

PRACTICE

Taking over part or all of the works under NEC4 ECC



ANDREW WOOLDRIDGE-IRVING AND STEVE GOODWIN GVE COMMERCIAL SOLUTIONS LTD

KEY POINTS

- NEC4 ECC clients have a contractual right to take over part of the works at any time. This is a compensation event if it happens before completion and the completion date.
- Issues such as timing, liability, insurance and access should be discussed with the contractor before clients exercise this right.
- Clients are obliged to take over all of the works not later than two weeks after completion.

Clause 35 of the NEC4 Engineering and Construction Contract (ECC), entitled 'Take over', sets out the rights and obligations of the client to use part or all of the works. It is similar to 'beneficial use' or 'partial possession' under other forms of contract. The client does not require any consent for take over to occur and the contractor is obliged to allow this to happen.

Taking over part of the works

Clause 35.2 provides the client with the right to take over part of the works, with this right continuing until completion has been certified. It is not clear how the words 'has been certified' influences this right, as the occurrence of completion automatically changes the client's contractual action from a right to an obligation to take over the works.

There are two stated exceptions to take over actually occurring: where the client's use is for a reason stated in the scope, or if it is to suit the contractor's method of working. Where neither of these apply, clause 35.3 requires the project manager, within one week from when take over occurred, to certify the date it actually happened and the extent of the works taken over. There is no stated remedy where the project manager fails to certify take over, although this could possibly initiate a compensation event under clause 60.1 (18) for a client breach.

Where take over occurs before both completion and the completion date, this is a compensation event under clause 60.1 (15), which the project manager should notify when certifying take over. Note that where the completion date has passed, take over would not be a compensation event.

Where option X7 on delay damages applies, then the project manager assesses the benefit to the client of taking over part of the works and reduces the delay damages amount, as a proportion of the overall benefit received.

Taking over all of the works

As stated in clause 35.1, the client is obliged to take over the works not later than two weeks after completion. Where the client is unwilling to take over the works before the completion date, however, this must be stated in contract data part one. Completion would still be certified by the project manager, although the contractor would continue to be responsible for care of the works until the completion date.

Where the date on which the client takes over the whole of the works is before the completion date, then the take over date is used in the assessments for options X6 on bonus for early completion, X7 on delay damages and X16 on retention.

Although only option X16 refers to the whole of the works, take over in part would not actually initiate an X6 bonus payment unless the part was defined in X5 on sectional completion, with X6 amounts identified in the contract data for each section.

Similarly, take over in part would not prevent the continued payment of X7 delay damages, except where the scenario above with option X5 applied, notwithstanding any adjustment of the amount under clause X7.3.

Liability, access, termination and insurance

An important consequence of take over is that liability for loss or damage to the works transfers from the contractor to the client, apart from the stated exceptions under the sixth bullet of clause 80.1.

Where the client has taken over the works, it should

be aware that the contractor may still require access to that part of the works to correct a defect. Under clause 44.4, the project manager arranges such access with the client, although where this is not given the cost of correcting the defect is calculated as per clause 46.2.

It is not clear whether take over is required to be certified by the project manager when the client begins to use part of the works following termination. This would appear to be a contractual formality, however, rather than initiating any important consequential actions.

A common misconception is that any stated obligation on the contractor to provide insurances transfers to the client when the works are taken over. This is not actually the case and any stated insurances are required to remain in force until the defects date. Where part or all of the works is taken over by the client, it is advisable that the contractor notifies its insurers and complies with any stated requirements to ensure any policies remain effective.

Taking over temporarily

In some situations the client might wish to take over part of the works temporarily before completion and subsequently hand this part back to the contractor. The initial take over could be stated in the scope, although the hand back part is not straightforward as the take over provisions imply that the procedure is a one-way process from the contractor to the client.

It is possible that the project manager could change the scope to deal with this scenario, which is a compensation event, although the subsequent hand back procedure is not one of the procedures in the conditions of contract.

In conclusion, although the client has a contractual right to take over part of the works at any time, it is advisable that the matter is discussed with the contractor prior to this actually occurring. This will ensure that the works are handed over at an appropriate cut-off point, with any suitable arrangements made to accommodate this. Notifying an early warning would be sensible as take over would certainly apply to at least one of the bullet points at clause 15.1. ○