# Clause 11: Defects After Taking Over

*Written by George Rosenberg*[1]

**While the general shape of the Clause has been left unchanged, it has been substantially elaborated. Many of these changes do increase its clarity, but some of the interfaces with other changed Clauses in the Contract produce outcomes which were perhaps not intended.**

### The positives:

- In several Sub-Clauses where the 1999 edition was not specific about the needs for notices and periods, detailed provisions have been included.
- There is reference to a DNP for Parts.
- A suspension which is the fault of the Contractor no longer prevents the extension of the DNP.
- The consequences of failure to remedy have been elaborated and, from the Contractor's point of view slightly ameliorated.
- There are clearer time limits and there are provisions to deal with delay or failure to meet time limits on the Employer's part.

### Change of risk allocation:

- Delay by Employer may entitle the Contractor to Costs plus Profit
- Liability for loss or damage to Plant is now limited to 2 years after expiry of DNP
- The Employer is entitled to recover cost of reinstating and cleaning the Site, if the Contractor fails to do so.
- The Contractor is for the first time entitled to compensation where it is denied timely access to the Site to carry out repairs.
- Suspension of work on erection of Plant or delay in delivery of materials no longer gives a right to the Employer to an extension of the DNP where the fault is that of the Employer.

### The negatives:

- There is a cross reference to Sub-Clause 7.5 *[Defects and Rejection]* to make it apply when defects or damage have occurred and there is a need to remedy. Sub-Clause 7.5 is not well adapted to this situation
- The allocation of cost when the loss or damage is not the Contractor's responsibility now cross-refers to Clause 13.3.1 [*Variation by Instruction*] and this may cause some confusion and raises the possibility that the previously unrestricted Employer right during the DNP to have defects and damage remedied and sort out the costs consequences later has been undermined.
- The previous position that the contract could be terminated and the cost recovered by the Employer where a part of the Works could not be used for its intended purpose is now dealt with as though it were an omission, but the consequences of this are (in the light of Sub-Clause 13.3.1) confusing.
- The provisions allowing the Employer to omit or terminate where the works do not perform as intended do not clarify what the intention is. This contrast with the re-worded definition of Fit for purpose in Sub-Clause 4.1.
- There are some examples of unclear drafting which may open the meaning to dispute.

[1] George Rosenberg is a Consultant at Corbett & Co. International Construction Lawyers Ltd. He can be contacted at george.rosenberg@corbett.co.uk


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

**Sub-Clause 11.1 [Completion of Outstanding Works and Remedying of Defects]:**

In wording which effectively adopts the same intent as the 1999 equivalent provision, the Contractor may be required by the Employer to remedy all defects or damage occurring during the DNP. Whereas previously this only referred to the DNP for the Works or a Section it now sensibly includes the DNP for a Part.

However, although the language in Sub-Clause 11.1 appears to be unequivocal, a provision in Sub-Clause 11.2 (see below) may limit this obligation in a way which did not previously apply.

This Sub-Clause is elaborated by setting out a procedure when the Employer discovers a defect or Damage. This requires a joint inspection, a proposal by the Contractor and then a process for remedying the defect by cross reference to Sub-Clause 7.5 [*Defects and Rejection*]. The 1999 Edition merely required the Employer to notify the Contractor and later provisions (which have been largely duplicated in the 2017 edition) then dealt with the Contractor's obligations and what would happen if the Contractor failed to abide by them.

The notification and joint inspection provisions are useful additions, but the cross-reference to Sub-Clause 7.5 merely creates confusion.

Sub-Clause 7.5 provides for a proposal to be Reviewed by the Engineer. It should be noted that "Review" is a defined term and refers to a procedure carried out by the Engineer.

Thus, Sub-Clause 7.5 gives powers to the Engineer (which is of course appropriate where the Works are still underway) but does not give powers to the Employer, who is in charge during the DNP. Presumably the intent is that "Employer" be substituted for "Engineer" (both in Sub-Clause 7.5 and in the definition of "Review" but this is not spelled out. The result is therefore, arguably, that the Sub-Clause 7.5 procedure (despite being cross referred to) cannot be applied. It would have been better if Sub-Paragraph 11.1 had said that, for this purpose "Engineer" should be read as "Employer" under Sub-Clause 7.5 and "Review" should be read as review by the Employer. As a result, an elaboration of procedure which ought to have been helpful now creates a confusion which was not previously present.

However even this would not have entirely solved the problem. the relevant paragraphs of Sub-Clause 7.5 rely for their workings on the power of the Engineer to instruct (a power which the Contract gives exclusively to the Engineer (see Sub-Clause 3.5)) under Sub-Clause 7.6 [*Remedial Work*] and creates rights for the Contractor to claim compensation in the case the need for the remedial work is caused by the Employer or Exceptional Events. In contrast Sub-Clause 11.2 provides for such compensation where the cause is "other" than the list included (all faults of the Contractor). Thus, the compensation rights under Sub-Clause 7.6 may be more limited than under 11.2. It is not clear which will apply.

Further under Sub-Clause 7.5, where a Contractor does not follow an *Engineer's* instruction, the Employer has the right to have the work carried out at the cost of the Contractor. It is not clear why it is necessary to cross refer to Sub-Clause 7.5 for this purpose as later provisions of Clause 11 cover the same ground.

The paragraphs imported into Sub-Clause 11.1 from Sub-Clause 7.5 also allow the *Engineer*, by Notice, following a proposal from the Contractor to reject the design, Plant Materials or workmanship and the paragraph refers back to Sub-Clause 11.4(a). This allows the Employer to remedy the defects at the Contractor's cost. This cross-reference works.

Finally, the Sub-Clause 7.5 power requires the Contractor to carry out any subsequent re-testing, whereas Sub-Clause 11.4(a) allows the Employer to do the re-testing. It may be that the requirement that the Contractor only carry out the re-testing where it has done the remedial work but this is not clear.

In summary the use of the cross-reference to Sub-Clause 7.5 creates considerable confusion. It would have been much clearer if, rather than relying on a remedial provision drafted to deal with a situation which occurred during the carrying out of the


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

Works, Sub-Clause 11.1 had incorporated its own bespoke procedure. An attempt to avoid confusion by setting out a more elaborate procedure and, at the same time, to save words by cross-referencing has failed.

### Sub-Clause 11.2 [Cost of Remedying Defects]:

The sense of this Sub-Clause generally remains as before. However, there is one deliberate change and one which results (again) from ill thought through cross referencing. As noted above, the interface between Sub-Clause 7.5 and Sub-Clause 11.1 also raises a doubt as to whether the circumstances in which the Contractor is required to bear the cost may have been modified.

The deliberate change is that the final circumstance under which the Contractor is said to be responsible for the cost of remedying defects has been changed from
*"failure by the Contractor to comply with any other obligation."*
to
*"failure by the Contractor to comply with any other obligation under the Contract."*

This potentially reduces the Contractor's risk.

The accidental change results from the changes to Sub-Clause 13.3.1 [*Variation by Instruction*]. The 1999 edition simply cross referred to the variation procedure to deal with the situation where the remedial work was not to be carried out at the Contractor's cost. Now the cross-reference is to the Variation instruction procedure. In this case it is a deeming provision – it is to treated "as if such work had been instructed by the Engineer." This is workable under Sub-Clause 13.3.1. However Sub-Clause 13.1 limits the power to give a variation instruction (see commentary on Clause 13) and some of the new limits are quite likely to impact here, allowing the Contractor to refuse to carry out the quasi-variation. For example, the limitation on the right to instruct Unforeseeable varied work is very likely to apply. How can a Contractor be expected to foresee that the Employer will damage the works during the DNP?

It may be arguable that the unqualified obligation under Sub-Clause 11.1(b) to remedy all defects or damage overrides the right to object to a variation, but this is by no means clear. Thus, what seems on the face of it to be an unqualified right for the Employer to have the Contractor remedy all defects and damage, may in fact be limited.

The way this cross reference has been worded is in contrast to Sub-Clause 11.4 (c) which instead of requiring that Sub-Clause 13.3.1 be applied, states that it shall be deemed to have been applied and the consequences of that are to follow. This would have been a better approach.

### Sub-Clause 11.3 [Extension of Defects Notification Period]:

Whereas the 1999 edition allowed an extension wherever the defects or damage affected the Works, the provision has now been critically altered so as to only allow the Employer an extension where the defect or damage is the result of one of the acts of the Contractor listed in Sub-Clause 11.2(a)-(d).

It is also made clear that the extension of a DNP may not extend more than 2 years beyond the expiry of the DNP stated in the Contract data.

By reference to Sub-Clause 1.1.27 which defines DNP, that period is either as stated or 1 year. Thus, unless a general provision is inserted in the Contract stating that the DNP for any Part will be the same as for a Section or the Works, it can be assumed that the DNP for a Part (which by definition does not exist at the time the Contract Data is written) will be 1 year, even if the Works or Section in which it is included had been agreed to be longer.

As with the 1999 edition, a period of suspension is not to have the effect of lengthening the DNP period. It starts when it would otherwise have started. However, this has now been qualified so that a suspension which was the fault of the Contractor no longer has this effect. The starting date has also been modified. Whereas previously it was the date on which the DNP for any particular Plant or Materials would have expired, now it is the date on which the DNP for the Works would have


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

expired. Thus, Sections and Parts have been overlooked and a suspension which only applies to a Part or a Section may no longer fail to extend the DNP if the Works as a whole have not been suspended.

**Sub-Clause 11.4 [Failure to Remedy Defects]:**

This Sub-Clause provides for what happens if the Contractor unduly delays remedying any defect or damage. It has moved in favour of the Contractor because, under the 1999 edition, it could have been read to apply whatever the cause of the delay.

A Notice has to be provided by the Employer and the reasonable time given must now take account of all relevant circumstances.

The consequence of failing to meet this demand has now been modified as follows:

1. Where the Employer chooses to accept the damaged or defective work

   (a) If there is any retesting required this will be carried out by the Employer at the Contractor's cost.

   (b) The previous right for the Employer to require the Engineer to agree or determine a reasonable reduction in the Contract Price has been replaced by a right under Sub-Clause 20.2
      a. to claim Performance Damages (if these are included in the Contract).
      b. If there are no Performance Damages to claim for the price to be reduced. The amount of the reduction is now said to be "*in full satisfaction of this failure only*" and the amount shall be only "*as appropriate to cover the reduced value to the Employer as a result of the failure*".

2. Where the Employer chooses not to accept the damaged or defective work.

   (a) The Employer may "*require the Engineer to treat any part of the Works which cannot be used for its intended purpose(s) under the Contract ... as an omission as if such omission had been instructed under Sub-Clause 13.3.1.*"

   The reference to "*cannot be used for its intended purpose(s)*" is unfortunate. It will be remembered that this was the wording of Sub-Clause 4.1 in relation to fitness for purpose under the 1999 edition and that the 2017 edition now defines intended purpose by reference to the Employer's requirement and ordinary purposes. This welcome clarification has, for some reason, not been incorporated here. The same problem relates to the alternative remedy of termination as discussed below.

   This is another cross reference to Sub-Clause 13.3.1, so one must refer to that Sub-clause to see what it means. The provision, in this case does not require a variation order, but only requires the Engineer to act as thought there had been a variation order.

   Cross referring to Sub-clause 13.3.1, it needs to be remembered that an omission made in order to enable the Employer to carry out the Works is not permitted. Thus, the right to apply the present provision cannot apply where this is the Employer's intention. Should the Employer not intend to remedy the omission itself, the only element of Sub-Clause 13.3.1 which expressly deals with omissions is that relating to the Contractor's proposal. As noted in the commentary on Clause 13, it is not clear whether the Engineer is obliged to consider this in setting a valuation. If the Engineer is so required the


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

Contractor is entitled to some compensation for the omission which would be offset against any reduction in the price.

(b) Alternatively, the Employer may terminate the Contract as a whole with immediate effect "*if the defect or damage deprives the Employer of substantially the whole benefit of the Works.*" The normal termination procedure under Sub-Clause 15.2 is bypassed. As with the 1999 edition the Employer is then entitled to a refund plus other costs. The new provision departs significantly from the 1999 edition in that the right to terminate then applied if a major part of the Works could not be used and also gave a right to terminate the Contract in respect of the part which could not be used.

Thus as a result of this new combination of remedies, the Employer's right to terminate is limited but a new right to treat part of the Works as omitted largely fills the gap. In principle this is a welcome change and introduces an element of workable flexibility. Unfortunately, the wording of the omission provision leaves some doubt about precisely how it is intended to work. It is particularly unfortunate that no yard-stick for "*intended purpose*" or "*whole benefit*" has been introduced here.

### Sub-Clause 11.5 [Remedying of Defective Work Off Site]:

The Sub-Clause (like that in the 1999 edition) allows the Contractor, with the Employer's consent, to carry out some remedial work on Plant off-site. The policy of this Sub-Clause remains unchanged, with one exception. Without departing from policy, but in a useful procedural requirement, it introduces a Notice requirement when the Contractor wishes to remedy off site.

The change to policy is that the notice can now be given if "*the Contractor considers*" it necessary. Previously the right was to be judged objectively, but this seems to give the Contractor more influence over the decision.

The Notice now required to be given includes details of what needs to be done, where it will be done, how it will be transported, proposals for inspections and testing and how long the process will take. Although it is likely the Employer would have asked for all this information anyway before giving consent, it provides a useful check-list.

### Sub-Clause 11.6 [Further Tests after Remedying Defects]:

While the previous provision required the Engineer to decide whether any tests needed to be repeated, this Sub-Clause is now limited to Tests on Completion and Tests After Completion and now requires the Contractor to provide a Notice setting out proposed tests. Thus, there is no reference to the tests which may be required under Sub-Clause 7.4. This may leave a gap. For example, if there has been physical damage to a structure which has been repaired during the DNP, there is unlikely to be a Test on Completion or Test After Completion but there might be tests specified elsewhere in the Contract. The Engineer can either agree or give its own instructions. These instructions may be for any tests which demonstrate that the Works comply with the Contract and may thus fill the gap mentioned above. However, the Engineer will be required to give these instructions without the prior proposal from the Contractor.

There is a default provision allowing the Engineer to give the instruction if the Contractor fails to provide the proposal.

### Sub-Clause 11.7 [Right of Access After Taking Over]:

Again, this follows the policy of the 1999 edition but elaborates with one minor change and one substantial one and some detailed procedural requirements.


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

The minor change is that the Contractor's right of access now extends to 28 days after issue of the Performance Certificate whereas before it expired on issue of the PC.

The major change is that the Contractor is now entitled to claim Cost plus Profit if the Employer delays access.

The Notice requirements require reasonable advance notice with details of what is required. The Employer is entitled to propose a reasonable alternative date, but is deemed to give consent to the Contractor's requested date if it does not propose an alternative within 7 days.

### Sub-Clause 11.8 [Contractor to Search]:

This is again similar to that in the 1999 edition but with a procedural addition and a remedy for the Employer if the Contractor fails to meet its obligation.

Under the 1999 edition the Engineer could "*request*" a search for causes of defects. Now the Engineer "*instructs*". This instruction will include a date which, in the absence of agreement, must be complied with.

If the Contractor does not carry out the instructed search the Employer may do so and recover its reasonable costs.

### Sub-Clause 11.9 [Performance Certificate]:

The Performance Certificate is to be issued when the Contractor has "*fulfilled the Contractor's obligations*" under the Contract. The 1999 edition equivalent stated the test as "*completed his obligations*". It is not clear what difference the change in wording means.

The PC now has to be issued not only to the Contractor and Employer but also to the DAAB. Whereas, previously, it was only a precondition that all Contractor's Documents had been supplied, it is now also a requirement that the Engineer has given a Notice of No-objection to the as-built records.

There is now a provision deeming that the Performance Certificate has been issued if the Engineer has not done so within 28 days after the DNP is complete and the relevant documents supplied. The deemed Performance Certificate only comes into effect after a further 28 days.

### Sub-Clause 11.10 [Unfulfilled Obligations]:

Like the equivalent 1999 provision, both parties remain liable after the issue of the PC for any unfulfilled obligations. However, this is now limited to 2 years for Plant after the end of the DNP for that Plant, unless this is prohibited by law or in case of fraud, gross negligence, deliberate default or reckless misconduct.

Presumably the reference to "*prohibited by law*" is intended to catch situations where the law provides for a mandatory period of liability.

### Sub-Clause 11.11 [Clearance of Site]:

This Sub-Clause extends the 1999 version by including an obligation to reinstate and clean. In view of this extension the Employer is given the right to recover the cost of reinstatement and cleaning if the Contractor does not do so.

The right to sell items left on the Site is now limited to those situations where this is "*permitted by the applicable law*". It is not clear what is meant here. It would have been clearer to say "not prohibited by mandatory law"


**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**

*Article Author*

**George Rosenberg**[2]

**Email: george.rosenberg@corbett.co.uk**

[2] The contents of this article should not be treated as legal advice. Please contact the lawyers at Corbett & Co before acting on or relying upon anything stated in this article.



**Tel**: + 44 (0)20 8614 6200
**Fax**: + 44 (0)20 8614 6222
**Email**: info@corbett.co.uk
**www.corbett.co.uk**