

# Clause 9

## Summary

**Clause 9 deals with the Tests on Completion. Sub-Clause 9.1 requires the Contractor to give notice when it is ready to carry out the Tests on Completion. Tests on Completion are a defined term at Sub-Clause 1.1.3.4. Sub-Clause 9.2 deals with delayed testing caused by either the Employer or the Contractor. Sub-Clause 9.3 deals with retesting after a failure to pass the Tests on Completion. Sub-Clause 9.4 deals with a failure to meet the requirements of the contract after retesting.**

## Origin of clause

There is no clause similar to Clause 9 of FIDIC 99 within the FIDIC 4<sup>th</sup> edition; although there was a reference in the definition section to Tests on Completion - clause 1.1(d)(i) and Clause 37 of FIDIC 4<sup>th</sup> edition dealt with inspection and testing.

## Cross-references

Reference to Clause 9 or to the Tests on Completion is found in the following clauses:-

- Sub-Clause 1.1.3.4 Definitions - “Tests on Completion”
- Sub-Clause 4.1 Contractor’s General Obligations
- Sub-Clause 8.2 Time for Completion
- Sub-Clause 10.1 Taking Over of the Works and Sections
- Sub-Clause 10.2 Taking Over of Parts of the Works
- Sub-Clause 10.3 Interference with Tests on Completion
- Sub-Clause 13.1 Right to Vary

## Sub-Clause 9.1 Contractor’s Obligations

Tests on Completion are defined by the Contract as tests that have been specified, agreed or instructed by the Engineer and are carried out before Taking Over. They are intended to include any type of tests which the Contractor is required to carry out prior to or at completion. Their purpose is to show to the Employer that the Works (or a Section) has reached a stage where it can be Taken Over under Clause 10. Before it is possible for the Contractor to test whether the Works or a Section have passed any Tests on Completion, it must first provide to the Engineer the complete, specified as-built documents and operation and maintenance manuals required under Sub-Clause 4.1(d). The Contractor must then provide everything necessary to conduct the Tests

on Completion efficiently and observe all of the detailed obligations regarding attendance, notice and timing of these tests given in Sub-Clause 7.4 (Testing).

The Sub-Clause makes no reference to “additional” testing that may be required, in contradistinction to retesting. Such additional testing would form part of the Tests on Completion as the phrase ‘Tests on Completion’ is defined in Sub-Clause 1.1.3.4 as including additional tests “instructed as a Variation.” The consequence of failing to meet an additional testing requirement, which has been instructed as a Variation, is not spelt out. There appears to be a tension between Sub-Clause 8.4(a) and Sub-Clause 7.5, which deals with the rejection of testing. Under Sub-Clause 8.4(a) the Contractor could argue that the Variation has led to the delay and it is entitled to an extension of time and consequential costs. However, Sub-Clause 7.5 states that if the Employer incurs additional costs as a result of a failure to pass the testing, the Contract shall pay these costs.

The Contractor must give 21 days’ advance notice of his readiness to start each Test on Completion. The test should then be completed within 14 days after that, on the day(s) instructed by the Engineer.

The Engineer must take into account whether the Employer’s use of the Works has affected the performance of the Works under test.

Immediately when the Works have passed the Tests on Completion, the Contractor shall certify the results to the Engineer. Typically, Tests on Completion are specified in detail within the Contract and therefore the report, required by the last sentence of the Sub-Clause, is usually necessary. They are not, however, used in every type of contract. Their main use is where the contract requires the provision of, for example, a process plant or power-generation plant. In such cases the requirement for performance testing is central to the purpose of the contract. In road building contracts or other similar types of works there may not be a requirement for any Tests on Completion. All the required testing may have been carried out as the works progressed.

## **Sub-Clause 9.2      Delayed Tests**

This Sub-Clause deals with two situations. The first relates to delays caused by the Employer. The second relates to delays caused by the Contractor.

### Delays Caused by the Employer

Sub-Clause 9.2 states that if the Tests on Completion are being unduly delayed then Sub-Clause 7.4 [*Testing*] (fifth paragraph) and Sub-Clause 10.3 [*Interference with Tests on Completion*] become applicable.

Sub-Clause 7.4 [*Testing*] (fifth paragraph) deals with the consequences of additional time and Cost resulting from delayed testing for which the Employer is responsible. The Sub-Clause states that subject to Sub-Clause 20.1 the Contractor is entitled to claim an extension of time, if completion is or will be delayed, and payment of such Cost and reasonable profit. Given that the Tests on Completion are the final step before Taking Over of the Works it is almost inevitable that any

delay caused by the Employer at this stage will lead to an extension of time claim. However, this must be read with Sub-Clause 10.3 [*Interference with Tests on Completion*].

Sub-Clause 10.3 is dealt with in more detail when considering Clause 10. In summary Sub-Clause 10.3 states that where the Contractor is prevented for more than 14 days from carrying out the Tests on Completion then the Employer shall be deemed to have Taken-Over the Works or Section (as the case may be) and the Engineer is then required to issue a Taking-Over Certificate. An extension of time and Cost plus reasonable profit may then be claimed. The words “unduly delayed” in Sub-Clause 9.2 must therefore refer to a delay which is more than 14 days.

### Delays Caused by the Contractor

Given that the Contractor must give 21 days’ notice that it is ready to carry out the Tests on Completion, it will be unusual for the Tests on Completion to be delayed by the Contractor. However, if this does occur, perhaps because a piece of plant breaks down and needs to be replaced, and the Tests on Completion are unduly delayed then the Engineer may give notice requiring the Contractor to carry out tests within 21 days after receiving the notice.

The FIDIC Guide states that the Contractor should first be given the opportunity to rectify his default, in accordance with the second paragraph of the Sub-Clause. If the Contractor then fails to carry out the Tests on Completion within the 21 days then these may be carried out by the Employer's Personnel. It is deemed that the Tests on Completion are carried out in the presence of the Contractor who is required to accept the results of the Tests.

The Employer's Personnel are not obliged to carry out these Tests, and may consider that it would be unwise to do so.

### Undue Delay

Within Sub-Clause 9.2 reference is made to the Tests on Completion being ‘unduly delayed’. This reference arises in relation to both the rights that the Contractor has to claim time and Cost and the Employer’s rights in carrying out the Tests through the Employer’s Personnel. Simply delaying the Tests on Completion appears not to give either party a right to claim; the Tests must be delayed ‘unduly’. In *Lichfield Securities Ltd, R (on the application of) v Lichfield District Council & Anor*<sup>1</sup> the English Court of Appeal addressed what was meant by undue delay. Sedley LJ stated as follows:

“I believe that the question of undue delay is to be approached more, rather than less, objectively than the earlier question of promptness. Perhaps some analogy is to be found in the concept of inordinate delay developed in the authorities governing the striking out of actions for want of prosecution. Inordinate delay means materially longer than the time usually regarded by the profession and courts as acceptable. It falls to be judged

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<sup>1</sup> [2001] EWCA Civ 304

objectively. Why should undue delay be judged differently? If one has delayed inordinately, surely one has delayed unduly.”

Sedley LJ then stated at para 37:

“But promptness, like undue delay, is not to be gauged simply by locating the earliest practicable opportunity and adding a short time for lawyers to advise and launch proceedings. It is crucially affected by the potential or actual effects of the passage of time on others.”

Factors that the parties may have regard to when considering whether there has been an undue delay are the level of delay damages, the losses that might be caused to the Employer, how this impacts on follow on trades, and the purpose of the project. What appears to be evident though is that the Tests on Completion will be considered to be unduly delayed even a short time after they ought to have been carried out. The specific reference to a 14 day period in Sub-Clause 10.3 makes this abundantly clear.

### **Sub-Clause 9.3 Retesting**

If the Works or a Section fails to pass the Tests on Completion, Sub-Clause 7.5 shall apply and the Engineer or the Contractor may require that the Tests be repeated. Sub-Clause 7.5 states that the Engineer may reject the Plant, Materials or workmanship and the Contractor shall then promptly make good the defect and make sure that the rejected item complies with the Contract. Sub-Clause 7.5 also repeats in similar terms what is stated in Sub-Clause 9.3; i.e. that any repeated tests shall be carried out under the same terms and conditions.

If the rejection and retesting cause the Employer to incur additional costs, the Contractor shall, subject to Sub-Clause 2.5, pay these costs to the Employer. There are potentially two types of loss that the Employer may incur. The first relates to delay related costs. However, it is less than clear whether the delay damages cap would apply to this type of loss. There is one view that the delay damages clause is an exclusive remedy for delay<sup>2</sup> and on ‘all obligations that bite on delay’; however, there is another view that when construing a contract, which includes other specified heads of loss, it cannot have been intended to create an exclusive remedy.<sup>3</sup> Furthermore, the delay damages clause does not specifically refer to this breach. The second head of loss relates to the additional costs of re-testing; for example, additional costs of people attending Site or reviewing the results.<sup>4</sup> These losses will be recoverable: *Decoma UK Ltd v Haden Drysys International Ltd* [2005] EWHC 2948.

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<sup>2</sup> *Temloc Ltd v Errol Properties Ltd* (1987) 39 BLR; and *Biffa Waste Services Ltd v Maschinenfabrik* [2008] EWHC 6.

<sup>3</sup> See *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.

<sup>4</sup> *Scottish Coal Company v Kier Construction Ltd* [2005] CSOH, where the judge took a divisible approach to the obligation to complete by the Time for Completion and other obligations.

The FIDIC Guide states that “If tests are repeated after the cause of previous failures has been remedied, and it seems likely that other (related) work may have been affected by the remedial work, that other work may therefore need to be retested.”

The clause is silent about Works where the Employer has provided free issue material for the project. If it is the free issue material that is the cause of the failure to the Tests on Completion then the Contractor will be entitled to an extension of time and may also argue that unless the Employer remedies these defects within 14 days there should be a deemed Taking Over under Sub-Clause 9.2. In order to overcome this problem the parties in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co Kg (Uk Productions)*<sup>5</sup> agreed that there would be an assumption that performance of free issued items would be sufficient to test the elements of contractor’s scope of supply together with a provision that, if those items were insufficient to test the elements of contractor’s scope of supply (i.e. to enable the contractor to pass the Tests), the test would be based on the maximum throughput allowed by the free issued items.

#### **Sub-Clause 9.4 Failure to Pass Tests on Completion**

Where the works fail to pass the repeated Test on Completion the Engineer is provided with three choices:

- a) Order further tests under Sub-Clause 9.3.
- b) If the failure deprives the Employer of substantially the whole benefit of the Works or Section, reject the Works and terminate the contract.
- c) Permit a Taking-Over Certificate to be issued.

The FIDIC Guide suggests that there is no limit on the number of repetitions which may be ordered, because after any Test it may appear that only minor remedial work will be required to overcome the apparent reasons for the failure.

Sub-paragraph b) has been described as “some sort of nuclear weapon newly granted to the Employer in relation to alleged defects and is found in all three books of the new rainbow. Under the normal principles of English contract law it is inconceivable that an Employer could have any such rights. He would be entitled to damages under the normal measure of foreseeable damages under the rules in *Hadley & Baxendale*<sup>6</sup> and *Victoria Laundry*<sup>7</sup> and the measure of those damages would be subject to his obligation to mitigate his loss.”<sup>8</sup> This issue is discussed in more detail under Clause 11 as is the meaning of the phrase ‘substantially the whole benefit.’

Sub-paragraph c) allows for the issue of a Taking-Over Certificate. Where this occurs then the Contractor is still obliged to complete all its obligations under the Contract, including completing

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<sup>5</sup> [2008] EWHC 1087

<sup>6</sup> *Hadley & Anor v Baxendale & Ors* [1854] EWHC Exch J70

<sup>7</sup> *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528

<sup>8</sup> Robert Knutson: An English Lawyer’s View of the New Fidic Rainbow – Where is the Pot of Gold?

all the Works (see Sub-Clause 8.2(b)). If the Contractor cannot carry out the remedial work, the Employer may issue a notice to correct under Sub-Clause 15.1 or seek agreement to a reduction in the Contract Price. In such circumstances the Employer is likely to first indicate the reduction it would require and seek the Contractor's agreement prior to the issue of a Taking-Over Certificate. If agreement cannot be reached prior to the issue of the Taking-Over Certificate under sub-paragraph (c), then sub-paragraph (a) or (b) could be applied.

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