

FIDIC 1999 Books – Commentary on Clause 10

Summary

Clause 10 deals with the Taking-Over of the Works, Sections, or parts of the Works. Sub-Clause 10.1 deals with the Taking-Over of the Works and Sections. Taking-Over by the Employer happens when the Works:

- (a) pass the Tests on Completion;
- (b) are substantially complete;
- (c) any contractual requirements relating to Taking-Over have been met; and
- (d) the Taking-Over Certificate has been issued or is deemed to have been issued.

Sub-Clauses 10.2 and 10.3 deal with deemed Taking-Over where the Employer uses part of the Works or interferes with the Tests on Completion for more than 14 days. The failure to issue a Taking-Over Certificate by the Engineer, where the Employer has taken into commercial use the Works, will amount to a breach of contract.

Origin of Clause

There is a similar clause to Clause 10 of FIDIC 1999 at Clause 48 of the 4th Edition. There were also similar provisions within the 3rd Edition, except that there was no provision for Taking-Over of Sections or Parts.

Cross-References

Reference to Clause 10 or to the Taking-Over Certificate is found in the following clauses: -

- Sub-Clause 1.1.3.5 [*Definitions - "Taking-Over Certificate"*]
- Sub-Clause 1.1.3.7 [*Definitions - "Defects Notification Period"*]
- Sub-Clause 4.1 [*Contractor's General Obligations*]
- Sub-Clause 4.8 [*Safety Procedures*]
- Sub-Clause 4.21 [*Progress Reports*]



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- Sub-Clause 4.23 [*Contractor's Operations on Site*]
- Sub-Clause 6.10 [*Records of Contractor's Personnel and Equipment*]
- Sub-Clause 8.2 [*Time for Completion*]
- Sub-Clause 8.4 [*Extension of Time for Completion*]
- Sub-Clause 8.7 [*Delay Damages*]
- Sub-Clause 9.2 [*Delayed Tests*]
- Sub-Clause 9.4 [*Failure to Pass Tests on Completion*]
- Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*]
- Sub-Clause 13.1 [*Right to Vary*]
- Sub-Clause 14.2 [*Advance Payment*]
- Sub-Clause 14.4 [*Schedule of Payments*]
- Sub-Clause 14.6 [*Issue of Interim Payment Certificates*]



- Sub-Clause 14.9 [Payment of Retention Money]
- Sub-Clause 14.10 [Statement at Completion]
- Sub-Clause 14.14 [Cessation of Employer's Liability]
- Sub-Clause 17.2 [Contractor's Care of the Works]
- Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment]
- Clause 6 of the General Conditions of Dispute Adjudication Agreement

Sub-Clause 10.1 – Taking-Over of the Works and Sections

Sub-Clause 10.1 deals with the Employer's obligation of Taking-Over of the Works. This Sub-Clause applies except as stated in Sub-Clause 9.4 [Failure to Pass Tests on Completion]. Therefore, if the Works pass the Tests on Completion, the Employer shall Take-Over the Works (or a Section, if any) when:

"(i) the Works have been completed in accordance with the Contract, including the matters described in Sub-Clause 8.2 and except as allowed in sub-paragraph (a) below [minor outstanding work and defects], and (ii) a Taking-Over Certificate has been issued, or is deemed to have been issued in accordance with this Sub-Clause."

In order for Taking-Over to occur under Sub-Clause 10.1, the Works must be completed in accordance with the Contract including: (i) the matters described in Sub-Clause 8.2; (ii) but excluding those matters referred to in Sub-Paragraph (a).

(i) The Matters Described in Sub-Clause 8.2

Sub-Clause 8.2 states that the Contractor shall complete the whole of the Works, and each Section (if any), including: (a) achieving the passing of the Tests on Completion; and (b) completing all work which is stated in the Contract as being required for the Works or Section to be considered to be completed for the purposes of Taking-Over under Sub-Clause 10.1.

(a) achieving the passing of the Tests on Completion

The Tests on Completion are dealt with at Clause 9 of the Contract. If the Contractor fails to pass the repeated Tests on Completion (Sub-Clause 9.3) then there are remedies available to the Employer. It may instruct the Engineer to order further re-testing until the Works pass; reject the Works if the failure deprives the Employer of substantially the whole benefit of the Contract; or issue a Taking-Over Certificate.

(b) completing all work which is stated in the Contract as being required for the Works or Section to be considered to be completed

Subject to sub-paragraph (a) of Sub-Clause 10.1, the Contractor must carry out and complete the Works as specified within the Contract (see Sub-Clause 7.1 [Manner of Execution]). It is also required to have regard to the provisions of Sub-Clause 4.1(d)¹; which state that:

"prior to the commencement of the Tests on Completion, the Contractor shall submit to the Engineer the "as-built" documents and operation and maintenance manuals in accordance with the Specification and in sufficient detail for the Employer to operate, maintain, dismantle, reassemble, adjust and repair this part of the Works. Such part shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [Taking Over of the Works and Sections] until these documents and manuals have been submitted to the Engineer."

¹ Prior to the list of requirements at (a) to (d), Sub-Clause 4.1 states: "If the Contract specifies that the Contractor shall design any part of the Permanent Works, then unless otherwise stated in the Particular Conditions..." However, from the wording of Sub-Clause 9.1 it appears that the requirements of Sub-Clause 4.1(d) applies even where the Contractor has not designed a part of the Permanent Works.



(ii) But Excluding Those Matters Referred to in Sub-Paragraph (a)

The obligation to complete the Works “in accordance with the Contract” prior to Taking-Over is tempered by sub-paragraph (a). The effect of this sub-paragraph is that the Engineer may still issue a Taking-Over Certificate despite there being “minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose.”

This reference to minor outstanding work allows the Employer therefore to Take-Over the Works when they are practically or substantially complete. These phrases have been judicially considered in a number of cases. In *J. Jarvis and Sons v Westminster Corporation*², Lord Justice Salmon defined practical completion as completion for the purpose of allowing the employers to take possession of the works and use them as intended.³ He held that practical completion did not mean completion down to the last detail, however trivial and unimportant. Similarly, in *H.W. Neville (Sunblest) Ltd v William Press and Son Ltd*⁴, it was held that practical completion did not mean that very minor *de minimus* work had to be carried out, but did mean that if there were any patent defects the Architect should not give a certificate of practical completion. Regard may also be had to the value of work outstanding and the importance of defects to the safety of the facility.⁵

(iii) A Taking-Over Certificate Has Been Issued

The definition section of FIDIC 1999 is unhelpful and “Taking-Over Certificate” is defined as meaning the certificate issued under Clause 10.

Sub-Clause 10.1 provides that within 28 days of the Contractor’s application for a Taking-Over Certificate it shall be issued or rejected. If the Engineer fails to issue or reject the application within 28 days and “if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over

² (1978) 7 BLR 64 HL.

³ This statement was approved in the Australian case of *Murphy Corporation Ltd v Acumen Design & Development (Queensland) Pty Ltd and Derek Hooper* (1995) 11 BCL 274.

⁴ (1981) 20 BLR 78.

⁵ *Big Island Contracting (H. K.) Ltd v Skink Ltd* (1990) 52 BLR 110 and see also *Hoenig v Isaacs* [1952] 2 All E.R. 176.

Certificate shall be deemed to have been issued.” “Substantially in accordance with the Contract” allows for “minor outstanding works and defects” to exist which do not substantially affect the “intended purpose” of the Works. The deeming provision is otiose as the Contractor may still have to prove that the Works are “substantially in accordance with the Contract.” Again, the drafting of this Sub-Clause could be improved.

The reference in sub-paragraph (a) to the “intended purpose” of the Works is confusing. There is no obligation on the Contractor to ensure that the Works are fit for purpose, except where the Contractor takes on a design obligation – see Sub-Clause 4.1(c). The Contractor’s obligation is to construct the works as specified in the Contract – see Sub-Clause 7.1.

Applying for a Taking-Over Certificate

Under the second paragraph of Sub-Clause 10.1, the Contractor applies for the Taking-Over Certificate by written notice. It is envisaged that the Contractor will anticipate completion and give notice up to 14 days in advance of his expected completion date. Although it may be desirable for there to be a joint inspection of the Works or Section when the Contractor asserts that they are complete, there is no express requirement for this to happen. This early notice allows the Employer time to take responsibility for the care of the Works. Once the Taking-Over Certificate is issued (or it is deemed to be issued) for the Works, a Section or a part, responsibility for its care passes to the Employer (see Sub-Clause 17.2). There may be a conflict between this provision and the substantive law, which may lay down provisions relating to acceptance of construction works.⁶ The Taking-Over Certificate is also relevant to the obligation to insure the Works, Plant, Materials and Contractor’s Documents – see Sub-Clause 18.2.

The FIDIC Guide provides “Sample Forms” for a Taking-Over Certificate for the Works and Sections.

Sample Form for Works:

“Having received your notice under Sub-Clause 10.1 of the Conditions of Contract, we hereby certify that the Works were

⁶ See for example, the *Romanian Government Decision No. 273/1994*, regarding the approval of reception regulation of construction works and related plant.



completed in accordance with the Contract on ... [date], except for minor outstanding work and defects [which include those listed in the attached Snagging List and] which should not substantially affect the use of the Works for their intended purpose."

Sample Form for a Section:

"Having received your notice under Sub-Clause 10.1 of the Conditions of Contract, we hereby certify that the following Section of the Works was completed in accordance with the Contract on the date stated below, except for minor outstanding work and defects [which include those listed in the attached Snagging List and] which should not substantially affect the use of such Section for its intended purpose:
[name or description of the Section; and state the completion date]"

When considering Sub-Clause 10.1, regard must be had to the substantive law of the contract. The substantive law may dictate when acceptance or reception of the Works takes place, and this may have an impact on the obligations that the Contractor owes to the Employer and also from when the limitation period for defects begins to run.⁷

As the requirements for Taking Over of the Works are not linked to the Time for Completion it therefore follows that the Contractor can apply for Taking Over prior to the Time for Completion or any extended date for the Time for Completion, as determined by the DAB. In the case of *Laker Vent Engineering Ltd v Jacobs E&C Ltd*⁸ it was argued that a decision by an adjudicator awarding an extension of time to October 2013 was inconsistent with a later decision that Taking Over occurred in August 2013. Mr Justice Ramsey held that these two decisions were not inconsistent and stated:

⁷ See further - A.V Jaeger and G.S Hök, *FIDIC – A Guide for Practitioners*, page 290; and G.S Hök, *Taking Over, Acceptance and Completion Certificate Under German Law*.

⁸ [2014] EWHC 1058 at para 93.

"I do not consider that there is anything inconsistent with the Adjudicator determining that an extension of time should be given to 11 October 2013 and a decision that taking over took place on 30 August 2013. That is the effect of the decisions which are temporarily binding on the parties and those decisions are enforceable. It follows that I do not consider that there is any uncertainty or any conflict between the two decisions, one dealing with extensions of time and the other dealing with the date of the taking over certificate."

Sub-Clause 10.2 – Taking Over of Parts of the Works

Sub-Clause 10.2 states that the Engineer may, at the sole discretion of the Employer, issue a Taking-Over Certificate for any part of the Permanent Works. The Employer is therefore entitled to take back possession if it issues a Taking-Over Certificate for a part of the Works and, unless a Taking-Over Certificate is issued for a part of the Works, the Employer shall not use a part of the Works. There are two exceptions to this: where the Employer uses the Works (a) as a temporary measure, as specified in the Contract, or (b) agreed by both Parties. The next section of the Sub-Clause then deals with what happens if the Employer does use any part of the Works.

These provisions were considered in the case of *Doosan Babcock Ltd v Comercializadora De Equipos Y Materiales Mabe Limitada*.⁹ In this case, counsel for the Contractor argued that the reference to "a temporary measure" in Sub-Clause 10.2 applied only to the prohibition on use by the Employer referred to in the first sentence of the second paragraph of the clause, and not to the second sentence and sub-paragraphs (a) – (c). The judge, Edwards-Stuart J., however stated:

"I am not persuaded that he is necessarily right about this, but I do not need to decide that question because I am wholly satisfied on the material before the court about the

⁹ [2013] EWHC 3010 (TCC).



use of the units, to which I have already referred, that the Claimant has established a strong case to the effect that the boilers have not been taken into use by MABE as a temporary measure. On the face of it, the units have been put into commercial operation as the contract contemplated."

The judge went on to state that therefore the failure to issue a Taking-Over Certificate was a clear breach of contract.

Where the Employer uses part of the Works before a Taking-Over Certificate is issued, then:

- (a) that part shall be deemed to have been taken over from the date it is used;
- (b) the Contractor ceases to be liable for the care of that part of the Works; and
- (c) the Engineer shall issue a Taking-Over Certificate for that part if requested by the Contractor.

The failure to issue a Taking-Over Certificate, where a part of the Works is in commercial use or is permanently under the control of the Employer, will be a breach of contract: *Doosan Babcock Ltd v Comercializadora de Equipos y Materiales Mabe Limitada*.

Use of a Section or part of the Works will pass responsibility for the care of that Section or part back to the Employer (see Sub-Clause 17.2). The Employer must also make sure that there is insurance in place in relation to damage to the Works and third parties. The Employer must also be aware that delay damages are reduced by a proportional amount to the value of the work Taken-Over. The FIDIC Guide suggests that in some countries this may in fact undermine the Employer's entitlement to any delay damages as: "*The Laws of some countries require liquidated delay damages to be predetermined, and not to be subject to assessment by someone appointed by the payee.*" It is, however, unlikely that this statement reflects the current position under English law on the payment of liquidated damages as recently set out by the Supreme

Court in *Cavendish Square Holding BV v Talal El Makdessi; Parkingeye Ltd v Beavis*.¹⁰

It is the Engineer that determines the proportional reduction of delay damages under Sub-Clause 3.5. The Engineer does this by looking at the value of the works Taken-Over as a proportion of the value of a Section (if applicable) or the whole of the Works. The last sentence of Sub-Clause 10.2 states that the proportional reduction affects only the daily rate of the delay damages and does not affect the maximum amount of the delay damages.

If the Contractor suffers loss as a result of the Employer Taking-Over a part of the Works under Sub-Clause 10.2, it must give notice of its loss. The Contractor is required to comply with Sub-Clause 20.1 and may claim Cost plus reasonable profit, which shall be included in the Contract Price. The Engineer is required to determine the value of the claim under Sub-Clause 3.5. There is no express mention of a right to an extension of time. However, if in Taking-Over a part of the Works the Employer impedes or delays completion of a Section or the whole of the Works then the Contractor may claim an extension of time under Sub-Clause 8.4(e). Sub-Clause 8.4(e) states that Contractor may claim an extension of the Time for Completion if it is delayed, impeded or prevented by a cause attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site. It should be noted that where the Employer Takes-Over a part of the Works, the Contractor will still be required to complete that part of the Works – see Sub-Clause 11.1(a).

The FIDIC Guide provides sample forms for the Taking-Over Certificate:

"Sample Form of Taking-Over Certificate for Parts of the Works (CONS or P&DB)
We hereby certify, in the terms of Sub-Clause 10.2 of the Conditions of Contract, that the following parts of the Works were completed in accordance with the Contract on the dates stated below, except for minor outstanding work and defects [which include those listed in the attached Snagging List]:

¹⁰ [2015] UKSC 67.



[description of each part taken over; and state its completion date]"

Sub-Clause 10.3 – Interference with Tests on Completion

Once again, the FIDIC draftsmen have included a deeming provision in this Sub-Clause. In circumstances where the Employer is responsible for preventing the Tests on Completion from being carried out for more than 14 days, the Employer shall be deemed to have Taken Over the Works or Section. The thinking behind this Sub-Clause is that the Test on Completion will immediately precede the Taking-Over of the Works and therefore if the Employer is preventing the Tests on Completion being carried out, the Employer should become responsible for the Works or Section (if applicable).

The Engineer is then required to issue a Taking-Over Certificate for the Works or Section (if applicable). This will therefore prevent the Employer deducting delay damages. The Sub-Clause then proceeds to state that where the Contractor suffers delay or incurs additional Cost it shall be entitled, subject to Sub-Clause 20.1, to claim an Extension of Time and Cost plus reasonable profit.

The mere fact that the Employer prevents the Test on Completion occurring for more than 14 days does not relieve the Contractor of his obligation to complete these tests. The Contractor must still carry out the Tests on Completion as soon as practicable, and before the expiry of the Defects Notification Period. The Contractor does not have to give a further notice that it is still ready to carry out the Test on Completion, but the Engineer must give 14 days' notice of the date on which it wishes the tests to be carried out.¹¹

Sub-Clause 10.4 – Surfaces Requiring Reinstatement

Reinstatement presumably must be distinguished from repair and maintenance, particularly in circumstances where the Employer has moved onto and is making use of the surface concerned. On road projects, the wearing course is sometimes left off when the Employer first takes occupation so that, shortly before

the works are complete as a whole, the entire project can be brought up to the same standard with the wearing course being laid for the whole project.

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

¹¹ See Sub-Clause 9.1 paragraph 2.

