



**ECV REVIEW
No. 2**

**INDEPENDENT ASSESSMENT OF
POTENTIAL USE OF THE 2021
FIDIC SHORT FORM OF CONTRACT
(GREEN BOOK)**

BY

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POTENTIAL USE OF THE 2021 FIDIC SHORT FORM OF CONTRACT (GREEN BOOK)

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SECTION 1: INTRODUCTION

a) FIDIC 1999 Short Form of Contract (Green Book)

i) FIDIC Foreword on use of Contract:

In the Foreword to the Contract, FIDIC recommend the contract is suitable “for engineering and building work of relatively small capital value. However, depending of the circumstances, the Conditions may be suitable for contracts of greater value. They are considered most likely to be suitable for fairly simple or repetitive work or work of short duration without the need for specialist sub-contracts”

It is unlikely that this Contract would be used for Works in excess of USD \$5 million and more likely around USD \$1 million

ii) Contract Structure:

A compact document with 10 pages of General Conditions (15 main Clauses). A single document combines the form of tender and the agreement between the Employer and the Contractor. The Contract is administered by an Employer’s Representative and there is a provision for a single person adjudicator to deal with any dispute between the Parties.

In addition to the General Clauses an Appendix to Tender sets the out the main requirements for the particular project, such as Time for Completion, form of programme, valuation alternatives and payment details, Insurance requirements and Arbitration details.

iii) Project Management details:

The contract has little in the way of project management procedures. It provides a long list of the Employer’s liabilities and gives some guidance on the valuation of Variations. A simple claims procedures is given and if there is a failure to settle amicably then an adjudication agreement is attached to the Contract.

The document also has a Guidance section and although Particular Conditions (PC’s) are anticipated to be few, this Guidance is of assistance to drafters of PC’s

b) FIDIC 2021 Short Form of Contract

i) FIDIC Foreword on use of the Contract:

“Whilst FIDIC recognises that many developments banks use specific procurement and contract documents for works of capital volume less than 10 million USD (so called Small Works) and whilst this second edition of the Green Book is fit for purpose it is no longer being represented as dedicated to only simple and repetitive Works and / or short duration and /or limited capital value projects”

Whilst the Contract’s “aim remains to produce a straightforward document which includes all essential commercial provisions in a construction contract. Under this type of Contract

the Contractor generally constructs the Works in accordance with design provided by the Employer. However, this form also accommodates other situations, such as where the Works are partly or fully designed by the Contractor.”

The Contract’s use may be summed up as stated in the Foreword as *“providing an alternative to the 2017 Red and Yellow Books for construction where it is not deemed required, or relevant, to mobilise contract administration and management resources at the same scale and extent as required under these Books”*.

The Contract is meant to be appropriate for Works in excess of USD 10 million, however there is no guidance as to how much more. Depending on the complexity of the Works it is reasonable, in my opinion, for its use to be extended to works of value up to USD 25-30 million. This Contract may be regarded as an *“Intermediary Contract”* between Small and Large Works Contracts, or suitable for Medium Works.

ii) Contract Structure:

This Contract, although still bearing the 1999 Short Form of Contract title is substantially different to the 1999 Contract. The General Conditions are increased from 10 pages to 26 pages with in addition Particular Conditions (PC’s). These PC’s are split into part A – Contract Data (9 pages) and Part B – Special Provisions.

The structure of the Contract is mirrored upon the 2017 FIDIC Contracts and may be considered a mini 2017 Red or Yellow Book.

The Contract is administered by an Engineer on behalf of the Employer and who is to act neutrally when undertaking duties under the Agreement and Determination Sub Clause 3.5 relating normally to issues of time and/or money.

An Adjudicator is to be appointed by the Parties within 28 days of the Contract coming into effect. Disagreement with any Adjudicator’s decisions may be taken by either Party to arbitration under Sub Clause 14.2.

iii) Project Management Details:

The General Conditions have been based upon the FIDIC 2017 Contracts, although the number of main Clauses is reduced from 21 to 14. This is partly due to an expanded Contract Data section, which includes details relating to valuation and measurement of the Works and programme and also transfer some items to Special Provisions.

The Guidance section of the Contract provides extensive details on issues not included in the General Conditions, but may well be included in the Part B – Special Provisions. Examples of this include Contractor’s design (if required), Testing, Exceptional Events, and Valuation of Variations.

FIDIC justify this approach by stating in the Guidance Notes *“The approach taken by FIDIC in drafting this second edition has been to capture only the essential rights and obligations*

of the Parties, and to disregard / not retain obligations which are considered secondary and /or better placed elsewhere in the Contract (Specifications for instance). It follows that additional care is to be given by those drafting the Contract documents (and in particular Specification) to make sure that the project requirements which are not found in the Conditions of Contract (full scope of Works, delineation of design responsibilities between the Parties, progress monitoring and reporting etc.) are properly set out in other Contract Documents”.

From the above explanation it is noted that there are limited Project Management procedures within the General Conditions and ample Guidance for their inclusion either in Special Provisions or the Specifications or if a design build option is adopted in the Employer’s Requirements.

SECTION 2: PRINCIPAL FEATURES OF 2021 FIDIC GREEN BOOK

a) Contract Contents

The Contract is presented in a very readable manner. It follows the format within the 1999 and 2017 FIDIC Contracts, which provides a familiarity for those working with these Contracts.

Set out below are the principal elements within the Contract:

i) Sequence of events flow charts:

Following the Foreword there are seven “Typical Sequence of Events” flow charts provided, which although not contractual are of assistance to users of the Contract.

The typical events shown are listed below:

- Principal Events under Contract
- Payment Events envisaged under Clause 8
- Claim Management under Sub-Clause 3.5
- Dispute Events envisaged in Sub-Clause 14
- Termination by Employer under Sub-Clause 10.2
- Suspension / Termination by Contractor under Clause 10.3
- Variation Procedure flow chart

ii) Contract Agreement:

A form of Contract Agreement is provided before the General Conditions and incorporates the tenderer’s offer and its acceptance by the Employer in one single document.

This may be considered an oversimplification of the tender and award of Contract process, which is recognised in the Guidance on pages 4 and 5. The intent though is to make the Agreement as simple for the ease of use by the Parties.

iii) General Conditions:

The 14 main Clauses are logically provided in keeping with the 1999/2017 FIDIC Contracts. The omission as Clauses from these larger Contracts relate to items that are incorporated within the 14 Main Clauses, or are more appropriately dealt with in the Special Provisions or Specification.

These include Subcontractors, Design by Contractor (YB); Staff and Labour; Tests before Completion; Tests after Completion (YB); Measurement (RB); Defects Notification Period, Exceptional Events.

Individual Clauses will be addresses later within this review.

iv) Appendix: Rules of Adjudication:

The Contract requires for a single person Adjudicator to be appointed within 28 days after the Contract comes into effect as stated in Clause 14. This Clause provides the outline process for the Adjudicator to operate.

The detailed Rules by which the Adjudicator and the two Parties are to work are contained in the Appendix. The Rules cover the issues of the appointment and the terms of appointment, payment and procedures for achieving an Adjudicator's decision.

Following the Rules is a "Form of Adjudicator's Agreement" which is a tripartite agreement between the Adjudicator and the two Parties.

v) Index of Sub Clauses:

A useful index for reference of items and their Sub Clause numbers and reference pages within the Contract. The items are listed alphabetically.

vi) Particular Conditions – Part A - Contract Data:

The Contract Data requirements, which are primarily to be completed by the Employer although some items may be completed by the tenderers, are more comprehensive in many respects than in the 1999/2017 Contracts.

The principal additional items include:

- Permits and licences to be obtained by each Party. Those relating to the Employer are listed to include planning, zoning, or building permits, permissions, licences and/or approvals for the Permanent Works.
- Sub Contractors to be used by tenderer
- Programme form, which may have to be detailed in Specification
- Valuation of the Works with following options: Lump sum price with single payment or stage payment or bill of quantities; Remeasurement with bill of quantities; Cost plus.
- Prolongation cost formula
- Contract Price adjustments
- Insurance Policies with details of responsibility

vii) Particular Conditions – Part B – Special Provisions

This is in three parts:

The first part is a series of Forms relating to Security / Guarantee provisions and are published by International Chambers of Commerce. An additional form is "*Example Form of Insurance Certificate*".

The second part is Guidance in the drafting of the Special Provisions. These are extensive, and extremely relevant in the providing of project management procedures that are omitted from the General Conditions.

The third and final part which is included under Guidance are a series of Sample Forms (40 number in total). These forms are *“for communications which are expressly required under the Contract”*

Examples are *“Notice of Access to Site”*; *“Engineer’s Instructions”*; *“Instruction to Remedy”*; and *“Interim Payment Certificate”*.

These Sample Forms are not contractual, but provided to assist the users of the Contract. They are drafted on the basis that there are no Part B Special Provisions, so need to be used carefully if the latter forms part of the Contract.

b) Responsibilities and Risks of Parties and Engineer

i) Responsibilities of the Employer:

The Employer after signing the Contract Agreement assigns the duties of administering the Contract to the Engineer. There are certain circumstances where the Employer deals directly with the Contractor and these are:

- Sub Clause 4.5 Performance Security
- Sub Clause 10.2 Termination by Employer
- Sub Clause 10.3.3 (a) Employer to return Performance Security
- Clause 14.1 Adjudication
- Clause 14.2 Arbitration

The prime responsibilities of the Employer are:

- Sub Clause 2.1 Provide right of access and possession of Site
- Sub Clause 2.2 Provide Site Data
- Sub Clause 2.3 Provide Employer’s financial arrangements
- Clause 8 Payment duties

In addition to undertake any duties or obligations where the Engineer is required to obtain the Employer’s consent under Sub Clause 3.2.2

ii) Responsibilities of the Contractor:

The Contractor has general obligations as stated in Sub Clause 4.1 to execute the Works in accordance with the Contract and consistent with the Laws of the Country.

The Contractor shall commence the execution of the Works as soon as possible after the Commencement Date as stated in Sub Clause 6.1.2. The Contractor shall proceed with *“due expedition and without delay and shall complete the Works and Sections (if any) within the relevant Time for Completion”*

iii) Responsibilities of the Engineer:

If the Engineer is a legal entity, the Engineer “shall notify the Contractor of the name and particulars of the Engineer’s authorised person who is a natural person to act on the Engineer’s behalf under the Contract”

The Engineer or the Engineer’s authorised person (as the case may be) shall have suitable qualifications, experience and competence to act as the Engineer under the Contract.

The Engineer’s duties are stated under Sub Clause 3.2 that permits the Engineer to delegate his/her authority to assistants. The Engineer “shall act as a skilled professional and shall be deemed to act for the Employer” with one exception under Sub Clause 3.5 “Agreement or Determination” when the Engineer “shall act neutrally between the Parties and shall not be deemed to act for the Employer”.

iv) Risks of the Employer:

The Contract under Sub Clause 11.1 sets out in tabular form the “Employers Risks”.

These are extensive and against each is listed the Contractor’s entitlement being either an Extension Time (EOT) and/or Cost and/or Cost plus Profit

v) Risks of the Contractor:

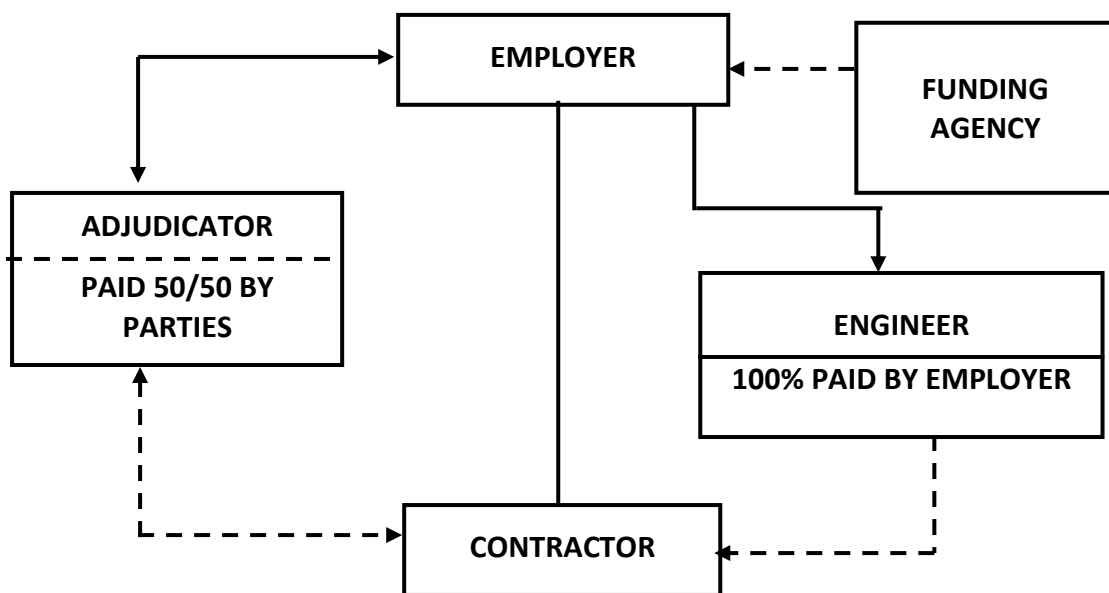
To balance the Employer’s Risk under Sub Clause 11.2 the Contractor’s risks are scheduled but in more general terms.

vi) Risks of the Engineer:

These are not itemised within the Contract as the Engineer is deemed to be part of the Employer’s personnel.

The Engineer has a separate contract with the Employer, and within that contract the responsibilities and risks for the Engineer will be stated.

vii) Contractual Relationships:



c) Time, Quality and Cost Control

i) Overview:

The drafters of the Contract have stated that their objective is to have contractual issues within the General Conditions and for project management issues to be within the Specifications or Special Provisions.

This is the case with respect to Time, Quality and Cost Controls

ii) Time Controls – Clause 6:

The basic requirements of Commencement Date, Extension of Time for Completion (EoT), and Delay Damages are within the Clause. In addition reference is made to the Contractor's programme but the form and details within the programme are to be stated in the Contract Data or Specifications (most probably the latter).

Surprisingly the issue of "*Exceptional Events*" under Sub Clause 6.6 is included within this Clause. It is a defined term under Sub Clause 1.1.23, but examples are only provided in the Guidance section of the document.

iii) Quality Controls – Clause 5:

As with Time controls the issues relating to Quality are itemised, but details are to be provided in the Specification or Special Provisions. Such details relate to Health, Safety and the Environment, Quality Assurance, Inspection and Testing and remedying Defects.

There appears to be no clause that deals with "*Staff and Labour*" as in the 1999/2017 Contracts, and would expect this to be added through the Special Provisions.

iv) Cost Controls:

The issue of valuation of the Works is contained within the Contract Data and referred to as such in Sub Clause 8.1.

As previously mentioned various methods of valuing the Works are offered under Contract Data, but for Works designed by the Employer, that provided as Option D "*Remeasurement with bill of Quantities*" would be the most applicable option. The measurement procedures are set out within this option.

Should the Works be designed by the Contractor in accordance with an Employer's Requirements, then probably Option B "*lump sum price with staged payments*" would apply, but a method of evaluation would be required.

d) Financial Issues – Variations and Payments – Clauses 7 and 8

The right to vary the works may be done by the Engineer in accordance with the provisions of Sub Clause 7.1. Variations may be by instruction or request for a proposal from the Contractor. There are circumstances listed whereby the Contract shall not be bound by a Variation instruction.

The valuation of Variations are to be finalised under Sub Clause 3.5 (Agreement and Determination)

Under Clause 8 payment issues such as Advance Payment, Statement, Interim Payments, Release of Retention Money, Final Report and Delayed Payment are covered. The procedures are standard, but time periods reflect the expected magnitude of the Works, with the Engineer required to certify the Contractor's statement within 14 days of receipt, and the Employer to make payment within 28 days of the Engineer receiving the Contractor's Statement.

A final Sub Clause 8.8 relates to changes in Cost and refers to the Contract Data, where the Employer should state if applicable and provide details if required.

e) Suspension and Termination – Clause 10

i) Suspension – Clause 10.1:

The Sub Clause provides for suspension of the Works or part thereof by the Engineer, as well as specific reasons for the Contractor to suspend or reduce the rate of Work.

ii) Termination by the Employer – Sub Clause 10.2:

This provides for a pre-termination notice to the Contractor to remedy any default within a reasonable time.

Thereafter, if not remedied, the Employer is entitled to give a further Notice, which if not complied with within 14 days may lead to a further notice from the Employer to terminate the Contract.

Within the Sub Clause other grounds for an Employer's termination of the Contract are provided.

iii) Termination by Contractor – Sub Clause 10.3:

The Sub Clause leads on from the reasons for the Contractor to suspend the Works, with further time periods, which if expired and the default not corrected, entitles the Contractor to terminate the Contract with a similar notification procedure as that for the Employer. Additional grounds for termination also included within the Sub Clause

iv) Payment after Termination – Sub Clause 10.4: Should termination of the Contract by either Party occur, then this Sub Clause provides a procedure and formula for the evaluation of payment to the terminating Party.

After consideration of the value of the Works executed, and any claims either Party is entitled to, then the following applies:

- If the Employer has terminated then an amount equivalent to 20% of the value of those parts of the Works not yet executed
- If the Employer has terminated for its convenience (Sub Clause 10.2.4) or the Contractor is the terminating Party, then the Contractor is entitled to 10% of the value of those parts of the Works not yet executed, plus demobilisation costs etc.

f) Claims Procedures – Clause 13

i) Right to Claim - Sub Clause - 13.1:

Either Party, if it considers it has a claim relating to cost and/or time, is to give a Notice to the Engineer within 28 days of the event or circumstance causing the claim. Within a period of 56 days the claiming Party is to provide a fully detailed claim to the Engineer.

Thereafter the Engineer is to proceed in accordance with Sub Clause 3.5 to agree or determine the entitlement or relief (if any) of the claiming Party.

ii) Dissatisfaction with Engineer's Determination:

If either Party is dissatisfied with the Engineer's determination then the issue may be taken to the Adjudicator, and no time limit is provided

iii) Prolongation Costs – Sub Clause 1.1.35 and 11.1.3 (N):

To assist in the evaluation of costs due to a Contractor should an extension of Time for Completion (EOT) be awarded with costs, then under the Contract Data a formula for the evaluation of such costs is provided. The reasons for the EOT may be due to Variation(s), increase in measured quantities, exceeding 10% of the Bill of Quantities tender quantity, or a claim under Sub Clause 11.1.3.

g) Dispute Procedures – Clause 14

i) Adjudication – Sub Clause 14.1:

As previously described the Contract calls for a single person Adjudicator to be appointed within 28 days of the Contract becoming effective and to remain in place till the final payment Certificate.

The Sub Clause has to be read in conjunction with the Appendix: Rules for Adjudication Agreement.

Provision is made for the Parties to jointly seek *“assistance and/or informally discuss any issue or disagreement”* between them.

Should a dispute be referred to the Adjudicator then the detailed dispute procedure is stated within the Rules.

On receipt of an Adjudicator's decisions, the Parties shall promptly give effect to it *“unless and until the decision of the Adjudicator is revised by Arbitration”*. There is a time limit of 28 days after receipt of decision for either Party to issue to the other Party a notice of dissatisfaction with the decision, otherwise the decision becomes binding and final.

ii) Arbitration – Sub Clause 14.2:

If a notice of dissatisfaction within due time has been issued by a Party, then the Party may refer the dispute to arbitration unless settled amicably

The Sub Clause notes that the dispute is to be settled by international arbitration under Rules of Arbitration of the International Chamber of Commerce, with one arbitrator and conducted in the language of the Contract.

SECTION 3: APPLICATION OF 2021 FIDIC GREEN BOOK

a) Works Designed by Employer

The Contract has been drafted on the basis of the Works being designed by the Employer in the same manner as the 2017 FIDIC Contract for Construction (Red Book). This is acknowledged in the Foreword where it states, *“The Contractor shall execute the Works in accordance with the Specification and Drawings prepared by (or on behalf of) the Employer.”* It is also stated in the Guidance, page 12.

As such the Contract provides clear responsibilities for each Party and the Engineer. The risks relating to the provision and the accuracies of the Drawings are with the Employer. This is clarified under Sub Clause 11.1.3 (a) (iv) and 11.1.3 (j) (Employer’s Risks) as well as under Sub Clause 1.5 (Priority of Errors or Defects in Documents).

b) Works with detailed design by Contractor

The drafters do envisage the Contract may be used by an Employer, who requires the Contractor to design the whole of the Works to the Employer’s Specifications. This Contract does not use the terms Employer’s Requirements, which is the normal FIDIC term for the technical requirements within a Design-Build Contract.

The Guidance suggests that whilst the Contract has two Sub Clauses that relate to the Contractor’s design (Sub Clause 4.6 Contractor’s Documents and Sub Clause 4.7 Contractor’s Design), it recommends *“The Employer’s requirements portion of the Specification contains a clearly identified, defined and described specific purpose or purposes for which the facility/Works will be used when complete, in order that the Contractor can comply with the obligations to provide the Works which are ‘fit for purpose(s)’ for which they are intended.”*

Whilst the drafters consider that the adaption of the Contract to a full Design-Build Contract may be *“swiftly implemented, with limited amendments”*, it will be necessary to use the Guidance for issues not covered within the Contract. These include qualities and licences of the designers, scrutiny period of the Specifications (Employer’s Requirements), provision of Contractor’s Documents, external authority review of Contractor’s Documents, language of Contract Documents for such review, changes in laws affecting the design, as-built drawings, training, operational manuals, tests on completion and after completion.

It would seem that if the Contract is to be adapted to a Design-Build Contract, then Clauses within the 2017 Design-Build Contract (Yellow Book) should be considered to be added to the Contract.

Attention should also be made to the method of measurement and payment.

SECTION 4: CONCLUSIONS

a) Advantages and Disadvantages of Contract

i) Advantages:

- The Contract is built upon the experiences in the use of the 1999 FIDIC Short Form Contract, which was a prototype for FIDIC. The drafters have taken the opportunity to expand the use of the Contract from “*Small Works*” to projects with a value I estimate of up to US\$ 30 million.
- The format of the Contract is based upon the 1999/2017 FIDIC Contracts and so provides familiarity for users of these Contracts, which have become the norm on the international construction industry
- The Contract provides for clear contractual relationships between the Parties
- The contractual risks relating to each Party are stated within the Contract, enabling each to take precautionary measures
- The Engineer is to administer the Contract on behalf of the Employer, but is required to act neutrally when exercising his/her duties under Sub Clause 3.5 (Agreement or Determination), which is anticipated to facilitate agreement between the Parties
- A full time Adjudicator is appointed, who may provide informal assistance to avoid/reduce disputes
- Project Management procedures are kept to a minimum within the General Conditions, allowing flexibility to the Employer as to what in this respect is required. Such procedures may be provided in the Specification or Special Provisions
- Depending on the size of the project, the Contract allows for varying methods of valuation of the Works
- Provides in the Contract Data clarity of the insurance requirements within the Works, and which Party is responsible.
- Provides within the Contract Data a formula for evaluation of any Prolongation Costs due to the Contractor, if relevant due to an extension of Time for Completion. This should avoid conflicts.
- Potential to adapt to a Design-Build Contract

ii) Disadvantages

- The Contract is no longer suited to “Small Works” projects of say up to US \$5 million
- Employers using the Contract must have qualified Contract drafters to complete the Specifications and Part B Special Provisions
- If the Contract is to be used as a Design-Build Contract, then appropriate additional Sub Clauses to be added and others amended, requiring suitably skilled Contract drafters

b) Potential application

Many IFI’s and Employers are using the FIDIC1999/2017 Contracts for Construction Contracts other than those covered by their “*Small Works*” Contract. The 1999/2017 Contracts may be considered appropriate for “*Large Works*”, but many consider there is a gap for “*Medium Size*” projects, of up to say US \$30 million where the “*Small Works Contracts*” are inappropriate.

The second addition Green Book would appear to be the logical Contract for *such “Medium sized Works”*.

With any Contract the IFI’s and Employers will wish to add the Particular Conditions of Contract (PCCs) and this 2nd Edition Green Book adequately provides for this.

Whilst a significant amount of alteration will be required to the drafting of the PCC’s, once completed this 2nd Editions Green Book should be a useful addition to the IFI’s and Employers portfolio of Contracts.

SECTION 5: NOTE ON ECV CONSULTANCY LTD:

ECV was established in 1993 and has been a leading provider of FIDIC Contract training, providing both In-Person and On-Line training to over 32,000 professionals in 95 countries.

ECV’s training courses contain course materials that are exclusive to ECV, although accredited by FIDIC. This ECV Review forms part of their course on the 2021 FIDIC Short Form of Contract (Green Book).

It’s is provided in good faith and without any liability to ECV Consultancy Ltd or the author David Heslett.

Hopefully it is of assistance to those using the 2021 FIDIC Green Book.