

FIDIC contracts—introduction to the FIDIC Green Book 2021

Produced by LexisNexis in partnership with Victoria Tyson

This Practice Note is an introduction to the FIDIC Green Book 2021 (the Short Form of Contract). It is not a fully detailed clause-by-clause commentary.

In December 2021, FIDIC launched the second edition of the Green Book. For more information on the background to the release of the second edition of the Green Book, and the key differences between the first and second editions, see News Analysis: FIDIC Green Book 2021—what's changed?

For information on other contracts in the FIDIC suite, see:

- FIDIC contracts 2017 onwards—overview
- FIDIC contracts pre-2017 editions— overview

For what type of project is the Green Book suitable?

The FIDIC Green Book is primarily intended '*for projects where the perceived level of risk is low, and/or where construction parties wish to use a form which is simple to use and does not require significant contract administration and management resources*'. Its use is not restricted to simple or repetitive works and/or short duration and/or limited capital value projects. The Green Book is an alternative to the FIDIC Red or Yellow Book 2017. Like all the contracts in the FIDIC suite, the FIDIC Green Book is designed to be suitable for use on international projects.

References:

FIDIC Green Book (Short Form of Contract) 2021

PDF Format

The structure of the contract

The FIDIC Green Book is structured as follows (in order of priority):

- Contract Agreement (incorporating the Contractor's offer and the Employer's acceptance in a single document)
- Particular Conditions Part A - Contract Data



Victoria Tyson
Partner

T +44 (0)20 3755 5733

M +44 (0)7546 695 614

victoria.tyson@howardkennedy.com

- Particular Conditions Part B - Special Provision
- General Conditions
- Specification
- Drawings
- Schedules
- The Contractor's tendered design (if any)
- Any other documents forming part of the Contract

The priority of the documents is listed in the Contract Data rather than in the General Conditions.

The General Conditions are divided into 14 clauses:

- General Provisions
- The Employer
- The Engineer
- The Contractor



- Quality
- Time
- Variations
- Payment
- Taking-Over
- Suspension and Termination
- Risk and Responsibility
- Insurance
- Claims
- Disputes

Appended to the General Conditions is the Form of Adjudicator's Agreement.

The FIDIC Green Book also provides flow charts, detailed Guidance (which does not form part of the Contract Data) and sample forms including:

- Performance Security—Demand Guarantee
- Advance Payment Guarantee
- Retention Money Guarantee
- Payment Guarantee by Employer
- Insurance Certificate

In addition, there are many pro-forma FIDIC Forms of Communication (which do not form part of the contract).

Key features of the general conditions

The Employer

Clause 2 sets out some of the Employer's obligations.

The Employer must give the Contractor access to the Site (as defined), and also ensure that its personnel and other contractors co-operate. A failure to do so by the Employer or the Engineer (as part of the Employer's personnel) would fall under Sub-Clause 11.1.3 (j) which entitles the Contractor to Cost Plus Profit and/or EOT.

The Contractor is responsible for access outside of the Site, except where there is an '*Unforeseeable non-suitability or non-availability of an access route to the Site caused by the Employer or a third party*' under

Sub-Clause 11.1.3 (m) which entitles the Contractor to Cost (no profit) and/or EOT.

As in the FIDIC Red and Yellow Books 2017, the Employer must '*make available*' (rather than provide) to the Contractor all the relevant data in the Employer's possession, before the Base Date and (importantly) on a continuing and prompt basis throughout the course of the Works. The Contractor is responsible for interpreting that data. 'Data' is not a defined term but the clause limits the obligation to data on '*the topography of the Site and on the sub-surface, hydrological, climatic and environmental conditions at the Site*'. Whether or not something constitutes such data may be open to dispute. A failure to provide such data as prescribed would also fall under Sub-Clause 11.1.3 (j).

Under Sub-Clause 2.2.2 the Contractor is expressly deemed to have '*obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the tender or Works*'. Further, the Contractor shall be deemed to have '*inspected and examined the Site, access to the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the tender as to all matters relevant to the execution of the Works*'. Sub-Clause 2.2.2 is limited to '*the extent which was practicable (taking account of cost and time)*' and the deeming provision will not apply where it causes an obviously inappropriate result.

The Contractor may ask the Employer to provide '*reasonable evidence*' that financial arrangements are being made and maintained (as in the FIDIC Red Book 1999). Unlike the FIDIC Red or Yellow Books 2017, this is not predicated on a Variation, failure to pay, or material change in the Employer's financial arrangements. The Employer has 28 days (4 weeks) to provide reasonable evidence, failing which the Contractor may take the steps outlined in Sub-Clause 10.1 [*Suspension*], and if the failure to provide reasonable evidence is a material breach, proceed under Sub-Clause 10.2. [*Termination*].

The FIDIC Green Book 2021 does not include the clauses on 'Assistance', 'Employer's Personnel and Other Contractors', 'Site Data and Items of Reference' and 'Employer-Supplied Materials and Employer's Equipment' found in the FIDIC 2017 editions.

The Engineer

The FIDIC Green Book 2021 envisages an Engineer. This was not the case in the FIDIC Green Book 1999.



The Engineer must be named in the Contract Data and forms part of the Employer's personnel (Sub-Clause 1.1.22).

As in the FIDIC Red and Yellow Books 2017, the Engineer (or, if a legal entity, the Engineer's authorised person who is the natural person appointed to act on the Engineer's behalf) must have suitable 'qualifications, experience and competence' to act as an Engineer, and be fluent in the language of the Contract. There is no express requirement for the Engineer to be a 'Professional Engineer' as in the FIDIC Red and Yellow Books 2017 but under Sub-Clause 3.2.1 the Engineer must 'act as a skilled professional' (which is also a requirement of Sub-Clause 3.2 of the FIDIC Red and Yellow Books 2017).

As in the other FIDIC forms, the Engineer's role is to:

- act on behalf of the Employer as its agent (other than as stated under Sub-Clause 3.5)
- administer the Contract as it is written or can be interpreted, and
- make determinations

The Guidance states that in performing the Engineer's duties, the Engineer should take due regard of 'FIDIC's Code of Ethics for consulting engineers', and its duty to prevent corruption and bribery as described in 'FIDIC Guidelines for Integrity Management (FIM) in the consulting industry, Part 1—Policies and principles first edition 2011' and 'FIDIC Guidelines for Integrity Management System in the Consulting Industry 1st Ed (2015) Part 2, FIMS Procedures'

Placing limits on the Engineer's authority is not encouraged.

Engineer's Instructions

Sub-Clause 3.3 [Engineer's Instructions] permits the Engineer to issue instructions. An instruction must comply with Sub-Clause 1.3 [Communications] and be in writing. If an instruction constitutes a Variation, Clause 7 [Variations] applies.

Agreement or Determination

The provisions for agreement or determination by the Engineer apply not just to claims under Sub-Clause 13.2 but also to:

- Extension of Time for Completion under Sub-Clause 6.4

- Valuation of Variations under Sub-Clause 7.2, and
- Payment after Termination under Sub-Clause 10.4

When exercising authority under Sub-Clause 3.5 [Agreement or Determination], the Engineer must act 'neutrally' and 'shall not be deemed to act for the Employer'. The Engineer cannot delegate its duties under this Sub-Clause, it is expressly forbidden under Sub-Clause 3.1.3.

The Engineer has 42 days (6 weeks) from receipt of a fully detailed claim (or Variation proposal under Sub-Clause 7.1.1(a)) to give notice of an agreement or determination. This is shorter and simpler than in the FIDIC Red and Yellow Books 2017, where there are two separate 42-day periods, (i) 42 days (6 weeks) for the Engineer to give Notice of the Parties' Agreement if agreement is achieved, and if no agreement is reached (ii) a further 42 days (6 weeks) for the Engineer to give Notice of the Engineer's Determination. Meaning, the time in which the Engineer must make a determination in the FIDIC Red and Yellow Books 2017 is twice as long, ie 84 days (12 weeks).

Each Party must give effect to each agreement or determination unless and until revised under Clause 14 [Disputes]. However, unlike the FIDIC Red and Yellow Books 2017, there is no requirement to issue a Notice of Dissatisfaction if a Party is dissatisfied with the Engineer's determination.

The Contractor

Many, but not all, of the Contractor's obligations are set out in Clause 4.

The Contractor must 'execute the Works in accordance with the Contract' and is 'responsible for the adequacy, stability and safety of all Site operations and of all methods of construction'. It must correctly position the Works and verify any original setting out points, lines and levels of reference. However, errors in the original setting out points etc specified in the Contract or notified by the Engineer are Employer's risk under Sub-Clause 11.1.3 (d).

While the Contractor is responsible for the Contractor's Documents and the Temporary Works, it is not responsible for the design or specification of the Permanent Works. Responsibility for the temporary stages of the Permanent Works is arguably ambiguous and open to dispute.



Further, the Contractor must not '*interfere unnecessarily or improperly with the convenience of the public*'.

The Contractor has an express duty of co-operation (for example, with the Employer's personnel, with any other contractors employed by the Employer, and with any authority or utility company working on or near the Site). But any delay, impediment or prevention caused by or attributable to the Employer or the Employer's personnel etc entitles the Contractor to Cost Plus Profit and/or EOT under Sub-Clause 11.1.3 (j). Further, any Unforeseeable (defined) delay caused by or attributable to the Employer's other contractors, or utility companies, on or near the Site entitles the Contractor to Cost Plus Profit and/or EOT under Sub-Clause 11.1.3 (k).

The Contractor is responsible for the security of the Site and for the care of the Works, the Goods and the Contractor's Documents, from the Commencement Date to the date of issue, or deemed date of issuance, of the Taking Over Certificate. But loss and/or damage to the Works, Goods or Contractor's Documents caused by any of the following is an Employer's risk, entitling the Contractor to Cost Plus Profit and/or EOT, as a Variation, if an instruction to rectify is given by the Engineer:

- an Exceptional Event, under Sub-Clause 11.1.3 (a)(i)
- an operation of forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions, under Sub-Clause 11.1.3 (a)(ii)
- interference, whether temporary or permanent, with any right of way, light, air, water or other easement (other than that resulting from the Contractor's method of construction) which is the unavoidable result of the execution of the Works in accordance with the Contract, under Sub-Clause 11.1.3 (a)(iii)
- fault, error, defect or omission in the design of the Works attributable to the Employer, under Sub-Clause 11.1.3 (a)(iv)
- use or occupation by the Employer of any part of the Permanent Works, except as specified in the Contract, under Sub-Clause 11.1.3 (a)(v)

- any act or default by the Employer, the Employer's personnel or the Employer's other contractors, under Sub-Clause 11.1.3 (a)(vi)

This list is similar to that at Sub-Clause 17.2 [*Liability for Care of the Works*] of the FIDIC 2017 editions.

The Contractor is responsible for its subcontractors including its agents and employees. It may not subcontract the whole of the Works, and it may not subcontract any part of the Works without the consent of the Engineer (except for sub-contractors named in the Contract Data or for suppliers of Materials). A breach will fall under Sub-Clause 11.1.3 (j) and a ground for immediate termination under Sub-Clause 10.2.3 (a). If a subcontractor's obligations to the Contractor extend beyond the expiry of the relevant Defects Notification Period ('DNP'), the Contractor must assign the benefit of that obligation to the Employer. There is a similar provision at Sub-Clause 4.5 of the FIDIC Red Book 1999. This has not been carried through to the FIDIC Red or Yellow Books 2017 but the Guidance Note to the FIDIC Red Book 2017 provides optional additional wording for inclusion at the end of Sub-Clause 5.1, while the Guidance Note to the FIDIC Yellow Book 2017 sets out optional additional wording for inclusion at the end of Sub-Clause 4.4.

If it is desirable to use or encourage the Contractor to employ local contractors, the Guidance provides sample wording. The FIDIC Red Book 1999 provides similar Guidance as does the Guidance for the FIDIC 2017 editions. The FIDIC Pink Book 2010 goes further, and at Sub-Clause 6.1 states '*The Contractor is encouraged, to the extent practicable and reasonable, to employ staff and labour with appropriate qualifications and experience from sources within the Country*'.

The Contractor must deliver to the Employer a performance security in the amount set out in the Contract Data, within 28 days (4 weeks) after the date the Contract comes into effect. There are limits on the Employer's ability to make a claim under the performance security. The Employer must return the performance security within 21 days (3 weeks) after receiving the Performance Certificate.

Before a Contractor can start the Works, the Engineer must review the Contractor's Documents and, within the prescribed period, give (i) a notice of No-objection (with or without comments), or (ii) a notice that the Contractor's Documents fail to comply with the



Contract (giving reasons) following which the Contractor must rectify and resubmit them. If the Engineer fails to give a notice, a notice of No-objection is deemed to have been given so that any delay by the Engineer is no excuse for a late start to the Works.

Contractor's Design

The Guidance states that the FIDIC Green Book has been drafted on the principle that the Contractor constructs the Works in accordance with the design provided by the Employer, although some Contractor design might be required. The FIDIC Green Book may also be used in a full Contractor's design scenario for which some suggested amendments are given in the Guidance.

Where the Contractor designs the Works, then it undertakes that the Works will be in accordance with all applicable Laws and the documents forming the Contract (Sub-Clause 4.7.1). A change in Laws of the Country (or judicial or official governmental interpretation of such Laws) after the Base Date entitles the Contractor to Cost (but not profit) and/or EOT under Sub-Clause 11.1.3 (h).

The Works 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 in the Contract then they are required to be fit for their ordinary purpose(s). For more information on fitness for purpose obligations, see Practice Note: Fitness for purpose in construction contracts.

Quality

Clause 5 provides for quality. Most of the detailed obligations in respect of this will be set out in the Specification.

Generally, the Contractor must execute the Works *'in the manner (if any) specified in the Contract, and in a proper workmanlike and careful manner in accordance with recognised good practice'*.

Prior to the expiry of the DNP, the Engineer may instruct the Contractor to remedy any defect or damage in any part of the Works or the Contract Documents. During the DNP the Employer has the same power. The Contractor must comply as soon as possible.

If the defect is a Contractor's risk, the Contractor must pay for the remedial works. If the defect is an

Employer's risk, the instruction will constitute a Variation under Clause 7 [Variations].

In some circumstances, the Employer will be entitled to an extension of the DNP in accordance with Sub-Clause 5.5.2.

If the Contractor fails to remedy a defect for which it is responsible when instructed to do so, the Employer may (subject to Clause 13 [Claims]):

- carry out the remedial work itself at the Contractor's cost (not defined); or
- accept the defect for a reasonable reduction in the Contract Price

The Engineer must issue a Performance Certificate within 21 days (3 weeks) after the expiry of the DNP and after the Contractor has supplied all the Contractor's Documents, completed and tested all the Works, remedied any defects and cleared the Site.

Time

Execution of the Works

The Commencement Date is, unless otherwise stated in the Particular Conditions, 28 days (4 weeks) after the date when the Contract comes into effect (Sub-Clause 6.1.1). The wording in the precedent form Contract Agreement at the front of the FIDIC Green Book states that *'The Contract comes into effect on the date when the Contractor receives one original of this Contract Agreement signed by the Employer, which date shall be immediately confirmed by the Contractor to the Employer'*.

The Engineer must give the Contractor a Sub-Clause 6.1 notice at least 7 days (1 week) before the Commencement Date. In the FIDIC Red and Yellow Books 2017 it is 14 days (2 weeks).

Programme

14 days (2 weeks) from the Engineer's Sub-Clause 6.1 notice (or as otherwise specified in the Contract Data) the Contractor must submit an initial programme (in the form specified in the Contract Data) for the execution of the Works.

If the programme does not comply with the Contract, the Engineer may give notice stating the extent to which it does not comply, and the Contractor must submit a revised programme within 14 days (2 weeks).



Sub-Clause 6.2.3 expressly states that no work shall be carried out on the Site outside the working hours stated in the Contract Data, unless otherwise consented to by the Engineer.

Advance Warning

Under Sub-Clause 6.3 [*Advance Warning*] the Parties are obliged to warn 'of any known or probable future events or circumstances which may delay or disrupt the execution of the Works or increase the Contract Price'. This is a narrower obligation than the equivalent under the FIDIC Red and Yellow Books 2017. There is no time limit or express sanction for failing to warn. Giving advance warning may impact the timing of a notice under Sub-Clause 13.1 [*Right to Claim*] which must be given within 28 days (4 weeks) after the claiming Party 'became aware, or should have become aware' of the event or circumstance giving rise to the claim.

Extension of Time

The definitions first adopted in the FIDIC 2017 editions for Extension of Time/EOT, and Date of Completion have been retained.

The grounds for an EOT under Sub-Clause 6.4 are simplified and comprise: (a) Employer's Risks (defined as those listed in Sub-Clause 11.1); (b) Variations; and (c) a cause of delay giving an entitlement to an extension of time under the Contract conditions.

The Guidance states that EOT applies if completion is (or will be) delayed by any of the listed causes and, therefore, if there is float in the Contractor's programme, it will be preserved and owned by the Contractor 'contrary to some industry literature stating that the float is to be shared between the Contractor and the Employer'. However, unlike the FIDIC 2017 editions, the FIDIC Green Book does not expressly address concurrent delay

The causes listed as Employer's Risks in Sub-Clause 11.1 which are shared risk giving the Contractor an entitlement to EOT only include:

- any Unforeseeable (defined) adverse climatic conditions at Site itself, under Sub-Clause 11.1.3 (f)
- delays caused by authorities, under Sub-Clause 11.1.3 (g)
- any Unforeseeable (defined) shortages in the availability of personnel or Goods caused by epidemic or governmental actions, under Sub-Clause 11.1.3 (l)

These causes are similar to those at Sub-Clauses 8.5 [*Extension of Time*] and 8.6 [*Delays Caused by Authorities*] of the FIDIC Red and Yellow Books 2017. There are also many causes listed which are Employer Risk, including the catch all provisions for Employer prevention etc at Sub-Clause 11.1.3 (j) giving the Contractor entitlement to Cost Plus Profit and/or EOT.

Delay Damages

Delay damages are set out in the Contract Data. In the FIDIC Red and Yellow Books 1999 editions they are calculated as a percentage of the final Contract Price and often capped. However, due to differences in governing laws, FIDIC moved to a more general approach in the FIDIC 2017 editions which it has carried through to the FIDIC Green Book.

New wording has been introduced at Sub-Clause 6.5.2 so that delay damages are reduced proportionally after taking-over.

Delay damages are the exclusive remedy for the Employer for the financial consequences of delay, other than in the case of termination for Contractor default. They protect the Employer from the consequences of time at large. For more information, see Practice Note: Liquidated damages in construction contracts.

Exceptional Events

Exceptional Events have been relocated to Sub-Clause 6.6 (from Clause 18 in the FIDIC 2017 editions). 'Exceptional Event' is defined in Sub-Clause 1.1.23 in such a way that it does not actually need to be exceptional, just:

- an event or circumstance
- beyond a Party's control
- such Party could not reasonably have provided against before entering into the Contract
- having arisen, such Party could not reasonably have avoided or overcome, and
- is not substantially attributable to the other Party

The list of example Exceptional Events has been removed from the General Conditions but is mentioned in the Guidance.



The Exceptional Event must prevent performance of the affected Party's obligations. The affected Party is excused from performance of its obligations for the duration of the prevention (subject to notice and reasonable endeavours to avoid or minimise the effects). If 'execution of substantially all the Works in progress' is prevented for 84 continuous days, ie 12 weeks (or 140 non-continuous days, ie 20 weeks) due to the same Exceptional Event, there is an entitlement to issue a notice of termination.

Where an Exceptional Event causes loss and/or damage to the Works, Goods or Contractor's Documents, and an instruction to rectify is given by the Engineer, the Contractor is entitled to Cost Plus Profit and/or EOT, as a Variation (Sub-Clause 11.1.3 (a) (i)).

Responsibility for a man-made Exceptional Event (other than for loss and/or damage to the Works, Goods or Contractor's Documents) which actually prevents the Contractor from performing any of its obligations is allocated under Sub-Clause 11.1.3 (b). Essentially it is the Employer's risk where the Exceptional Event incurs inside the Country (as defined) entitling the Contractor to Cost (no profit) and/or EOT, and a shared risk where the Exceptional Event incurs outside the Country (as defined) entitling the Contractor to EOT only.

A natural Exceptional Event (other than for loss and/or damage to the Works, Goods or Contractor's Documents) which actually prevents the Contractor from performing any of its obligations is a shared risk under Sub-Clause 11.1.3 (c) entitling the Contractor to EOT only.

Variations

"Variation" is a defined term and means "any change to the Specification and/or the Drawings or the Works, which is instructed as a variation under Clause 7 [Variations]". (Sub-Clause 1.1.45.) This is similar to the FIDIC 2017 editions post errata, but expressly includes the Drawings.

A Variation may comprise, for example:

- changes in quantities
- changes to quality and other characteristics
- changes to levels, positions and/or dimensions

- omission of work, unless it is to be carried out by others
- additional work, Plant, Materials or services necessary for the Permanent Works including tests; or
- changes to sequence of timing of the Works.

A Variation may not comprise, expressly (Sub-Clause 7.1.2):

- the omission of any work which is to be subsequently carried out by the Employer or others unless otherwise agreed, unless the Employer pays the Contractor Cost plus 10% for the omitted work
- varied work which was Unforeseeable (as defined with reference to the Base Date, ie 28 days (4 weeks) before submission of the tender) having regard to the scope and nature of the Works described in the Specification, or
- varied work which will adversely affect the Contractor's ability to comply with Sub-Clause 5.2 [Health, Safety and Environment]

Variations may be initiated in one of two ways:

- the Engineer may instruct a Variation which the Contractor will be bound by (Sub-Clause 7.1.1 (a)), or
- the Engineer may request a proposal for a Variation from the Contractor (Sub-Clause 7.1.1 (b))

If the Contractor does not wish to submit a proposal when requested to do so, it must provide reasons why it cannot so do with reference to the three subparagraphs at Sub-Clause 7.1.2.

Unlike the FIDIC Red and Yellow Books 2017, the Contractor may not initiate its own proposals.

There is a useful flow chart detailing the 'Variation Procedure' which is located towards the front of the FIDIC Green Book.

Those drafting the FIDIC Green Book 2021 did not consider that either value engineering or provisional sums clauses were required as core provisions. The Guidance states that if provision is required, reference might be made to Sub-Clauses 13.2 and 13.4 of the FIDIC Red Book 2017.



Valuation of Variations

In the event of a Variation, the Engineer will agree or determine the adjustment in the Contract Price and/or an EOT under Sub-Clause 3.5. The Contractor does not need to comply with the claim procedures under Clause 13 [Claims].

Adjustments to the Contract Price are valued as follows (in order of priority according to the Guidance):

- at a lump sum price agreed between the Parties (the Guidance states that the Parties 'shall endeavour to agree a lump sum price' but the wording in Sub-Clause 7.2.2(a) does not express such obligation)
- using appropriate rates or prices in the Contract (if any)
- in the absence of appropriate rates or prices:
- based on the rates or prices in the Contract for similar work to be carried out under similar conditions, or failing which,
- at appropriate new rates, derived from the Cost Plus Profit of executing the work, or
- if the Engineer so instructs, at daywork rates (if any) set out under the Contract for which the Contractor must keep records of hours of labour and Contractor's Equipment, and of Materials used

Sub-Clause 7.2.3 states that '*Valuation of Variations shall take due regard of the associated Prolongation Cost, if any*'. In other words, delays caused by Variations are compensable. This wording is a welcome addition. While it is obvious that the Contractor ought to be entitled to prolongation costs for delay caused by a Variation, the FIDIC Red Book 1999 includes no explicit wording and Sub-Clause 13.3.1 (ii) in the FIDIC 2017 editions is not explicit enough.

Under Sub-Clause 11.1.3 (n) the Contractor is entitled to EOT and Prolongation Cost for any re-measurable item of work where the measured quantity of that item is more than 10% of the estimated quantity stated in the Contract (after taking account of any significant reduction in the measured quantities of other items of work).

Changes in Cost and changes to the Laws of the Country are provided for respectively in Clause 8

[Payment] and Clause 11 [Risk and Responsibility]. See below.

Payment

There is a useful flow chart detailing the '*Typical Sequence of Payment Events Envisaged in Clause 8*' which is located towards the front of the FIDIC Green Book.

The Contract Price is defined in Sub-Clause 1.1.9 as '*...the agreed amount stated in the Contract Agreement for the execution of the Works, and includes adjustments (if any) in accordance with the Contract*'.

The Works are valued, and paid for, at the times stated in the Contract Data (subject to contractual adjustments).

Like the NEC forms, the Contract Data includes an Options clause. The Options are:

- Option A - Lump sum price with single payment
- Option B - Lump sum price with stage payments
- Option C - Lump sum price with bill of quantities
- Option D - Remeasurement with bill of quantities
- Option E - Cost plus
- Option (other) - to be specified by the Parties

There is also the possibility of a combination of Options.

Advance Payment

If an advance payment is specified in the Contract Data, it ought to be expressed as a percentage of the Contract Price stated in the Contract Agreement. Typically, this is 10%–20%.

The Engineer will certify it within 7 days (1 week) after receipt of (i) a copy of the Contractor's application for advance payment, (ii) the advance payment guarantee under Sub-Clause 8.2.2 (if required in the Contract Data), and (iii) the performance security (if any) under Sub-Clause 4.5.1. A failure to do so by the Engineer (as part of the Employer's personnel) would fall under Sub-Clause 11.1.3 (j) which entitles the Contractor to Cost Plus Profit and/ or EOT. Payment is in the currencies stated in the Contract Data.



The advance payment may only be used to finance the Contractor's obligations under the Contract. In other words, the money cannot be used to fund other projects.

The amount of the advance payment certificate may be reduced progressively by the amount repaid by the Contractor as stated in the payment certificates.

The amount certified in the advance payment certificate will be paid within 28 days (4 weeks) after the Employer receives (i) the Contractor's application for advance payment, (ii) the advance payment guarantee under Sub-Clause 8.2.2 (if required in the Contract Data), and (iii) the performance security (if any) under Sub-Clause 4.5.1.

Any outstanding balance is immediately repayable on issue of the Taking-Over Certificate for the Works, or before termination of the Contract.

Payment process

To trigger payment, the Contractor issues to the Engineer an application (ie a statement and supporting documentation) under Sub-Clause 8.3 [Statements] at the time for payment stated in the Contract Data, in accordance with Sub-Clause 8.1 [Valuation of the Works]. There are some prescribed things that the statement must include.

The Engineer responds with the issue of an interim payment certificate under Sub-Clause 8.4 [Interim Payments] stating the amount which the Engineer 'fairly considers' to be due. It must be accompanied by supporting particulars identifying any differences in any amount between what is certified and what the Contractor included in its statement giving reasons for the difference.

The Engineer will not certify or pay the Contractor until the performance security has been received by the Engineer.

In the interim payment certificate, the Engineer may make any correction or modification that should be properly made to any previous interim payment certificate.

The Contractor makes its application at the time for payment stated in the Contract Data, in accordance with Sub-Clause 8.1 [Valuation of the Works] and the Engineer has 14 days (2 weeks) to issue the interim payment certificate. The Employer essentially has 14 days (2 weeks) to pay the amount certified in the interim payment certificate under Sub-Clause 8.4.4;

this is calculated as 28 days (4 weeks) from the Contractor's application (receipt of the Statement and supporting documentation) so that any delay by the Engineer is no excuse for late payment by the Employer. Different periods may be specified in the Contract Data.

Neither the interim payment certificate, nor payment itself, indicate the Employer or Engineer's acceptance, approval, consent or notice of No-objection to any corresponding part of the Works or Contractor's Documents.

If the Employer does not pay, the Contractor has a number of options:

- Sub-Clause 2.3 [Employer's Financial Arrangements] allows the Contractor to demand reasonable evidence of the Employer's ability to pay
- Sub-Clause 8.7 [Delayed Payment] provides for financing charges, which is essentially a form of interest for delayed payment. Unless altered by the Contract Data the figure is at 3% above a rate in the country of the currency of payment. If payments were partly in currency local to the project, then a different base rate would apply
- Clause 10 [Suspension and Termination] permits both suspension and termination for non-payment by the Employer and non-certification by the Engineer. Suspension under Sub-Clause 10.1 requires 14 days' (2 weeks') notice. If the Employer fails to cure the defect notified within those 14 days (2 weeks) the Contractor may issue an intention to terminate. If the Employer fails to remedy the defect within this further 14 days, the Contractor may give a second notice to immediately terminate the Contract

Sub-Clause 8.8 [Changes in Cost] provides for price escalation. If the Contract is to be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, the Employer must tick 'Yes' in the Contract Data, and it will be calculated 'in accordance with the details provided in the Schedule of cost indexation'. Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions is a shared risk event under Sub-Clause 11.1.3 (l) entitling the Contractor to EOT only.



Retention

In the Contract Data, the amount of retention to apply to each statement ought to be expressed as a percentage of the Contract Price. Typically, this is 5 - 10%. The limit of retention money to be applied should also be expressed as a percentage of the Contract Price.

The standard practice is for the first 50% of the retention monies to be released after the Taking-Over Certificate for the Works is issued (via the next statement), and the second 50% of the retention monies to be released after the Performance Certificate is issued (also via the next statement). Alternatively, the Parties may agree to substitute all or part of the retention money with a guarantee which the Employer returns to the Contractor within 21 days (3 weeks) after receiving a copy of the Performance Certificate.

Final Payment

To trigger the final payment, the Contractor issues an application (ie a statement and supporting documentation) under Sub-Clause 8.6 [*Final Payment*] within 14 days (2 weeks) after issue of the Performance Certificate.

If the Contractor and Engineer can agree the amount finally due, the Contractor will submit a final statement, discharge (confirming that such amount represents '*full and final settlement of all monies due to the Contractor under or in connection with the Contract*') and supporting documentation.

If the Contractor and Engineer cannot agree the amount finally due, and it becomes evident that a dispute exists, the Contractor must issue a statement for the agreed parts, and Sub-Clause 8.4 [*Interim Payments*] applies. The disagreed parts are deemed to be a dispute which may be referred to adjudication under Sub-Clause 14.1 [*Adjudication*]. If the dispute is then resolved, the Contractor will submit the final statement, discharge and supporting documentation.

From the date of submission of the final statement, discharge and supporting documentation:

- the Engineer will, within 28 days (4 weeks), issue a final payment certificate, and
- the Employer will, within 56 days (8 weeks), pay the Contractor the amount certified

Suspension and Termination

Suspension

The Engineer may instruct the Contractor to suspend progress on all or part of the Works (as defined) under Sub-Clause 10.1.1.

The Contractor may suspend work or reduce the rate of work under Sub-Clause 10.1.2 if (i) one of the four grounds set out below are met, (ii) the Contractor has issued a notice to the Employer specifying what is wrong, and (iii) the default has not been remedied within 14 days (or a reasonable period of time in respect to an Employer's failure to perform an obligation which constitutes a material breach).

The four grounds listed are:

- the Engineer has failed to certify, or the Employer has failed to pay, in accordance with Clause 8 [Payment]. A failure to certify or pay are grounds for suspension which are also found expressly in the FIDIC Red and Yellow Books 1999 and 2017
- the Employer has failed to comply with Sub-Clause 2.3 [Employer's Financial Arrangements]. A failure to comply with the Employer's Financial Arrangements is a ground for suspension which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017
- the Employer has failed to comply with an agreement or determination under Sub-Clause 3.5 [Agreement or Determination], or with a decision of the Adjudicator under Sub-Clause 14.1 [Adjudication] and such failure is a material breach of the Employer's obligations under the Contract. Provided they constitute a material breach, a failure to comply with an agreement or determination, and a failure to comply with an adjudicator's decision, are grounds for suspension which are also found expressly in the FIDIC Red and Yellow Books 2017 (but not in the 1999 editions)
- the Employer substantially fails to perform, and such failure is a material breach of the Employer's obligations under the Contract. A substantial failure to perform appears to be a new ground for suspension (rather than termination) which is not found in the FIDIC 1999 and 217 editions.

The time period for remedying the default is 14 days (2 weeks), or in the case of the Employer's substantial



failure to perform which is a material breach, within a reasonable time. (Under the FIDIC 1999 editions and the FIDIC Red and Yellow Books 2017 the Contractor has 21 days (3 weeks) to remedy the default.) If the Employer fails to remedy the defaults within the notified time period it may suspend work (or reduce the rate of work) under Sub-Clause 10.1, or it may (subject to the prescribed additional notices) proceed with termination under Sub-Clause 10.3. In other words, the Contractor may choose to reduce the rate of work, suspend or seek to terminate. See below for further details on termination.

Clause 11 [*Risk and Responsibility*] provides at Sub-Clause 11.1.3 (i) that the Contractor is entitled to Cost Plus Profit and/or EOT for a suspension (or reduction of the rate of work) under Sub-Clause 10.1, if it is not attributed to a failure by the Contractor. This is not expressed as an exclusive remedy. The Contractor's entitlement is subject to Clause 13 [*Claims*].

Termination by the Employer for contractor Default

There is a useful flow chart detailing the 'Typical Sequence of Events for Termination by the Employer under Sub-Clause 10.2' which is located towards the front of the FIDIC Green Book.

The Guidance recommends expert legal advice before any termination process. For more information on termination, see Practice Note: Termination of a construction contract.

There are five grounds for termination by the Employer in the FIDIC Green Book. These are where the Contractor:

- substantially fails to perform, and such failure is a material breach of, the Contractor's obligations under the Contract (Sub-Clause 10.2.1). Three notices are required under Sub-Clause 10.2 [*Termination by the Employer*] to affect the termination:
 - the first is a notice of default (under Sub-Clause 10.2.1) specifying the default and a reasonable time within which the Contractor must remedy it. This is described as a Notice to Correct in the FIDIC Red and Yellow Books 1999 and 2017.
 - the second is a notice of the Employer's intention to terminate the Contract if the default is not remedied a reasonable time (Sub-Clause 10.2.2).

- third is a notice, issued 14 days (2 weeks) after the Contractor has received the second notice but not remedied the default, immediately terminating the Contract. (Sub-Clause 10.2.2)
- subcontracts the whole or part of the Works in breach of Sub-Clause 4.4.1. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017. The Employer is entitled to terminate the Contract immediately by giving notice to the Contractor (Sub-Clause 10.2.3)
- assigns the Contract without the required agreement under Sub-Clause 1.6 [*Assignment*]. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017. The Employer is entitled to terminate the Contract immediately by giving notice to the Contractor (Sub-Clause 10.2.3)
- becomes bankrupt or insolvent. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017. The Employer is entitled to terminate the Contract immediately by giving notice to the Contractor (Sub-Clause 10.2.3)
- is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 2017 and there is wording in the FIDIC 1999 editions in respect of bribes etc. The Employer is entitled to terminate the Contract immediately by giving notice to the Contractor (Sub-Clause 10.2.3)

The notices must be in accordance with Sub-Clause 1.3 [*Communications*].

Unlike the FIDIC 2017 editions, the Contractor's non-compliance with a final and binding Engineer's Determination and a binding or final and binding adjudicator's decision is not a separate and distinct ground for termination but such non-compliance is, arguably, a substantial failure to perform which might fall within Sub-Clause 10.2.1. Further, maxing out the Delay Damages is not a separate and distinct ground for termination.

Upon termination by the Employer for default, the provisions of Sub-Clause 10.2.5 apply and the



Contractor shall (i) cease work, (ii) deliver to the Engineer all Contractor's Documents, and (iii) demobilise the Site leaving behind all Goods required by the Employer. If and to the extent instructed by the Employer, the Contractor shall also assign any subcontract to the Employer.

Termination by the Employer for Convenience

Under the FIDIC Green Book, the Employer has the right to terminate at any time for convenience in order to execute the Works itself or to arrange the Works to be executed by another contractor under Sub-Clause 10.2.4. But the Employer must first give 28 days' (4 weeks') notice (which must be in accordance with Sub-Clause 1.3 [Communications]) and return the performance certificate. The Employer will, of course, incur financial penalties for such termination—see 'Payment After Termination' below.

Upon termination for convenience, the provisions of Sub-Clause 10.3.3 (a) apply and the Contractor shall (i) cease work, (ii) deliver to the Engineer all Contractor's Documents, and all Plant, Materials and other work for which the Contractor has received payment, (iii) remove all other Goods (in which case property of the removed Plant and Materials shall revert to the Contractor), and (iv) demobilise, from the Site.

Termination by the Contractor

There is a useful flow chart detailing the 'Typical Sequence of Events for Suspension/Termination by the Contractor under Clause 10' which is located towards the front of the FIDIC Green Book.

There are four grounds for termination by the Contractor in the FIDIC Green Book. These are where the Employer:

- fails to remedy the default(s) notified within the time specified under Sub-Clause 10.1.2 (and in the case of sub-paragraph (d) has no reasonable excuse for such failure)— as discussed above. Three notices are required under Sub-Clause 10.3.1 to affect the termination:
 - the first is a notice of suspension under Sub-Clause 10.1.2
 - the second is notice of the Employer's intention to terminate the Contract under Sub-Clause 10.3.1 if the default(s) is not remedied within 14 days (2 weeks) or reasonable period in the case of Sub-Clause 10.1.2 (d)

- the third is a notice, issued 14 days (2 weeks) after the Employer has received the second notice but not remedied the default, immediately terminating the Contract under Sub-Clause 10.3.1
- assigns the Contract without the required agreement under Sub-Clause 1.6 [Assignment]. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017. The Contractor is entitled to terminate the Contract immediately by giving notice to the Employer (Sub-Clause 10.3.2)
- becomes bankrupt or insolvent. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 1999 and 2017. The Contractor is entitled to terminate the Contract immediately by giving notice to the Employer (Sub-Clause 10.3.2)
- is found, based on reasonable evidence, to have engaged in corrupt, fraudulent, collusive or coercive practice at any time in relation to the Works or to the Contract. This is a ground for termination which is also found expressly in the FIDIC Red and Yellow Books 2017 (but not 1999). The Contractor is entitled to terminate the Contract immediately by giving notice to the Employer (Sub-Clause 10.3.2)

The notices must be in accordance with Sub-Clause 1.3 [Communications].

Unlike the FIDIC 2017 editions, the Employer's non-compliance with a final and binding Engineer's determination and a binding or final and binding adjudicator's decision is not a separate and distinct ground for termination but such non-compliance is a ground for suspension under Sub-Clause 10.1.2 (c) which, if not remedied, may lead to termination under Sub-Clause 10.3.1.

Upon termination, the provisions of Sub-Clause 10.3.3 apply and the Contractor must (i) cease work, (ii) deliver to the Engineer all Contractor's Documents, and all Plant, Materials and other work for which the Contractor has received payment, (iii) remove all other Goods (in which case property of the removed Plant and Materials shall revert to the Contractor), and (iv) demobilise, from the Site. The Employer must also return the performance security, promptly



Payment After Termination

After termination, the Contractor is entitled to 'payment of the unpaid balance of the value of the Works executed (and any other work executed) and of the Plant and Materials reasonably ordered for the Works (once delivered to the Employer)' to the extent that they comply with the Contract. The phrase 'any other work executed' covers design work, or other types of work not falling within the definition of Permanent or Temporary Works.

The payment is adjusted by:

- any amount to which either Party is entitled under Clause 13 [Claims] or otherwise
- in the case of Employer termination for Contractor default - the Employer will be entitled to 20% of the value of the parts of the Works not executed at the date of termination (it is a liquidated amount to avoid the time and expense of substantiating actual loss)
- in the case of termination for the Employer's convenience, or Contractor termination for Employer default - the Contractor will be entitled to (i) the Cost of demobilisation, (ii) any other Cost or liability reasonably incurred by the Contractor in the expectation of completing the Works, and (iii) 10% of the value of the parts of the Works not executed at the date of termination (as above, it is a liquidated amount to avoid the time and expense of substantiating actual loss)

Supporting particulars must be submitted by the relevant Party within 42 days (8 weeks) after the notice of termination. Although there is no express sanction for a failure to do so, the time for payment runs from the date of submission.

The Engineer will agree or determine the payment due under Sub-Clause 10.4.1 in accordance with Sub-Clause 3.5 [Agreement or Determination]. The resulting balance must be paid by the Employer or Contractor within 70 days (10 weeks) after submission of the supporting particulars. Many of the remedies for non-compliance with an Engineer's determination are not available post termination (for example, suspension). If a Party is dissatisfied with the Engineer's determination, it becomes a dispute which the dissatisfied Party may refer to adjudication under Sub-Clause 14.1—see below.

This payment is the only amount due between the Parties in respect of loss and/or damage resulting from the termination.

Risk and Responsibility

Employer's Risks and Contractor's Entitlement

The Employer's Risks and corresponding Contractor's entitlement (subject to Clause 13 [Claims] unless the Engineer gives an instruction which constitutes a Variation) are tabulated in Sub-Clause 11.1.3. This is a good idea. The Contractor's entitlements as listed in this table are not expressed as exclusive remedies. The Guidance states that the table ought not to be amended as this might contravene FIDIC Golden Principle 3 which states '*The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.*' But it is likely that it will be amended.

The Contractor is entitled to Prolongation Cost where the Contractor's entitlement is described as 'Cost and/or EOT' or 'Cost Plus Profit and/or EOT', ie in respect of an Employer risk event ('ERE') where delay is compensable. The Contractor is not entitled to Prolongation Cost for shared risk events ('SREs') (which give rise to additional time but not money) where delay is excusable.

The Guidance states that Prolongation Cost is a sub-category of the Cost incurred by the Contractor, in accordance with the definition at Sub-Clauses 1.1.13. Prolongation Cost is defined at Sub-Clause 1.1.35 of the Contract Data as 'on-Site and off-Site overheads associated with compensable EOT, as stated in the Contract Data'. It is a liquidated amount to avoid the time and expense of substantiating actual loss. This is a first for FIDIC.

The Contract Data states that '*Prolongation Cost shall be the only compensation due from the Employer to the Contractor for an EOT resulting from a compensable delay*'. Therefore, if the Cost is more than the amount recovered in the Prolongation Cost, the difference would not be recoverable. But the limitation does not affect the Contractor's compensation rights for other Cost, such as disruption Cost (if any) which would need to be substantiated and avoid any overlap with the Prolongation Cost. As explained in the Guidance, the Contract Data expressly states, '*For the avoidance of doubt, this provision shall*



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

The Contract Data details how the Prolongation Cost is to be calculated. It is done so on the basis that construction progress is a Gaussain function (a bell-curve). The default daily rate for on-Site and off-Site overheads in the Contract Data is 20% of the Contract Price stated in the Contract Agreement, divided by the number of days in the Time for Completion. The Contract Data provides that the Contractor is entitled to:

- 60% of this daily rate in the first third of the certified value of the Works (when the Contractor progressively mobilises its resources which are ramping up)
- 125% of this daily rate in the second third of the certified value of the Works (during peak production when resources are expected to be mobilised in full and working at full capacity), and
- 60% of this daily rate in the remaining period (when completion is nearing, and demobilisation progressively starts to occur)

The Contract Data may be amended if this weighting of the site overheads is not appropriate for the project.

Sub-Clause 11.1.3 does not address concurrent delay. The Guidance states that concurrency of delays may be handled differently under different national laws and refers to the Society of Construction Law Delay and Disruption Protocol (2nd edition, 2017). This is, perhaps, a missed opportunity. Much governing law gives authority to the express wording of a contract.

Contractor's Risks and Employer's Entitlement

The Contractor's Risks require compliance with Clause 13 [*Claims*] and are:

- a decrease in Cost caused by a change in the Laws of the Country (or in the judicial or official governmental interpretation of these Laws) after the Base Date
- a failure by the Contractor to fulfil its obligations which causes the Employer to incur costs (not defined), or
- any cause giving the Employer an entitlement under or in connection with the Contract

Indemnities

There are the usual indemnities for:

- bodily injury, sickness, disease or death
- damage to or loss of any property, real or personal (other than the Works)
- infringement of a patent, registered design, copyright, trademark, trade name, trade secret or other intellectual or industrial property right

Insurance

The Guidance recommends expert insurance advice.

By default, the insuring Party is named as the Contractor in a comprehensive table included in the Contract Data. It must effect and maintain insurance(s) in the joint names of the Parties.

The insuring Party must provide the other Party with endorsed insurance certificates in the prescribed form. The policies themselves must be provided upon request.

If a Party fails to effect, or maintain, the insurances, or does not provide the other Party with endorsed insurance certificates, the other Party may pay the premiums due. It may recover the same from the defaulting Party as an addition or deduction in the amount certified for payment without any need to proceed under Clause 13 [*Claims*].

If either Party fails to comply with a condition of the insurance(s), the failing Party must indemnify the other Party against all direct losses and claims (including legal fees and expenses) arising from such failure.

Claims

Employer's Claims and Contractor's Claims both fall within Clause 13 [*Claims*]. However, entitlements associated with Variations do not need to follow the claims procedure in Clause 13 (Sub-Clause 7.2.1).

There is a useful flow chart detailing the '*Typical Sequence of Claim Management under Clause 13 and Sub-Clause 3.5*' which is located towards the front of the FIDIC Green Book.



Employer's claims

The Employer may claim for (i) additional payment (or reduction in the Contract Price), and/or (ii) extension of the DNP, and/or (iii) another entitlement or relief against the Contractor, under any Clause of the Contract Conditions, or otherwise in connection with the Contract.

Claims for payment will usually be for delay damages, other claims specifically provided for by the Contract, and/or for damages for breach of contract by the Contractor.

The first step requires the Employer to give to the Engineer:

- notice describing the event or circumstance giving rise to the entitlement within 28 days (4 weeks) after it became aware, or should have become aware, of the event or circumstance, and
- a fully detailed claim with supporting particulars, including contemporary records, of the entitlement within 56 days (8 weeks) after it became aware, or should have become aware, of the event or circumstance

Unlike the FIDIC Red or Yellow Books 2017, there are no time bars associated with these time periods. But the entitlement or relief will take account of any prevention or prejudice caused to the proper investigation of the claim and/or mitigation of the effects of the claim by a failure to comply with any Sub-Clause in relation to a claim.

Contractor's claims

The Contractor may claim for (i) additional payment, and/or (ii) an EOT, and/or (iii) another entitlement or relief against the Employer as a result of any of the Employer's Risks, or under any Clause of the Contract Conditions, or otherwise in connection with the Contract.

The first step requires the Contractor to give to the Engineer:

- notice describing the event or circumstance giving rise to the entitlement within 28 days (4 weeks) after it became aware, or should have become aware, of the event or circumstance, and
- a fully detailed claim with supporting particulars, including contemporary records, of the entitlement within 56 days (8 weeks) after it

became aware, or should have become aware, of the event or circumstance

As for Employer's Claims, unlike the FIDIC Red or Yellow Books 2017, there are no time bars associated with these time periods. But the entitlement or relief will take account of any prevention or prejudice caused to the proper investigation of the claim and/or mitigation of the effects of the claim by a failure to comply with any Sub-Clause in relation to a claim.

Claims Procedure

The same claims procedure applies to both the Employer and the Contractor.

After receiving the fully detailed claim under Sub-Clause 13.1 [*Right to Claim*], the Engineer shall reach agreement or make a determination under Sub-Clause 3.5 [*Agreement or Determination*]. The Engineer must give notice to both Parties of each agreement or determination (with supporting particulars) within 42 days (6 weeks) of receipt of the fully detailed claim. There is no prescribed sanction if this time period is not met.

The entitlement or relief must take into account the extent (if any) to which a failure by a Party to comply with any Sub-Clause of the Conditions has prevented or prejudiced (i) proper investigation of the claim, and/or (ii) mitigation of the effects of the claim event or circumstance.

There is an express obligation on the Parties to use 'reasonable endeavours' to avoid or minimise the effects of all claim events or circumstances, ie to mitigate loss. This should go without saying.

Each Party must give effect to the Engineer's agreement or determination unless and until revised under Clause 14. As previously discussed, a failure to by the Employer to give effect to the Engineer's determination would fall under Sub-Clause 11.1.3 (j) and could entitle the Contractor to suspend progress of all or part of the Works under Sub-Clause 10.1.2 (c) and, if not remedied, terminate via Sub-Clause 10.2.2. It is possible that a failure by the Contractor to give effect to the Engineer's determination could also constitute a substantial failure to perform which might entitle the Employer to pursue termination under Sub-Clause 10.2.1.

If a Party is dissatisfied with the Engineer's determination, it becomes a dispute which the dissatisfied Party may refer to adjudication under Sub-



Clause 14.1. There is no facility or need for a Notice of Dissatisfaction in respect of an Engineer's determination in the FIDIC Green Book.

Disputes

The FIDIC Green Book adopts the usual FIDIC multi-tier approach to the resolution of disputes. Unlike the FIDIC 2017 editions, there is no definition of a dispute.

There is a useful flow chart detailing the '*Typical Sequence of Dispute Events Envisaged in Clause 14*' which is located towards the front of the FIDIC Green Book.

The FIDIC Green Book adopts a sole Adjudicator to be appointed at the commencement of the project (28 days after the Contract comes into effect), ie before any dispute has arisen. The Guidance states that the Adjudicator mechanism under the Contract is equivalent to a dispute board composed of one member. The Contract Data requires each Party to propose three names. If the Parties fail to appoint an Adjudicator, the Adjudicator will be appointed in accordance with the Rules for Adjudication which are appended to the General Conditions. If necessary, an application to the President of FIDIC may be made. The Rules for Adjudication do not require that FIDIC consults with the Parties before making the appointment which shall be final and conclusive. The Parties are deemed to have signed and be bound by the Adjudicator's Agreement (this appears to include the Adjudicator's fee which could be high). One Party, acting alone, may not terminate the Adjudicator's Agreement.

The Guidance states that the Parties have several options available:

- Option 1: only for binding decisions
- Option 2: for time-to-time informal assistance and binding decisions
- Option 3: for regular informal assistance (including through regular Site visits) and binding decisions

Sub-Clause 14.1.2 provides that the Adjudicator may provide assistance and/or informally discuss and attempt to resolve any issue or disagreement which may have arisen between the Parties during the performance of the Contract if such a request has been made by the Parties jointly. The Adjudicator may invite the Parties to make such joint request if they

have not done so on their own initiative. Any opinion given by the Adjudicator is non-binding.

If the Adjudicator adopts the 'standing' mode providing regular informal assistance and binding decisions, a retainer will be required.

If not amicably settled, any dispute between the Parties, which arises out of or in connection with the Contract (including any opinion, instruction, certification, valuation or determination of the Engineer) shall be referred by either Party and shall be decided by the Adjudicator in accordance with the Rules for Adjudication.

The Rules for Adjudication provide that the Adjudicator has 84 days (12 weeks) to make a decision if a hearing is required and has 56 days (8 weeks) to make a decision if a hearing is not required. (It is possible that a short hearing might be sought for no other purpose than to extend the period for a decision.)

The Rules do not state what will happen if the Adjudicator does not meet those deadlines (although an Adjudicator may hold back its decision if an invoice remains unpaid). Arguably, a late decision is null and void. The Rules for Adjudication also make provision for the Adjudicator to correct the decision.

Unlike the FIDIC 2017 editions, there is no express provision to stop the limitation period running by referring the dispute to the Adjudicator. Therefore, this will be a matter of governing law.

If a Party is dissatisfied with the Adjudicator's decision, or if no decision is given within the prescribed time, a party may issue a notice of dissatisfaction within 28 days (4 weeks) of (i) receipt of the decision, or (ii) expiry of the time for the decision. If the Adjudicator has given a decision, and no notice of dissatisfaction has been given within the specified time, then the decision shall be final and binding on both Parties.

Regardless of any notice of dissatisfaction, the decision is binding on the Parties who must give effect to it unless and until it is revised in arbitration (Sub-Clause 14.1.5).

If a party fails to comply with a 'binding' or 'final and binding' decision, the other Party (without prejudice to its other rights) may refer the failure to comply with the decision to arbitration under Sub-Clause 14.2 [Arbitration] without obtaining a further Adjudicator's



decision or conducting further amicable settlement negotiations.

In such event, the arbitrator will have the power to order interim or provisional measures or an award to enforce the Adjudicator's decision, subject to the express reservation that the rights of the Parties as to the merits of the dispute are reserved until they are resolved by an arbitral award.

Arbitration

A notice of dissatisfaction with an Adjudicator's decision is a pre-condition to arbitration.

The FIDIC Green Book adopts a sole arbitrator, unless otherwise agreed by the Parties.

Unless the Parties agree otherwise, the arbitration will be conducted under the expedited procedure provisions of the ICC Rules (Rules of Arbitration of the International Chamber of Commerce) by a sole arbitrator in the language referred to in Sub-Clause 1.3 [Communications].

There is no express reference to the seat of arbitration. The Guidance explains why.

The arbitrator has the power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the Adjudicator (other than a final and binding decision, ie one where a notice of dissatisfaction has not been given) relevant to the dispute.

The Engineer may be called as a witness in the arbitration.

The Parties are not limited to the arguments or evidence they submitted to the Adjudicator or the reasons for dissatisfaction given in the notice of dissatisfaction. The Adjudicator's decision is admissible evidence.

Limits on Liability

Sub-Clause 1.10 [Limitation of Liability] provides: *'Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under...'* This is identical wording to that in the FIDIC Red and Yellow Books 2017 at Sub-Clause 1.15.

The list of exemptions is:

- Sub-Clause 6.5 [*Delay Damages*];
- Sub-Clause 7.1.2 (a)—omission of work which the Employer intends to do itself
- Sub-Clause 10.4.1 (b)—Employer termination for Contractor default
- Sub-Clause 10.4.1 (c) (ii)—10% of value of parts of Works not executed at the date of termination
- Sub-Clause 11.3 [*Indemnities*]

Sub-Clause 1.10.2 specifies a maximum liability of the sum stated in the Contract Data (or the Contract Price stated in the Contract Agreement). Sub-Clause 1.10.3 removes any limitation for fraud, gross negligence, deliberate default and reckless misconduct.

Please get in touch at victoria.tyson@howardkennedy.com with your thoughts or to discuss any concern

