

LALIVE

The new Fidic Green book short form of contract explained

FIDIC's revised Green Book is intended to cater to larger projects than its predecessor, and includes novel liquidated damages clauses for prolongation costs and losses arising from termination, as well as the appointment of an engineer for the administration of the contract.

What kind of projects is the new Green Book intended for?

FIDIC bills the 2021 Green Book as a shorter and simpler alternative to its Red and Yellow Books, for projects where parties want to avoid committing significant resources to contract administration and management, and/or where the “perceived level of risk is low”.

Its intended use is therefore much broader than the 1999 first edition, which was intended for use on small projects under USD 500,000, short projects of less than six months, and/or simple or repetitive works. In practice, the first edition was often used in much larger projects than intended by FIDIC, including projects over USD 10 million. The new 2021 Green Book now better reflects the reality of how the Green Book is used by parties, and FIDIC no longer provides specific quantitative criteria for its use.

Is it a contract for works designed by the Employer or the Contractor?

The Green Book can be used both for employer-designed and contractor-designed works, regardless of the extent of the contractor’s design responsibilities. It can therefore serve as an alternative for both the more elaborate FIDIC Red Book (for employer-designed works) and Yellow Book (for contractor-designed works). To the extent that the Contractor does take on design responsibility, the Green Book sets out an obligation of fitness for purpose for the Contractor’s design scope.

Is it a lump sum, re-measurement, or cost-plus contract?

The new Green Book can be whatever the parties want it to be and, like the previous edition, allows selection from several different valuation “Options”, similar to those under the NEC4 contracts, namely:

- lump sum with single payment, stage payments, or with bill of quantities;
- re-measurement with bill of quantities;
- cost plus; or
- any combination of such options.

Does it have anything I haven’t seen before in other standard forms?

The main novelty of the new Green Book is its “**Prolongation Cost**” mechanism; in essence a liquidated damages regime for the Contractor’s additional overheads arising from compensable delay. The Prolongation Cost is pre-determined in the Contract Data using a somewhat complex formula taking into account the “average weight” of the Contractor’s on-site and off-site overheads per day, and the value of the works executed at the time of the delay.

The new Green Book also provides for:

- liquidated damages **for the Employer’s loss arising from a termination** for cause by the Employer – set at 20% of the value of those parts of the



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Works not executed at the date of the termination (Sub-Clause 10.4.1(b)).

These liquidated damages provisions – which are not in the Red and Yellow Books – are aimed at avoiding the time and cost involved in substantiating loss of profit and other losses associated with termination, in light of the relatively low value and short duration of the projects for which the Green Book is intended to be used.

Are there other notable features or changes?

- The new Green Book provides for an Engineer to administer the contract and includes a claims procedure, adding new layers of complexity to the contract's administration.
- The claims procedure largely reflects the mechanism adopted in the 2017 FIDIC standard forms. However, unlike the 2017 Red and Yellow Books – which provide that in case of failure to timely notify a claim, the claiming party forfeits its right to any relief – the new Green Book merely provides that any entitlement or relief should “take account of the extent (if any) to which the failure [to provide notice] has prevented or prejudiced proper investigation of the claim, and/or mitigation of the effects of the claim event or circumstance” (Sub-Clause 13.2.2).

What kind of dispute resolution mechanism does the Green Book have?

- Disputes can be referred to a single adjudicator – similar to the institution of the Dispute Avoidance/Adjudication Board (DAAB) under other FIDIC contracts. The adjudicator can also provide informal assistance to facilitate the resolution of issues or disagreements between the parties (Sub-Clause 14.1.2), reflecting similar additions to the Red and Yellow Books in 2017.
- The adjudicator's decision is immediately binding on the parties (Sub-Clause 14.1.5), and a party can seek an order in arbitration for the enforcement of the adjudicator's decision
- liquidated damages **for the Contractor's loss of profit** in the event of termination for cause by the Contractor or a termination for convenience by the Employer – like the previous edition, the new Green Book fixes these liquidated damages at 10% of the value of those parts of the Works not yet executed at the date of termination (Sub-Clause 10.4.1(c));(Sub-Clause 14.1.6-7).
- Disputes can be escalated to arbitration for final settlement. In line with its intended use for relatively low-value construction projects, the new Green Book provides for a sole arbitrator and for proceedings to be conducted under the ICC expedited procedure rules (Sub-Clause 14.2.2).

Is the new Green Book well-suited to smaller projects?

The new Green Book is far more detailed than the first edition and introduces several features from the other FIDIC standard contracts, which add a layer of complexity to the contract's administration, such as the appointment of an Engineer and a claims procedure.

However, while it may now look more like the other FIDIC standard form contracts, it remains substantially shorter and the added length is in many cases aimed at improving clarity, rather than adding complexity or administrative burden.

The new Green Book remains well-suited to smaller projects, with the added advantage of allowing the parties to tailor provisions to the needs of a wider spectrum of projects. The introduction of certain features, such as the liquidated Prolongation Cost mechanism, may give rise to additional issues of validity and enforceability of provisions under the applicable law; additional

care should be taken when tailoring the Green Book to a specific project and applicable law to ensure its provisions are valid and enforceable.