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Second Edition of FIDIC Green Book: A Solid Foundation for Small to Medium Sized Projects

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Having been involved in a number of contract negotiations relating to small to medium sized projects in the private sector, we have become aware of the fact that parties do not always use appropriate standard form contracts for this purpose. In many instances, the owner does not have the requisite technical expertise to design the solar installation, plant, road or other project (as the case may be), and therefore relies on the contractor to do so. Despite the fact that the contractor designs, parties sometimes use the popular standard form contract which is generally used in the building industry in South Africa, namely the Joint Building Contracts Committee (JBCC) Principal Building Contract. Although a good agreement, the use of this standard form document is not recommended where the contractor designs because it has been developed for use in a situation when the owner (and not the contractor) designs. If such a document is used as a basis in a scenario where the contractor designs, many changes need to be made to cater for the fact that the contractor takes design responsibility. This not only leads to a lot of unnecessary work, time delays and legal costs, but also results in many points of disagreement between the parties because the standard form document used, does not offer conventional wording to cater for the situation concerned and, as a result, the parties have difficulty in finding consensus.

In 2021, the International Federation of Consulting Engineers ("FIDIC") published a second edition of what they call "the Short Form of Contract" or "Green Book". In what follows, this second edition is, for the sake of convenience, referred to as "FIDIC Green Book II". This is a very welcome addition to the FIDIC suite of standard form contracts and, in a situation where the contractor designs, is a much better starting point than a standard form contract developed for a situation where the employer designs.

FIDIC Green Book II is adaptable in that it caters not only for scenarios where the contractor constructs the works in accordance with a design provided by the employer, but also for scenarios where the works are partly or fully designed by the contractor. It has been developed to serve as a straightforward document that includes the essential commercial provisions in a situation where the perceived level of risk is relatively low and where there is a need for simplification of contract administration. As many owners who undertake small to medium sized projects do not have advanced contract administration skills available to them, FIDIC Green Book II offers an owner much needed guidance in this regard – it not only comes with recommended wording for the 3 most commonly used guarantees, but also sample wording for some 40 forms of communication/notices (catering for the most common situations that present themselves during and at completion of the construction process) which one party may give to the other. These forms should make owners aware of the need for providing a notice in a particular scenario – something a party may not always think of. This is particularly important where a failure to provide the notice could be to a party's detriment.

Another advantage of FIDIC Green Book II is that all the risks which the owner assumes, are clearly spelled out, as are the entitlements of the contractor (as regards to time and money) when the respective eventualities materialise.

As regards the contract price, parties are given 5 options, namely (i) lump sum price (single payment); (ii) lump sum price (stage payments); (iii) lump sum price with bill of quantities; (iv) re-measurement with a bill of quantities or (v) a 'cost plus' arrangement.

A very handy suggested insurance schedule is also provided, which serves as a tick box for making sure that all necessary types of insurance have been arranged/considered.

Provision is made for an engineer to be engaged by the owner. This could either be an in-house person or an independent firm or person. The engineer (acting neutrally) makes determinations – in this regard the provisions of the popular FIDIC clause 3.5 are also used in FIDIC Green Book II.

In terms of FIDIC Green Book II, disputes that are not settled informally by the parties, are to be dealt with (in the first instance) by way of adjudication. Rules for the conduct of the adjudication and a proposed agreement with the adjudicator are provided. Either party may have the adjudicator's decision revised by arbitration by a single arbitrator. If after the adjudication process no notice of dissatisfaction in respect of the outcome is given within the specified time, the adjudicator's decision stands.

Where the contractor designs, the design must comply with the owner's requirements and must be fit for purpose.

A Defect's Notification Period (DNP) as well as liquidated damages are provided for.

Although the FIDIC clauses could be amended by the parties, this should not be undertaken by inexperienced draftsmen. Great care should be taken to ensure that amendments don't have unintended consequences, or violate any of the 5 "FIDIC Golden Principles" which are specified in the Guidance Notes to FIDIC Green Book II and are designed to ensure that modifications to the FIDIC clauses:

- are limited to those necessary for the particular features of the site and the project, and necessary to comply with the applicable law(s);
- do not change the essential fair and balanced character of a FIDIC contract; and
- the contract remains recognisable as a FIDIC contract.

In our view FIDIC Green Book II is a much more appropriate standard form agreement to use where the contractor designs and fills a lacuna in the South African construction and engineering industry in that, firstly, it provides a simple, easy-to-understand, and balanced template that can be used for small to medium projects, irrespective of which party designs (contractor or owner), and secondly, it brings to a contracting situation the well-respected, conventional wisdom and methodology of the FIDIC suite which have been tried and tested internationally for many decades.

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