

Clause 7: Plant, Materials and Workmanship

Written by George Rosenberg¹

Clause 7 deals with a variety of issues relating to Plant Materials and Workmanship. All sub clauses have been subject to some change – in several cases of significance.

Manner of Execution (7.1)

The 1999 edition only applied the obligations under 7.1 to manufacture of Plant, production and manufacture of materials and generally to the execution of the Works. It is now extended to cover manufacture, supply, installation, testing and commissioning and/or repair of Plant, the production, manufacture, supply and testing of Materials, and all other operations and activities during the execution of the Works. Bullet point text.

Samples (7.2)

The 1999 edition inappropriately required samples to be submitted for testing in the same way as documents. This has not been fully remedied. A detailed process is set out in 7.5 where a sample is rejected on inspection but no time limits or process for inspection or provision for re-submission where the issue is not one which would lead to rejection on the basis of a defect is provided.

Inspection (7.3)

As in the 1999 edition Notices of availability for inspection have to be provided to the Engineer, but the inspections are carried out by the Employer's Personnel.

An express power to make records and take photographs and video recordings has been added.

Access is now required to be provided in a safe manner.

There is now an express right for the Contractor to proceed to cover up work or material which would otherwise need to be inspected if the Engineer does not respond to the Contractor's notice advising that an inspection may be carried out, or the Employer's Personnel do not make the inspection at the notified time.

Testing by the Contractor (7.4)

In addition to previous provisions the Contractor is now required to provide the temporary supplies of electricity and water necessary for any testing and his staff must be competent enough to ensure the tests are carried out properly.

The Contractor is required to give Notice to the Engineer of the time and place it plans to test. This is to be given at a reasonable time to enable the Employer's Personnel to attend. This is a change from the 1999 edition but the only indication in the Clause that it is Employer's Personnel rather than the Engineer who will attend. Later provisions all refer to the Engineer and indeed impose sanctions if he does not appear. There is clearly an error either here or in the later provisions. Whereas the 1999 edition required the Contractor and the Engineer to agree the times and places for testing, the Contractor now simply notifies the Engineer giving a reasonable time.

A new provision requires the Engineer to issue a VO where he wants the Contractor to change the location or timing or details of specified tests. The use of a VO may be appropriate where there are additional tests to be carried out and, perhaps, where there is a significant change to the location or timing of tests. However, the VO procedure is a time consuming and complex one and it is difficult to see why most changes could not be initiated by simple instruction. Indeed, the following paragraph provides for that. It is not clear which

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provision is intended to apply. It appears that at least as far as timing is concerned, the Engineer has an option as to whether to proceed by Notice or Variation. If this is the case, the Engineer is probably best to avoid the use of the Variation power, as this introduces rights to object which could complicate the process.

The Engineer formerly was required to give at least 24 hours' notice of his intention to attend the tests. This has been extended to 72 hours.

The Employer is now given the right to claim Costs where these are incurred as a result of a delay of the Contractor.

In an error which has been carried over uncorrected from the 1999 edition, in the event of the failure of the Engineer to attend at the time notified he is deemed to be present. However, a subsequent paragraph states that if he has not attended the tests he is deemed to accept them as accurate. Thus there seems to be no provision by which the Engineer may be deemed to have accepted the tests as accurate.

Defects and Rejection (7.5)

In the 1999 edition this provision did not elaborate on what would happen if the Contractor failed to remedy rejected inspected items. The remedies have been substantially elaborated.

The process through which the Engineer has to go to seek a remedy where defective items are found on inspection has been formalised – now requiring a formal Notice from the Engineer and a formal proposal from the Contractor. This will then be reviewed by the Engineer who may (within 14 days) give a Notice of the extent to which the proposal does not comply with the Contract. There can be a further exchange. If the Engineer does not give his 14 day notice there is a deemed Notice of No-objection.

If the Contractor fails to submit a proposal or fails to carry it out, there is provision for the Engineer to instruct the Contractor as to what he should do (see

7.6) or give a Notice of Rejection. In the latter case Sub-Clause 11.4(a) [*Failure to Remedy Defects*] comes into play. “Fail” is normally an absolute term but this would make nonsense of the Sub-Clause and presumably “fail” here is intended to mean “fail in whole or in part”.

This allows the Employer to carry out the necessary work to recover its reasonable costs.

There was no provision in the 1999 edition for the Employer to act in this way, so this provision remedies a gap.

In the case where the Contractor complies with its obligations and remedies the work, the Engineer may ask for a “retest”. This can only refer to an item whose defects were discovered as a result of a test. This final paragraph cannot therefore allow retesting where the process has had to be initiated as a result of an examination, inspection, or measurement. However the Engineer would be entitled to re-initiate the process under Sub-Clause 7.5 – for which there is no automatic cost entitlement for the Employer - or exercise its rights under Sub-Clause 7.6.

Remedial Work (7.6)

This Sub-Clause provides an alternative remedy where the Engineer does not reject the faulty element. It is similar to the 1999 equivalent but in addition to the 1999 remedies the Contractor may now be required to repair or remedy any Plant or Materials (rather than remove as previously) or any other work (rather than remove and re-execute as previously). This changes the character of the remedy from one for situations where tests etc have been failed to one which may also be applied where there is damage to the works. One reason for this change is that this sub-Clause is now to be activated under a cross-reference in Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*] which applies during the DNP and thus also to damage.

Sub-Clause 7.6 now entitles the Contractor to Cost and time where the cost of remedying the loss or

damage results from an act by the Employer and where there is an Exceptional Event under Sub-Clause 18.4.

The “*repair*” right overlaps and adopts a slightly different policy compared with Sub-Clauses 17.1 and 17.2 which impose on the Contractor an obligation to take full responsibility for the care of the Works up to completion or termination. Sub-Clauses 17.1 and 17.2 only apply where the damage to be remedied arises from a failure to care for the works. The obligation there is absolute and does not require a notice except where one of the excluded events set out in Sub-Clause 17.2 apply. The list of excluded events there is less comprehensive in some ways and more in others than the possible range of Exceptional Events.

Unlike this Sub-Clause, the procedure under Sub-Clause 17.2 requires a VO in those circumstances where the loss or damage is the result of an excluded event and, depending on the valuation procedure to be applied under Sub-Clause 13.3.1, the cost to the Employer may be more or less than a simple Cost plus Profit calculation under this Sub-Clause.

Where the remedial work is required as a result of damage to the Works caused by the Employer or Exceptional Events, Engineers should therefore consider but be careful about making use of this power. It is much simpler, but it may be more costly to the Employer than if they follow the provisions of Sub-Clauses 17.1 and 17.2. However the provision will need to be invoked where the Contractor fails to carry out repair obligations under Sub-Clause 17.2. That Sub-clause does not provide a remedy for this situation.

The consequence of the Contractor not carrying out the work is (in the same terms as under the 1999 edition) that the Employer may do the work itself at the Contractor’s cost where the fault is that of the Contractor. Like the 1999 edition there is no limitation to reasonable cost. A similar right under

Sub-Clause 11.4(a) [*Failure to Remedy Defects*] limits the costs to those reasonable and also states that the Contractor shall have no responsibility for the work. This seems to indicate, by contrast that the Contractor may have responsibility for the Employer’s work under Sub-Clause 7.6 and there is doubt as to whether the Employer’s recoverable costs need be reasonable.

A provision in the 1999 edition which allowed the Engineer to instruct the Contractor to carry out any work which was urgently required for safety reasons has now been limited to a right to instruct remedial work only. Presumably non-remedial work urgently required for safety reasons will now have to be instructed by a Variation (a process which is not much use in an emergency situation and which may be difficult to enforce, given the changes to Clause 13.).

In a significant shifting of risk from the Contractor to the Employer, whereas the 1999 edition required the Contractor to bear the risk of all remedial work ordered under this Sub-Clause, provision is now made for it to recover its Cost² where the work is necessary because of some act of the Employer or Employer’s Personnel or an Exceptional Event. The provision remains valuable to the Employer. Aside from its value under this Sub-clause, it may be a valuable remedy where the Contractor does not repair damage as required under Sub-Clause 17.1 and 17.2.

Ownership of Plant and Materials (7.7)

The rules on passing of property, which under the 1999 edition applied “*to the extent consistent with the Laws of the Country*” now apply “*to the extent consistent with mandatory requirements of the Laws of the Country*”. This clarifies a doubt which previously existed as to what the position would be if the Laws of the Country offered an alternative but non-mandatory solution.

² In contrast to the equivalent provision under the Defects Notification Period (11.3(a)) there is no requirement that this cost be reasonable.

The previous rules as to when ownership passed have now been extended to provide that ownership passes when the Contractor is paid the amount determined for the Plant and Materials under Sub-Clause 14.5. As the review of Sub-Clause 4.5 explains this payment will in many cases be substantially delayed. Further only 80% the amount determined is included in an IPC (the balance will only be paid when the Plant or Materials are incorporated into the Works). Thus, this extension is not likely to have much effect.



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