

Completion, Taking Over and the Taking Over Certificate in Construction: Why It's Important

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What are the key issues for both the employer and the contractor to consider in relation to taking over the works?

When Does Taking Over Occur in Construction?

Taking over normally occurs when the contractual requirements for the works to be considered 'complete' have been satisfied.

Contracts should clearly specify what needs to be done in order for the works to be accepted by the employer. Although the specific requirements will depend on the nature of the project, typical requirements include that the works can be used for their intended purpose (notwithstanding the existence of minor defects), all tests on completion have been passed and all necessary approvals for the works to be used have been obtained.

Tests on completion vary depending on the nature of the project. Works with a significant mechanical and/or electrical component (such as processing plants) will typically only be taken over if the facility is both physically complete and all mechanical and commissioning tests have been passed, while power plants usually need to meet specified levels of heat rate (i.e. the efficiency that the power plant produces energy from a unit of fuel) and output (i.e. the measure of the plant's capacity to produce energy).

FIDIC Contracts in the Middle East

[FIDIC based contracts in the Middle East](#) usually require the engineer (who is required to act fairly) to confirm when completion has occurred. The contractor may bring a claim if it considers that the engineer has unjustifiably failed to issue a taking over certificate, particularly if this failure has resulted in the employer seeking to levy delay damages.

As it is usual that the works need not be 'perfect' in order to be taken over, the form of taking over certificate should clearly specify the known defects and outstanding works at that time (usually in a schedule) and require such defects and outstanding works to be completed within a specified time. This should not be an exhaustive list and the contractor should be under an express obligation to remedy any subsequent defects which become known from time to time.

Deemed taking over

Even though the works have not achieved the state to be taken, parties should be aware that the works may be 'deemed' to have been taken over in certain circumstances.

For example, sub-clause 10.2 of the FIDIC 1999 Red Book provides that works will be deemed to have been taken over in the event that they are used or occupied (other than on a temporary basis which is agreed by the parties) by the employer prior to the issue of the taking over certificate.

This is because such use or occupation of the works by the employer demonstrates adequate completion of the facility and the employer's use or occupation of the works may cause damage or disruption for which it would be unreasonable to hold the contractor liable.

In certain circumstances, it may, unexpectedly, become commercially important for the employer to undertake commercial activities using the facility (i.e. to accommodate a lucrative order or to hold a one off event) even though the facility does not satisfy the contractual requirements for it to be taken over. Regardless of any other consideration, this approach should only be adopted if all legal consents and approvals for the use or occupation in question have been obtained.

In this situation, the employer could consider circumventing the risk of the whole of the works being deemed to have been taken over by dividing the works into sections and only taking over particular sections (but not the entire works). If this approach is not viable (i.e. because the entire works need to be used or occupied), the employer could consider issuing express qualifications to the effect that its use of the facility is a temporary measures which should not be deemed to constitute taking over on account of specified defects or items of incomplete works.

However, we consider that the underlying contract would need to contain specific bespoke drafting to enable the employer to confidently take this action without the contractor being able to strongly argue that the works should be deemed to have been taken over.

Why is Taking Over in Construction so Important?

Taking over the works is a significant landmark for various reasons.

Perhaps the most important consequence is that, upon take over, the project should have become a revenue generating asset.

Additionally, possession of and the risk in the works is, upon take over, transferred from the contractor to the employer. It is therefore vital that the employer ensures that it has adequate insurance for the works (i.e. in respect of loss of use, damage and destruction) upon the date of take over as the contractor's insurance obligations will cease.

If the works are taken over after the contractual time for completion and delay damages have fallen due, the contractor's obligation to pay delay damages will cease.

Taking over may also have a significant impact on the performance security under the contract. For example, the value of the performance bond may be reduced (i.e. by 50 percent) while a percentage of the retention monies (usually half) may need to be paid to the contractor.

Defects Liability Period

The defects liability period commences upon the issue of the taking over certificate. This period is usually between 12 and 24 months (particularly for facilities with a significant mechanical and electrical component). The contract may provide that the defects liability period shall be extended for any defects which are remedied during the defects liability period.

During the defects liability period, the contractor is required to promptly return to the site to remedy any defects or outstanding works (including those referred to in the taking over certificate).

If the contractor fails to comply with this obligation, the employer should have the express contractual right to remedy the defect at the contractor's expense. In this situation, it is important that the employer can readily recover this cost (i.e. through offsetting the cost from the retention or making a call under the performance bond). An alternative would be for the employer to subtract the value of the defect from the contract price and this will be reflected in the final statement.

Employers typically insert drafting in the contract to clarify that the issue of the final certificate (following the expiry of the defects liability period) shall not be deemed to constitute acceptance of the works and that the issue of the final certificate should not absolve the contractor from liability for latent defects. Contractors, on the other hand, frequently seek to insert drafting to the effect that the final certificate should release them from further liability regarding the works (other than in respect of Decennial Liability). Resolution of this issue is frequently determined by the respective bargaining power of the parties.

Conclusion

It is important that construction contracts contain carefully tailored taking over requirements that fully address the specific requirements of the project in question and that the works should not be accepted unless, as a minimum, they can be used for their intended purpose and can therefore generate revenue.

Al Tamimi & Company's [Construction & Infrastructure team](#) advises on all aspects of construction law. For further information please contact Scott Lambert (s.lambert@tamimi.com) or Euan Lloyd (e.lloyd@tamimi.com).