

Clause 12: Tests after Completion

Written by George Rosenberg¹

Clause 12 deals with Tests after Completion.

- It is more common overall for Tests on Completion to be the final test required rather than Tests after Completion. However, tests after completion are commonly required for process and power contracts. There may, for example be a requirement for a “reliability” test during a period of initial functioning. Sometimes the tests are required to be carried out in different seasons of the year to test functioning under different conditions – whether from weather or load.
- Thus, by definition, the Plant is likely to be under the control of the Employer by the time the Tests are to be carried out. The Yellow Book thus assumes that the tests will be carried out by the Employer, although the results will potentially lead to obligations being imposed on the Contractor.
- There are few changes from the 1999 edition but these few are significant.
- There is a new obligation for the Employer’s staff who carry out the test to both competent and able to carry out the tests properly. This is significant.
- By the time these tests are carried out, the relevant element of the Works will have been completed and operational and obviously any tests carried out by people who do not meet these qualifications may be of doubtful value. This is a serious issue where the Works include complex Plant, because, at least immediately after the time of taking over, it is quite possible that the Employer’s staff (probably those who will eventually run the Plant) may not be sufficiently experienced to meet the requirements. If they are not, they may not be able to operate and thus test it to its required efficiency and the test results will be misleading. Indeed, if they are the same people who have been running the plant for some time, their lack of competence may have contributed to any short-fall in performance.
- In the event that the Contractor disagrees with the results and can identify any lack of competence on the part of the Employer’s testing team, it will be able to take issue with the results of the Tests. Since the competence of the testing staff is an element of the requirement for testing, the mere fact that the Employer’s testing staff do not meet the standard required ought to be sufficient argument to say that the Employer is not entitled to rely on the tests. This is even without proving that the Plant would, if properly tested, have met the required standards.
- A further and sensible new provision requires that the tests be carried out in accordance with the Employer’s Requirements and the O&M Manuals to which the Engineer has given (or “deemed to have been given” sic²) a Notice of No-objection under Clause 5.7.
- The tests are (as before) to be carried out in the presence of the Contractor if the Employer or the Contractor so requests.
- There is new provision enabling the timing of Tests after Completion to be provided for in the ER’s and for the Engineer (previously the Employer) to provide the Contractor with notice of the date and a programme for the timing. Given that the tests are to be carried out by the Employer, not by the Engineer and

¹ George Rosenberg is a Consultant at Corbett & Co. International Construction Lawyers Ltd. He can be contacted at george.rosenberg@corbett.co.uk ² This appears to be an error as the Notice of no-objection is given by, not to, the Engineer.

the Engineer is not expected to be present, it is not clear why the Engineer has replaced the Employer in this provision.

Delayed Tests (12.2)

There are no changes.

Re-testing (12.3)

The previous provision regarding re-testing (12.3) is now said to be subject to Sub-clause 12.4 [*Failure to Pass Tests after Completion*]. Clause 12.4 allows for the imposition of Performance Damages or for the Contractor to remedy the non-performance discovered in the tests. The effect of making 12.3 subject to 12.4 appears to be quite significant as it now seems to be possible for the Employer to bypass the Contractor's right and obligation under Sub-Clause 11.1 to remedy defects and simply levy Performance Damages.

Should the Employer not choose to go straight to a demand of damages there is another anomaly. Sub-Clause 12.4 gives the Contractor an option to remedy defects. The conditions under which an 11.1 remedy has to be carried out are different from those under 12.4. Under the latter (which is especially designed to deal with the situation where the Employer is in occupation and operating) the Employer is entitled to delay access to accommodate its operational requirements. There is no equivalent provision in 11.1

Should remedy be required by the Employer under Sub-Clause 11.1 [*Defects Liability*], the 1999 provision allowed either party to request repeated tests under 12.1 – i.e. as a Test on Completion and thus carried out by the Employer. The new provision now provides that the repeated testing provisions in Clause 11.6 shall apply instead. Although 11.6 requires tests to be carried out in accordance with Clause 12, notices are given not by the Employer, but by the Engineer and are directed to the Contractor not to the Employer (who will carry out the tests).

Failure to Pass Tests after Completion (12.4)

One of the options under the equivalent 1999 Sub-Clause was for the Contractor to pay any prescribed non-performance damages. He would then be released from any obligation to remedy the discovered shortfall in performance. The redrafted Sub-Clause gives the Employer the option as to whether or not to demand this payment. Thus, the previous escape route for the Contractor to avoid having to carry out remedial works may be closed off.

The process for the Employer to seek payment of the Performance Damages requires a Claim under Clause 20.2. This is a very significant change from the previous position because the claim is now subject to the 28 day condition precedent. Once the Employer knows the tests have failed he must make his claim, otherwise he will lose the right to Performance Damages altogether. As noted above the provision for re-testing is subject to Clause 12.4 and it seems arguable that the 28 day period for claiming Performance Damages may start as soon as the failure to pass the test under 12.3 is apparent, even if the Employer decides to insist on a remedy under 11.1. Although (as noted below) Sub-Clause 12.4 goes on to give the Contractor the option to seek to remedy any deficiencies, such a request by the Contractor would not seem to give the Employer further time to make his claim for Performance Damages.

Payment of Performance Damages is said to lead to the result that the works are deemed to have passed the Tests after Completion.

The second part of Sub-Clause 12.4 is unchanged from the 1999 edition but it is necessary to discuss the implications of the change to the first part of the Sub-Clause. When payment of Performance Damages was a Contractor option it was logical to provide (as an alternative) that the Contractor could proceed to remedy any issues at its own expense. This is what the second part envisages. Since the choice of whether or not to claim Performance Damages is now that of the Employer,

it is much more difficult to see how the Sub-Clause works. If the Employer does not claim Performance Damages (whether accidentally or deliberately), the Contractor will remain liable under the general principles of damages for default, to meet the Employer's resulting losses. Thus, what was previously a choice now becomes an obligation and, unless the Contractor prefers to face a general damages claim³ it will be obliged to remedy the defects.



Article Author
George Rosenberg⁴

Email: george.rosenberg@corbett.co.uk

³ Since Performance Damages are a liquidated sum it would be possible, at least under English law, to argue that they provide a cap on liability for damages, even though the Employer no longer seeks them.

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