost over the duration of such EOT (i.e. resulting from a compensable delay);"

This language overrules the consensus of time but not money and gives Prolongation Cost regardless of concurrency for Employer's Risks, which include the usual claim headings including breach by the Employer but not Variations. Was this really intended?

What about Variations?

> "Valuation of Variations shall take due regard of the associated Prolongation Costs, if any." (Sub-Clause 7.2.3)

This language permits the usual consideration of causation and concurrency on the basis of "if any": the Contractor's own delays could prevent there being "any" Prolongation Cost "associated" with the Variations. Having a mixed regime where concurrency is partially arguable could make for some complex disputes.

And damages?

One of the Employer's Risks in Clause 11 is *"any delay, impediment or prevention caused by or attributable to the Employer … or any other failure of the Employer … to fulfil their obligations"*. So, breaches causing delay are part of the scheme.

In some jurisdictions, liquidated amounts attributable to breaches of contract such as delay damages are subject to review and adjustment by courts and arbitrators. This could well apply when Prolongation Cost is founded on an Employer's Risk amounting to a breach.

If the Contractor's actual Prolongation Cost arising from a breach exceeds the liquidated Prolongation Cost, is there a route to recovery of the excess via damages? There is exclusive remedy wording in the Contract Data where Prolongation Cost is specified:

> "Prolongation Cost shall be the only compensation due from the Employer to the Contractor for an EOT resulting from a compensable delay. For the avoidance of doubt, this provision shall not affect the Contractor's compensation rights for other Cost (if any) such as disruption Cost (if any)."

So, it appears that the Contractor cannot claim the excess over its Clause 11 recovery. But it can claim, by way of damages, any disruption, acceleration, or other costs caused by the Employer event.

Conclusion

The FIDIC Green Book 2021 is a pleasing contrast to the over-long and convoluted 2017 forms. It provides grounds for hope that FIDIC will change direction and draft shorter, simpler forms of contract in the future.

The Prolongation Cost regime is a welcome effort at simplification. It could have been simpler still with a single, standard daily rate.

The different treatment of Employer's Risks and Variations when it comes to concurrency looks like an oversight.

Overall, the Green Book 2021 is proving popular in the industry, where short and simple contracts are much appreciated.

For further information on the FIDIC Green Book 2021, see James Reader's article "As simple as it seems? - an analysis of the prolongation costs clause in the FIDIC Green Book 2021", and Victoria Tyson's article "FIDIC Contracts – Introduction to the FIDIC Green Book 2021" (which may be found on Lexis Nexis).

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