

FIDIC Middle East Contract Users' Conference

**Dubai,
24-27 February 2020**

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11.1 Completion of Outstanding Work and Remedying Defects

The Works and Contractor's Documents shall be in the condition required by the Contract (except for fair wear and tear) by the expiry date of the relevant Defects Notification Period or as soon as practicable thereafter. In order to comply with this, the Contractor shall:

- a) **complete any outstanding work as at the relevant Date of Completion**, within the time(s) stated in the Taking-Over Certificate or such other reasonable time as is instructed by the Engineer; and
- b) **remedy defects or damage**, of which a Notice is given to the Contractor by (or on behalf of) the Employer on or before the expiry date of the DNP for the Works (or Section or Part as the case may be).





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11.1 Completion of Outstanding Work and Remedying Defects

If a defect appears (including if the Works fail to pass the Tests after Completion, if any) or damage occurs during the relevant DNP, a Notice shall be given to the Contractor accordingly, by (or on behalf of) the Employer.

Promptly thereafter:

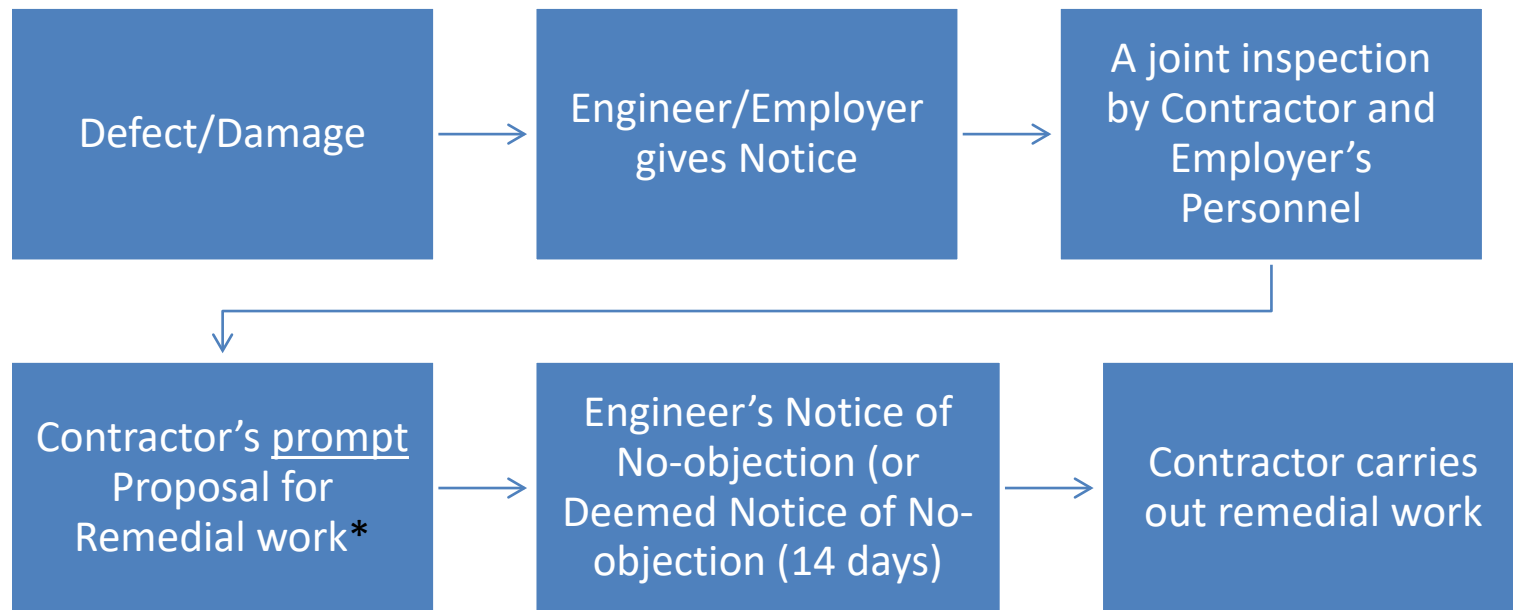
- (i) the Contractor and the Employer's Personnel shall jointly inspect the defect or damage;
- (ii) the Contractor shall then prepare and submit a proposal for necessary remedial work; and
- (iii) the second, third and fourth paragraphs of Sub-Clause 7.5 [Defects and Rejection] shall apply.





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** If Engineer gives a Notice within 14 days stating the extent to which the proposed work would not result in compliance with the Contract, Contractor submits a revised proposal for remedial work.*





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[SC 7.5(3rd para)] If the Contractor fails to promptly submit a proposal (or revised proposal) for remedial work, or fails to carry out the proposed remedial work to which the Engineer has given a Notice of No-objection (or deemed Notice of No-objection)



The Engineer may instruct the Contractor

- a) [SC 7.6(a)] to repair or remedy (on or off the Site), or remove from the Site and replace any Plant or Materials which are not in accordance with the Contract, and/or
- b) [SC 7.6(b)] to repair or remedy, or remove and re-execute, any other work which is not in accordance with the Contract
- or
- c) [SC 11.4(a)] (The Employer may) reject the Plant, Materials, Contractor's design or workmanship by giving a Notice to the Contractor, with reasons, in which case, the Employer may carry out the work or have it carried out by others (including any retesting), at the Contractor's cost*.

** the Contractor shall have no responsibility for this work. The Employer shall be entitled to payment by the Contractor of the costs reasonably incurred in remedying the defect or damage (subject to SC 20.2).*





11.1 Completion of Outstanding Work and Remedying Defects

After remedying defects in any Plant, Materials, design (if any) or workmanship, if the Engineer requires any such items to be retested, the tests shall be repeated in accordance with Sub-Clause 7.4 [Testing by the Contractor] **at the Contractor's risk and cost.**

If the Employer incurs any additional costs caused by the rejection and retesting, it shall be entitled to payment of these costs by the Contractor, subject to Sub-Clause 20.2 [Claims For Payment and/or EOT].





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11.2 Cost of Remedying Defects

All work under SC 11.1 (b) (*i.e. All work required to remedy defects or damage*) shall be **at the risk and cost of the Contractor**, if and to the extent that the work is attributable to:

- a) design of the Works for which the Contractor is responsible;
- b) Plant, Materials or workmanship not being in accordance with the Contract;
- c) improper operation or maintenance which was attributable to matters for which the Contractor is responsible, such as “As-Built Records”, “Operation and Maintenance Manuals” and/or “Training” or
- d) failure by the Contractor to comply with any other obligation under the Contract.





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11.2 Cost of Remedying Defects

Who has the discretion to consider the work is attributable to any other cause?

[1999] - If and to the extent that such work is attributable to any other cause, the Contractor shall be notified promptly by (or on behalf of) the Employer, and SC 13.3 [Variation Procedure] shall apply

[2017] - If the Contractor considers that the work is attributable to any other cause, the Contractor shall promptly give a Notice to the Engineer, the Engineer shall proceed under SC 3.7 [Agreement or Determination] to agree or determine the cause. If it is agreed or determined that the work is attributable to any other cause, SC 13.3.1 [Variation by Instruction] shall apply as if such work had been instructed by the Engineer.





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11.3 Extension of Defects Notification Period

The Employer shall be entitled to an extension of the Defects Notification Period for the Works or a Section

[1999] “ if and to the extent that the Works, Section or a major item of Plant (as the case may be, and after taking over) cannot be used for the purpose for which they are intended by reason of a defect or damage.” (SC2.5)

[2017] “(a) if and to the extent that the Works, Section, Part or a major item of Plant (as the case may be, and after taking over) cannot be used for the intended purpose(s) by reason of a defect or damage which is attributable to any of the matters under sub-paragraphs (a) to (d) of Sub-Clause 11.2 [Cost of Remedying Defects],” (SC20.2)





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11.3 Extension of Defects Notification Period

[1999] *“ If delivery and/or erection of Plant and/or Materials was suspended under Sub- Clause 8.8 [Suspension of Work] or Sub-Clause 16.1 [Contractor’s Entitlement to Suspend Work], the Contractor’s obligations under this Clause shall not apply to any defects or damage occurring more than two years after the Defects Notification Period for the Plant and/or Materials would otherwise have expired.”*

[2017] *“ If delivery and/or erection of Plant and/or Materials was suspended under Sub-Clause 8.9 [Employer’s Suspension] (other than where the cause of such suspension is the responsibility of the Contractor) or Sub-Clause 16.1 [Suspension by Contractor], the Contractor’s obligations under this Clause shall not apply to any defects or damage occurring more than two years after the DNP for the Works, of which the Plant and/or Materials form part, would otherwise have expired.”*





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11.4 Failure to Remedy Defects

If the Contractor unduly delays remedying defects or damage, the Engineer/Employer may fix a date by giving the Contractor a Notice with a reasonable time to remedy the defect or damage.



If the Contractor fails to remedy the defect or damage by the date stated in this Notice (provided that the cause of defect or damage is attributable to the Contractor),



The Employer may, at its sole discretion,

(a) carry out the work or have the work carried out by others, at the Contractor's cost, but the Contractor shall have no responsibility for this work. Subject to SC 20.2, Employer shall be entitled to payment by the Contractor of the costs reasonably incurred by the Employer in remedying the defect or damage,





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11.4 Failure to Remedy Defects

(b) accept the damaged or defective work, subject to SC 20.2, Employer shall be entitled to a reduction in the Contract Price.

(c) 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 [Variation by Instruction]

(d) terminate the Contract as a whole with immediate effect (SC15.2 [Termination for Contractor's Default] shall not apply) if the defect or damage deprives the Employer of substantially the whole benefit of the Works. Subject to SC 20.2, Employer shall have entitlement to recover from the Contractor all sums paid for the Works, plus financing charges and any costs incurred in dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.

The exercise of discretion by the Employer under sub-paragraph (c) or (d) above shall be without prejudice to any other rights the Employer may have, under the Contract or otherwise.





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11.5 Remedying of Defective Work off Site

If the Contractor considers that any defect or damage in any Plant cannot be remedied expeditiously on the Site, it shall give a Notice, with reasons, to the Employer requesting consent to remove the defective or damaged Plant off the Site.

This Notice shall clearly identify each item of defective or damaged Plant, and shall give details; such as the defect or damage to be repaired, the place for repair, the transportation and insurance, the proposed inspections and testing off the Site, the planned duration of repair, reinstallation and retesting and any further details that the Employer may reasonably require.

The Employer's consent shall not relieve the Contractor from any obligation or responsibility under this Clause.

Upon Employer's consent, the Contractor may remove from the Site such items of Plant as are defective or damaged. The Employer may require the Contractor to increase the amount of the Performance Security to cover the full replacement cost of the defective or damaged Plant.





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11.6 Further Tests after Remedying Defects

Within 7 days of completion of the remedial work, the Contractor shall give a Notice to the Engineer describing the remedied Works and the proposed repeated tests.

Within 7 days after receiving this Notice, the Engineer shall give a Notice to the Contractor either:

- (a) agreeing with such proposed testing; or
- (b) instructing (further) repeated tests (if any) to demonstrate that the remedied Works comply with the Contract.

If the Contractor fails to give such a Notice within the 7 days, the Engineer may give a Notice to the Contractor, within 14 days after the defect or damage is remedied, instructing the repeated tests that are necessary to demonstrate that the remedied Works, Section, Part and/or Plant comply with the Contract.

All repeated tests under this Sub-Clause shall be carried out at the risk and cost of the Party liable for the cost of the remedial work under SC11.2 [Cost of Remedying Defects].





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11.7 Right of Access after Taking Over

The Contractor shall have the **right of access to the Works** as is reasonably required in order to remedy defects or damage (if occurred) until the date 28 days after issue of the Performance Certificate, subject to the Employer's reasonable security restrictions.

Whenever the Contractor intends to access any part of the Works during the relevant DNP;

- a) the Contractor shall request access by giving a Notice to the Employer, describing the parts of the Works to be accessed, the reasons and the preferred date for access; and
- b) within 7 days after receiving the Contractor's Notice, the Employer shall give a Notice to the Contractor either:
 - i. stating the Employer's consent to the Contractor's request; or
 - ii. proposing reasonable alternative date(s), with reasons. If the Employer fails to give this Notice **within the 7 days**, the Employer shall be **deemed to have given consent** to the Contractor's access on the preferred date stated in the Contractor's Notice.

If Contractor incurs additional Cost as a result of any unreasonable delay by the Employer in permitting access to the Works, the Contractor shall be entitled to payment of any such Cost Plus Profit.





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11.8 Contractor to Search

If instructed by the Engineer, the Contractor shall search for the cause of any defect under the direction of the Engineer, on the date(s) stated in the Engineer's instruction or other date(s) agreed with the Engineer.

If the defect is not to be remedied at the cost of the Contractor as per SC 11.2, the Contractor shall be entitled to payment of the Cost Plus Profit of the search subject to SC 20.2.

If the Contractor fails to carry out the search, the search may be carried out by the Employer's Personnel. The Contractor shall be given a Notice of the date of the search on which the Contractor may attend to at the Contractor's own cost.

If the defect is to be remedied at the cost of the Contractor as per SC 11.2, the Employer shall be entitled to payment by the Contractor of the costs of the search reasonably incurred by the Employer subject to SC 20.2.





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11.9 Performance Certificate

The Contractor's obligations under the Contract shall be considered to have been completed when the Engineer has issued the Performance Certificate to the Contractor.

The Performance Certificate

- states the date on which the Contractor fulfilled its obligations under the Contract.
- is issued to the Contractor with a copy to the Employer and to the **DAAB** within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon thereafter as the Contractor has:
 - a) supplied all the Contractor's Documents; and
 - b) completed and tested all the Works (including remedying any defects) in accordance with the Contract.

If the Engineer fails to issue the Performance Certificate within 28 days, the Performance Certificate shall be **deemed to have been issued** on the date 28 days after the date on which it should have been issued, as required by this Sub-Clause.

Only the Performance Certificate shall be deemed to constitute acceptance of the Works.





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11.10 Unfulfilled Obligations

Each Party's liability for the fulfilment of any unperformed obligation remains after the issuance of the Performance Certificate.

The Contract shall be deemed to remain in force for the purpose of determining the nature and extent of unperformed obligations.

In relation to Plant, the Contractor shall not be liable for any defects or damage occurring more than two years after expiry of the DNP for the Plant except if prohibited by law or in any case of fraud, gross negligence, deliberate default or reckless misconduct.





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11.11 Clearance of Site

Promptly after the issuance of the Performance Certificate, the Contractor shall:

- a) remove any remaining Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the Site;
- b) reinstate all parts of the Site which were affected by the Contractor's activities during the execution of the Works and are not occupied by the Permanent Works; and
- c) leave the Site and the Works in the condition stated in the Specification (if not stated, in a clean and safe condition).

If the Contractor fails to comply with the above within 28 days after the issue of the Performance Certificate, the Employer may sell (to the extent permitted by applicable Laws) or otherwise dispose of any remaining items and/or may reinstate and clean the Site at the Contractor's cost.

Subject to SC 20.2, the Employer shall be entitled to payment by the Contractor of the costs reasonably incurred in connection with such sale or disposal and reinstating and/or cleaning the Site, less an amount equal to the moneys from the sale (if any).



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THANK YOU FOR YOUR ATTENTION!

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