

## As simple as it seems? - an analysis of the prolongation costs clause in the FIDIC Green Book 2021

Written by James Reader

This article reflects on the introduction of an automatic contractual mechanism for calculating prolongation costs into the Green Book 2021 and will consider whether it will remove the expense of experts and lawyers from the process of claiming prolongation costs.

### Purpose of the Clause

FIDIC's formula was designed to make it easier and quicker for contractors to claim prolongation costs, associated with an EOT, which arise from an employer's risk, as defined in Sub-Clause 11.1 of the Green Book 2021. The overarching aim is to ensure that contractors remain solvent.

### Procedure Rainbow Suite 1999

Contractors using the FIDIC Red, Yellow or Silver Books 1999 who, on the occasion of an employer's risk event under Sub-Clause 17.3, suffer delay and/or incur Cost from rectifying the damage, are required per Sub-Clause 17.4 to raise a claim via Sub-Clause 20.1. In practical terms, this means time and expense is required to collate supporting documentation etc. to substantiate and prove the Cost actually incurred.

In summary, the contractor has, under the 1999 Suite of Contracts, 28 days from the date it became aware (or should have become aware) of the associated event or circumstance to raise its claim (Sub-Clause 20.1). Should the contractor fail to meet this deadline, their claim will fail.

Within 42 days of raising the initial claim notice, the contractor must submit a fully detailed claim together with supporting documentation. The engineer (Red and Yellow Books 1999) or employer (Silver Book 1999) will then proceed to make a determination under Sub-Clause 3.5. The outcome is often disputed.

Disputes arising from the process often involve adjudication and arbitral proceedings, with lawyers and quantum expert witnesses being engaged on either side of the case. The process can be lengthy,



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acrimonious, and expensive; none of which is conducive to effective collaboration and the finalisation of the project.

### Green Book 2021

The Green Book 1999 was designed for engineering and building works of relatively small value, although it could be used for higher value works. It was perceived as a straightforward but flexible short form contract.

It seems appropriate for FIDIC to introduce a streamlined process for claiming prolongation costs in the 2nd Edition of the Green Book, published in 2021. The overriding purpose of the new clause is to avoid the problems faced by those claiming under the FIDIC 1999 contracts, which FIDIC considers to be incompatible with the projects on which the Green Book is intended to be used. This is achieved by liquidating the prolongation costs and so removes the time and expense of substantiating the loss.

The 2nd Edition introduced a number of changes, not limited to the prolongation clause, and it is now seen as a viable alternative to the FIDIC Red Books. For more on the changes introduced in the FIDIC Green Book 2021, this author recommends Victoria Tyson's article [Introduction to the FIDIC Green Book 2021](#).



## The Prolongation Clause

The Green Book 2021 defines Prolongation Costs in Sub-Clause 1.1.35 as:

"on-Site and off-Site overheads associated with a compensable EOT, as stated in the Contract Data".

The Guidance to the Green Book 2021 describes these as indirect costs suffered by the contractor in the case of critical delay.

To make a claim, the delay must be an Employer's Risk, as defined in Sub-Clause 11.1. In another innovation, the risks have been tabulated in Sub-Clause 11.1.3. Prolongation Costs can only be claimed for the duration of the EOT for compensable delays where the contractor is entitled to:

- Cost Plus Profit and/or EOT;
- Cost and/or EOT; or
- Prolongation Costs where specified in the table.

The formula can be found on page C of the Particular Conditions where it states that:

"Prolongation Cost shall be the only compensation due from the Employer to the Contractor for an EOT resulting from a compensable delay".

Consequently, where the actual Cost is more than the amount recovered in the Prolongation Cost, the difference would not be recoverable.

Prolongation Costs are calculated as follows:

$$\text{Daily Rate} \times \left( \frac{\text{Percentage of Daily rate}}{\text{(Determined by reference to the value of completed works as a \% of the Contract Price)}} \right) \times \text{Period of Delay in Days} = \text{Prolongation Costs}$$

## Daily Rate

A daily rate for on-Site and off-Site overheads is calculated by reference to the Contract Price (Sub-Clause 1.1.9). The default rate is 20% of the Contract Price stated in the Contract Agreement (Sub-Clause 1.1.7), divided by the number of days in the Time for Completion (Sub-Clause 1.1.43). The parties can amend the percentage in the Contract Data should they consider another figure to be more appropriate.

## Percentage of Daily Rate

The contractor is entitled to a percentage of the daily rate dependant on the value of the works certified as complete at the time of the event per Sub-Clause 8.4.1. The formula is based on the premise that construction progress is a Gaussian function (a bell-curve).

Value of works completed as a % of the Contract Price	Percentage of Daily rate for use in calculations
00	25%
Greater than 00 and less than 33	60%
Greater than 33 and less than 66	125%
Greater than 66	60%

In response to criticism of the beta version of the contract, circulated pre formal publication, FIDIC stated that the parties would be free to amend the weightings.

## Period of Delay

Sub-Clause 11.1.3 states that Prolongation Cost will be included "over the duration of the EOT".

## Analysis

Streamlining the procedure for claiming prolongation costs fits in with the ethos of the simplified contract. The de-lawyering of the process, and removal of the need for expert witnesses should save time and money and avoid the parties digging in behind trenches of opposing views, as often occurs. The absence of a time-bar for initiating a claim means that a contractor would not lose an entitlement on account of a lack of notice.

Whilst the introduction of the prolongation clause has removed the difficulties of their substantiation there are a number of issues which still remain:

## Valuation of Completed Work

A key element of FIDIC's formula is the valuation of the works completed by the contractor. The author's experience on other FIDIC contracts is that tensions frequently develop between the contractor and the engineer/employer as to whether works have been completed.

Sub-Clause 8.4.1 requires the engineer to act fairly, but contractors often will argue that the engineer is not acting fairly and makes decisions which favour the employer.

If the contractor disputes the engineer's valuation, then they can raise a claim by giving timely notice



under Sub-Clause 13.1, subsequently substantiated by a fully detailed claim. Assuming that the engineer issues a determination which is unsatisfactory to the contractor, the matter will start on the stepped dispute resolution mechanism, for which the Prolongation Costs formula was created in part to avoid (Sub-Clause 14). With the mechanism activated, the door reopens to the involvement of lawyers and expert witnesses.

## Contract Price

Another frequent battleground between the parties is whether a variation has been issued or not, and the valuation of that variation. If there has been a variation, then this may lead to an increase in the Contract Price, which will in turn affect the level of Prolongation Costs. Note that Sub-Clause 7.2.3 requires valuations of variations to take due regard of Prolongation Costs, if any.

Where there is a dispute as to the valuation of a variation, or as to whether a variation has been instructed, the contractor can initiate a claim under Sub-Clause 13. If the engineer's determination does not resolve the matter, then the dispute resolution process can be activated (Sub-Clause 14), leading once again to consequences FIDIC wanted to avoid.

## Concurrent Delay

The automatic nature of FIDIC's formula does not resolve the problem of concurrent delay. It seems iniquitous for a contractor to be compensated automatically where an Employer's Risk event leads to Costs being incurred where at the same time a risk allocated to the contractor also leads to Costs.

FIDIC's explanation for not addressing the issue is set out in the guidance section of the Green Book 2021, where it states that concurrency of delays may be handled differently under different national laws. FIDIC also refer readers to the *Society of Construction Law Delay and Disruption Protocol* (2nd Edition, 2017). As Victoria Tyson notes in her article this is, perhaps, a missed opportunity. Much governing law gives authority to the express wording of a contract.

## Disruption Costs

The formula does not address all costs that flow from an Employer's Risk event, only indirect costs. FIDIC's formula specifically states that the:

"... provision shall not affect the Contractor's compensation rights for other Cost (if any), such as disruption Cost (if any)".

Any claims for disruption costs would not only need to be substantiated but care will need to be taken to avoid any overlap with the Prolongation Cost claim, by claiming erroneously for indirect costs.

## Conclusion

FIDIC's introduction of an automatic contractual mechanism for calculating Prolongation Costs should have made their calculation simpler, and removed the need for lawyers, experts, Dispute Boards, and arbitrators to get involved. In this author's view, the battleground has simply been moved elsewhere.

The ultimate arbiter of the success of the clause and whether it is modified, replaced, or wholly adopted by contracting parties, will be the industry. Feedback from the industry will determine if the clause is an aberration or if it has potential to be rolled out to other FIDIC suite contracts in future.

Howard Kennedy's International Construction Team has many years of experience in dealing with claims for prolongation costs. If you have issues relating to a claim for prolongation costs, whether in respect of the Green Book 2021 or any of the other FIDIC issued contracts, then contact us for advice.

**Please get in touch at [james.reader@howardkennedy.com](mailto:james.reader@howardkennedy.com) with your thoughts or to discuss any concerns.**

