

MDA PRESENTS



FIRST AID FOR CONTRACTS



Twelfth Edition - December 2017

DOWN THE RABBIT HOLE WITH THE TAKING-OVER PROCEDURE UNDER FIDIC 1999 ¹

+ Author: Michelle Kerr

The Taking-Over Certificate is defined in Clause 1.1.3.5. of the 1999 FIDIC red book as *“a certificate issued under Clause 10 [Employer’s Taking Over]”*. A seemingly simple definition, which references a complex process, with a number of important consequences.

The Employer is obliged to take over the Works where (i) they have been completed in terms of the Contract, and (ii) the Engineer has issued (or is deemed to have issued) a Taking-Over Certificate. [Clause 10.1] This applies to the Works as a whole or, where the Works are divided into Sections, each Section, and is subject to the Works passing the Tests on Completion.

Except where it is stated in the Taking-Over Certificate, such certificate does not certify the completion of any ground or other surface, which requires reinstatement. [Clause 10.4]

Where the Contract specifies that the Contractor shall design any part of the Permanent Works, such part is not considered complete for the purposes of taking over until 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, have been submitted to the Engineer. [Clause 4.1(d)]

If the Works do not pass the Tests on Completion, the Engineer has three options: (i) order a repeat of the tests, (ii) if the failure deprives the Employer of substantially the whole benefit of the Works, the Employer may terminate the Contract and recover all sums already paid for the Works, plus financing costs and the costs of dismantling the Works and clearing the Site, or (iii) issue a Taking-Over Certificate anyway, provided that it is at the Employer's request, and reduce the Contract Price by an amount appropriate to compensate the Employer for the reduced value. [Clause 10.1 read with Clause 9.4]

The Contractor applies for a Taking-Over Certificate, by notice to the Engineer, not earlier than 14 days before the Works will, in his/her opinion, be complete and ready for taking over. Upon receipt of this notice, the Engineer has 28 days to either (i) issue the Taking-Over Certificate, or (ii) reject it, with reasons, specifying the work required to enable the Taking-Over Certificate to be issued. [Clause 10.1]

The Works are deemed to have been taken over, under the following circumstances:

- i. If the Engineer does not respond, by either issuing the Taking-Over Certificate or rejecting the Contractor's application, within the aforementioned 28-day period, and the Works are substantially in accordance with the Contract, the Taking-Over Certificate is deemed to have been issued. [Clause 10.1] Substantial performance is not defined in the Contract, however, it is usually taken to mean performance which is close to but not entirely in accordance with the requirements for practical completion. This will depend, largely,

on whether the Employer is able to take the benefit of the work performed, and the cost of correcting the shortcomings would normally be modest².

- ii. The Employer also has the option to request the Engineer to issue a Taking-Over Certificate for any part (differentiated from a contractually defined Section) of the Works and the Employer may not use any part of the Works until this Taking-Over Certificate is issued. If s/he does so, the part which is used, is deemed to have been taken over and the Engineer is obliged, at the request of the Contractor, to issue a Taking-Over Certificate for that part. The Tests on Completion must then be completed for this part, before the expiry of the Defects Notification Period. [Clause 10.2]
- iii. If the Contractor is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Employer is responsible, the Employer is deemed to have taken over the Works or Section of the Works and the Engineer is obliged to issue the Taking-Over Certificate. The Contractor then carries out the Tests on Completion before the expiry of the Defects Notification Period. [Clause 10.3]

If the Contractor incurs Cost as a result of the taking over of a part of the Works, or suffers delay and/or incurs Cost as a result of a delay to the Tests on Completion, s/he is entitled to make a claim, in terms of Clause 20.1, for an extension of time and/or such Cost plus reasonable profit. [Clause 10.2 and 10.3]

The taking over of the Works has a number of additional consequences:

- i. The Contractor is obliged to clear away and remove, from that part of the Site and Works to which the Taking-Over Certificate refers, all Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works. This is subject to the Contractor's entitlement to retain such Goods as are required for him/her to fulfil his/her obligations under the Contract, during the Defects Notification Period. [Clause 4.23]
- ii. The Contractor's liability for delay damages falls away. [Clause 8.7] If a Taking-Over Certificate has been issued for a part of the Works (other than a Section), the delay damages thereafter for completion of the remainder of the Works or Section thereof shall be reduced proportionally. This is calculated as the proportion which the value of the part so certified bears to the value of the Works or Section (as the case may be) as a whole. [Clause 10.2]
- iii. The Defects Notification Period commences. [Clause 1.1.3.7] The Contractor is required to complete any outstanding works and remedy any defects on or before the expiry of the Defects Notification Period, or as soon as practicable thereafter. [Clause 11.1] The Employer is entitled, subject to making a claim under Clause 2.5, to an extension of the Defects Notification Period for the Works or a Section, if, and to the extent, that the Works, Section or a major item of Plant cannot be used for the purpose for which they were intended, by reason of a defect or damage. [Clause 11.3] The Defects Notification Period can be extended by a maximum of 2 years [Clause 11.3] but only if the Employer's Clause 2.5 notice is given before the expiry of the Defects Notification Period. [Clause 2.5]
- iv. The Engineer may no longer initiate Variations. [Clause 13.1]
- v. If any advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works, the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer. [Clause 14.2]
- vi. The first half of the Retention Money is certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money is certified and paid. This proportion is two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract Price. [Clause 14.9]

- vii. Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor is required to submit to the Engineer six copies of a Statement at completion with supporting documents, showing the value of all work done up to the date stated in the Taking-Over Certificate, further sums which the Contractor considers due and any estimate of any other amounts which the Contractor considers will become due. The Engineer is then required to certify an Interim Payment Certificate in this regard. [Clause 14.10]
- viii. Responsibility for the care of the Works passes to the Employer. The Contractor, however, takes responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed. The Contractor is, further, liable for any loss or damage caused by any actions performed by him/her after a Taking-Over Certificate has been issued or which occurs after a Taking-Over Certificate has been issued due to a previous event for which the Contractor is liable. [Clause 17.2]
- ix. The insurance for Works, Plant, Materials and Contractor's Documents is no longer effective, although the insuring Party is required to maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor in the course of any other operations. [Clause 18.2]
- x. The retainer fee due to the Dispute Adjudication Board from the last day of the calendar month in which the Dispute Adjudication Agreement becomes effective until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works, falls away. [Clause 6 of the General Conditions of Dispute Adjudication Agreement]
- Interestingly, the Contractor must ensure that the Performance Security is valid and enforceable until s/he has remedied any defects. [Clause 4.2]
- The taking over procedure continues despite the presence of minor outstanding work and defects which do not substantially affect the use of the Works for their intended purpose. [Clause 10.1] The submission of progress reports also continues until the Contractor has completed all work which is known to be outstanding at the completion date. [Clause 4.21] Only once this outstanding work has been completed does the Contractor's monthly obligation to submit records of its Personnel and Equipment on the Site, cease. [Clause 6.10]

Should the Contractor fail to complete the outstanding work within such reasonable time as is instructed by the Engineer, this constitutes a failure to carry out an obligation under the Contract. The Engineer may then notify the Contractor requiring him/her to make good the failure and remedy it within a specified reasonable time. [Clause 15.1] Failure, by the Contractor, to do so will entitle the Employer to terminate the Contract and complete the Works/arrange for any other entities to do so, and recover the cost of such completion from the Contractor. [Clauses 15.2 and 15.4(c)]

If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor, the Employer may (at his/her option) (i) carry out the work him/herself or have it carried out by others at the Contractor's cost, (ii) require the Engineer to agree or determine a reasonable reduction in the Contract Price, or (iii) if the defect or damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract as a whole, or in respect of such major part which cannot be put to the intended use. [Clause 11.4]

Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor stating the date on which the Contractor completed his obligations under the Contract. [Clause 11.9]

¹“Down the rabbit hole”, a metaphor for an entry into the unknown, the disorienting or the mentally deranging, from its use in Alice's Adventures in Wonderland.”- https://en.wikipedia.org/wiki/Rabbit_hole

²Bailey, J. Construction Law (first edition) Informa Law from Routledge, 2011, Volume I, paragraph 6.312