

In many countries, it may be important in law to establish the ownership of Plant and Materials, particularly in the event of liquidation of the person who is in possession of them. In some countries, the Employer may have certain rights in respect of items for which he has paid, entitling him to take possession of them.

The Sub-Clause does not transfer ownership upon payment, except in the special case under sub-paragraph (b). Under the applicable law, the owner of goods may be liable for the payment of taxes or duties, and ownership may also be a factor in determining liability for care, custody and control.

Under sub-paragraph (a), the Contractor relinquishes ownership on delivery at Site. If he is not then able to transfer ownership (because of the terms of his supply subcontract, for example), he is in breach of the Contract.

Under sub-paragraph (b), payment follows ownership: see Sub-Clause 8.9.

Contractors are sometimes reluctant to have these provisions in the Contract, because of the possibility of inconsistency with supply subcontracts. This Sub-Clause was nevertheless drafted as shown, with the intention that the supply subcontract should be drafted consistent with Part I, not vice versa.

Clause 8 Commencement, Delays and Suspension

8.1 Commencement of Works

The Contractor shall commence the design and execution of the Works as soon as is reasonably possible after the receipt of a notice to this effect from the Employer's Representative. Such notice shall be issued within the time stated in the Appendix to Tender after the Effective Date. The Contractor shall then proceed with the Works with due expedition and without delay, until completion.

The Contractor is required to commence as soon as possible after receipt of notice from the Employer's Representative, but may want to start design immediately. No period is specified within which he has to commence, because of the practical difficulties in defining what constitutes commencement. For the Employer, the completion date is more important than the commencement date.

The wording of the notice should constitute an instruction to commence the design and execution of the Works. The date on which it is received by the Contractor must be established: this date is defined as the Commencement Date. The period within which the notice is to be issued must be stated in the Appendix to Tender.

Although the Employer should not issue the Letter of Acceptance until any pre-conditions have been met, he may find it necessary to prevent immediate commencement. Therefore, the Contractor is not entitled to start work on the Site until the date on which the Employer grants possession under Sub-Clause 2.2. This date is

usually defined by reference to the date of receipt of the notice (the Commencement Date): see the example Appendix to Tender, which is reproduced at the end of this Guide. Generally, both parties will prefer a short time for the issue of the notice: the Contractor would want an early start, reducing the time between tendering and commencement (especially in respect of the limited validity of subcontractors' offers); the Employer would want the earliest completion under Sub-Clause 8.2.

The importance of the last sentence of Sub-Clause 8.1 should not be overlooked. Notwithstanding extensions to the Time for Completion, particularly for delays which only affect part of the Works, the Contractor has to proceed expeditiously. This may, depending on the circumstances, oblige him to complete other parts (which were not affected by a delay which entitled him to an extension of time) before the expiry of the Time for Completion. However, the circumstances may give rise to practical difficulties in defining what constitutes "due expedition".

8.2 Time for Completion

The whole of the Works, and each Section (if any), shall be completed and shall have passed the Tests on Completion within the Time for Completion for the Works or such Section (as the case may be).

This is the fundamental time-related obligation. Sub-Clauses 5.6 and 5.7 specify obligations to be fulfilled before the Tests on Completion, and hence within the Time for Completion. Although "completed" implies that there are no outstanding works, Sub-Clause 10.1 permits the subsequent execution, after substantial completion, of "minor outstanding work that does not affect the use of the Works or Section for their intended purpose".

8.3 Extension of Time for Completion

The Contractor may apply for an extension of the Time for Completion if he is or will be delayed either before or after the Time for Completion by any of the following causes:

- (a) a Variation (unless an adjustment to the Time for Completion is agreed under Sub-Clause 14.3),*
- (b) a force majeure event (as defined in Sub-Clause 19.1),*
- (c) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions, unless the Contractor has not complied with such Sub-Clause,*
- (d) physical conditions or circumstances on the Site, which are exceptionally adverse and were not (by the Base Date) foreseeable by an experienced contractor, or*
- (e) any delay, impediment or prevention by the Employer.*

If the Contractor intends to apply for an extension of the Time for Completion, the Contractor shall give notice to the Employer's Representative of such intention as soon as possible and in any event within 28 days of the start of the event giving rise to the delay, together with any other notice required by the Contract and relevant to such cause. The Contractor shall keep such contemporary records as may be necessary to substantiate any application, either on the Site or at another location acceptable to the Employer's Representative, and such other records as may reasonably be requested by the Employer's Representative. The Contractor shall permit the Employer's Representative to inspect all such records, and shall provide the Employer's Representative with copies as required.

Within 28 days of the first day of such delay (or such other period as may be agreed by the Employer's Representative), the Contractor shall submit full supporting details of his application. Except that, if the Contractor cannot submit all relevant details within such period because the cause of delay continued for a period exceeding 7 days, the Contractor shall submit interim details at intervals of not more than 28 days (from the first day of such delay) and full and final supporting details of his application within 21 days of the last day of delay.

The Employer's Representative shall proceed in accordance with Sub-Clause 3.5 to agree or determine either prospectively or retrospectively such extension of the Time for Completion as may be due. The Employer's Representative shall notify the Contractor accordingly. When determining each extension of time, the Employer's Representative shall review his previous determinations and may revise, but shall not decrease, the total extension of time.

Provisions for extension of time are for the benefit of both parties. This Sub-Clause entitles the Contractor to more time to carry out the Works, unless he does not apply for an extension or does not comply with notification requirements; the Sub-Clause protects the Employer (especially in the event of a delay, impediment or prevention by the Employer) from the possibility of Sub-Clause 8.2 being invalidated under the applicable law. This Sub-Clause does not include a complete listing of the events which can give rise to an extension: the inclusion of a listing would risk inconsistency with the Sub-Clauses referred to in sub-paragraph (c).

The Contractor is required to notify the Employer's Representative promptly, so that he can carry out any investigations and so that both parties can keep adequate records, preferably on an agreed basis. Many other Sub-Clauses require the Contractor to notify the Employer's Representative, who then proceeds in accordance with Sub-Clause 3.5 to agree or determine an extension of time, and that notice may also constitute the notice required by Sub-Clause 8.3. The Employer's Representative can monitor these records without admitting any entitlement to extension, although early agreement on the principles usually simplifies resolution and minimises dispute.

The inclusion of sub-paragraph (e) is intended to prevent Sub-Clause 8.2 being invalidated by matters for which the Employer is responsible, such as a delay by the Employer's Representative in taking an action (such as the giving of a consent) which he is required to take under the Contract.

The Sub-Clause makes no mention of financial consequences of delay, so there is no entitlement to additional payment under this Sub-Clause; any entitlement can only be valid if explicitly stated in another applicable Sub-Clause. Most of the Sub-Clauses referred to in sub-paragraph (c) provide for the financial consequences; 8.4 is one exception. As sub-paragraph (c) states, the Contractor must comply with the notification requirements of the applicable Sub-Clause. Also, although the circumstances mentioned in sub-paragraph (d) could give rise to significant additional cost, the Contractor could only seek to recover it if another Sub-Clause, such as 4.11, was applicable. However, some of these circumstances may be insurable risks.

In accordance with Sub-Clauses 1.8 and 3.5, the Employer's Representative proceeds without unreasonable delay to agree or determine the extension of time, and to notify the Contractor and the Employer of the agreement or determination (even if it is a nil extension).

8.4 Delays Caused by Authorities

If the following conditions apply, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,*
- (b) such authorities delay, impede or prevent the Contractor, and*
- (c) the resulting delay to the Works was not (by the Base Date) foreseeable by an experienced contractor,*

then such delay will be considered as a cause of delay giving an entitlement to extension of time under Sub-Clause 8.3.

As with Sub-Clause 8.3, Sub-Clause 8.4 makes no mention of the financial consequences of delay. Financial entitlements may be affected by the circumstances related to the authorities' involvement in the work: see Sub-Clause 5.4, for example. The Contractor would be well advised to keep meticulous records.

8.5 Rate of Progress

If, at any time, the Contractor's actual progress falls behind the programme referred to in Sub-Clause 4.14, or it becomes apparent that it will so fall behind, the Contractor shall submit to the Employer's Representative a revised programme taking into account the prevailing circumstances. The Contractor shall, at the same time, notify the Employer's Representative of the steps being taken to expedite progress, so as to achieve completion within the Time for Completion.

If any steps taken by the Contractor in meeting his obligations under this Sub-Clause cause the Employer to incur additional costs, such costs shall be recoverable from the Contractor by the Employer, and may be deducted by the Employer from any monies due, or to become due, to the Contractor.

The final sentence of Sub-Clause 4.14 empowers the Employer's Representative to instruct the Contractor to revise the programme whenever it is inconsistent with actual progress; i.e., progress may be ahead or behind the programme. Under Sub-Clause 8.5, the Contractor must revise the programme whenever actual progress falls behind, or will fall behind, the current programme; no instruction is required. The revised programme will, of course, take account of any extensions of time determined by the Employer's Representative.

8.6 Liquidated Damages for Delay

If the Contractor fails to comply with Sub-Clause 8.2, the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate; except that the total payment shall not exceed the limit of liquidated damages (if any) stated in the Appendix to Tender.

The Employer may, without prejudice to any other method of recovery, deduct the amount of such damages from any monies due, or to become due, to the Contractor. In the event of an extension of time being granted under Sub-Clause 8.3, the amount due under this Sub-Clause shall be recalculated accordingly, and any over-payment refunded. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his duties, obligations or responsibilities under the Contract.

At any time after the Employer has become entitled to liquidated damages, the Employer's Representative may give notice to the Contractor under Sub-Clause 15.1, requiring the Contractor to complete within a specified reasonable time for completion. Such action shall not prejudice the Employer's entitlements to payment under this Sub-Clause and to terminate under Sub-Clause 15.2.

This Sub-Clause defines the extent of the compensation paid by the Contractor to the Employer in the event that the Works, or a Section (if any), are not completed within the Time for Completion. Although its operation may be affected by the applicable law, the Sub-Clause generally provides the mechanism for compensation, without the Employer having to demonstrate his actual loss. Note that the Contractor cannot prevent the deduction by submitting claims for extension of time.

The sum per day is to be stated in the Appendix to Tender. The sum may be expressed as a percentage of the Contract Price: see the example Appendix reproduced at the end of this Guide. Typically, the sum could be calculated by considering the Employer's losses or foregone benefits (which might be comparable with the financing charges for the Contract Price, per day); and the daily cost of the Employer's Representative. For the limit of liquidated damages, if stated in the Appendix to Tender, the usual percentage in international contracts generally varies between 5% and 15%. The currencies of payment may affect the Employer's calculation of the sum per day and the limit. When preparing their tenders, tenderers will wish to assess their potential liability to the Employer, and take account of the liquidated damages specified in the Appendix to Tender.

In the rare event of a subsequent extension of time, the amount recoverable has to be recalculated, and any over-payment refunded. No express provision is made for payment of financing charges in respect of this refund. The applicable law may entitle the Contractor to financing charges, unless he is partly responsible for the delay in the determination of this subsequent extension.

The Employer is entitled to deduct liquidated damages from moneys due to the Contractor. Before so doing, he could consider whether the delay is a reflection of cash flow shortfall from progress payments. If so, further diminution of cash flow (by the deduction of liquidated damages) could exacerbate the situation.

Liquidated damages are stated to be the only damages due to late completion; in other words, the Employer cannot recover his actual losses due to late taking over. However, he can recover additional costs which arose directly from the steps taken by the Contractor to expedite progress, under Sub-Clause 8.5.

The final paragraph provides for the possibility that the Contractor may be so late in completion that the Employer may realize that the limit of liquidated damages may be reached. The options open to the Employer include a formal notice under this Sub-Clause and Sub-Clause 15.1. The notice should specify a reasonably achievable date for completion: see comments on Clause 15.

Note that Sub-Clause 8.6 applies notwithstanding that the Contractor is not entitled (under Part I) to the payment of a bonus for accelerated completion. When preparing the tender documents, the Employer may wish to consider incorporating arrangements for bonus payments: see page 12 of the published Part II.

8.7 Suspension of Work

The Employer's Representative may at any time instruct the Contractor to suspend progress of part or all of the Works. During suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.

The Employer's Representative is not required to give reasons for instructing a suspension, but may do so in order to indicate how he proposes to apply the subsequent Sub-Clauses. The instruction must be in writing: see Sub-Clause 1.8.

The suspension may have been necessitated by a situation for which the Employer is responsible, or by a situation for which the Contractor is responsible. In the latter event, the Employer's Representative may consider it advisable, if instructing a suspension, to ensure that the Contractor's shortcoming is recorded as having necessitated the suspension. His shortcomings may not necessitate a suspension, particularly if they relate to manufacture off-Site. When contemplating whether to instruct a suspension, the Employer's Representative should consider all the alternatives carefully.

The Employer's Representative does not have a duty under the Contract to instruct a suspension, even if it is obvious that certain works must be suspended: for example, because of a flood season. In these obvious cases, it is the Contractor who is at risk if he persists in executing work which should obviously be suspended. In some cases, his persistence may make a suspension necessary for reasons attributable to the Contractor, so Sub-Clause 8.8 would not apply.

No mention is made of the Employer's Representative having to instruct the Contractor's activities of protecting, storing and securing. However, he should be involved, because of the entitlement to reimbursement under Sub-Clause 8.8.

8.8 Consequences of Suspension

If the Contractor suffers delay and/or incurs Cost in following the Employer's Representative's instructions under Sub-Clause 8.7, and in resumption of the work, and if such delay and/or Cost was not (by the Base Date) foreseeable by an experienced contractor, the Contractor shall give notice to the Employer's Representative, with a copy to the Employer. After receipt of such notice the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 to agree or determine:

- (a) any extension of time to which the Contractor is entitled under Sub-Clause 8.3, and*
- (b) the amount of such Cost, which shall be added to the Contract Price, and shall notify the Contractor accordingly. Except that the Contractor shall not be entitled to such extension and payment of Cost if the suspension is due to a cause attributable to the Contractor, or is necessitated by a Contractor's risk as defined in Sub-Clause 17.5.*

The Contractor shall not be entitled to extension of time for, or payment of the costs incurred in, making good any deterioration, defect or loss caused by faulty design, workmanship or materials, or by the Contractor's failure to take the measures specified in Sub-Clause 8.7.

This Sub-Clause sets out the procedure to deal with a suspension which is not due to the Contractor's shortcomings. Firstly, he gives notice to the Employer's Representative. Although no time is prescribed for him to give the notice (except in Sub-Clause 1.8), he should do so as soon as possible after receipt of the instruction to suspend, making reference to Sub-Clauses 8.8 and 20.1. The latter prescribes the procedure for submission of relevant records and evaluation.

The Contractor is not entitled to an extension of time for a delay, and/or to payment of a Cost:

- (a) if the suspension is due to a cause attributable to the Contractor,
- (b) if the suspension is necessitated by a Contractor's risk (his risks are all risks other than the Employer's risks listed in Sub-Clause 17.3),
- (c) in respect of the making good of any deterioration, defect or loss caused by faulty design, workmanship or materials,
- (d) which was due to the Contractor's failure to take the measures specified in Sub-Clause 8.7, or
- (e) which was foreseeable by an experienced contractor.

It will be unusual for (e) to apply, unless (a), (b), (c) or (d) also applies. However, the provision gives further protection to the Employer in the event of the Contractor persisting in the execution of work which should obviously be suspended.

8.9 Payment for Plant and Materials in Event of Suspension

The Contractor shall be entitled to payment for Plant and/or Materials which have not been delivered to Site, if the work on Plant or delivery of Plant and/or Materials has been suspended for more than 28 days. This entitlement shall be to payment of the value of such Plant and/or Materials as at the date of suspension, if:

- (a) the Contractor has marked the Plant and/or Materials as the Employer's property in accordance with the Employer's Representative's instructions, and*
- (b) the suspension is not due to a cause attributable to the Contractor.*

The Employer shall then, if requested by the Contractor, take over the responsibility for protection, storage, security and insurance of such suspended Plant and/or Materials; the risk of loss or damage to the suspended works shall then pass to the Employer.

For a suspension which is not due to the Contractor's shortcomings, he becomes entitled to payment for Plant and Materials, after 28 days, if they become the Employer's property and are marked accordingly. In some countries, the law may require certain actions to be taken in order to make the items the property of the Employer.

During these 28 days, the only entitlement to payment would be under Clause 13. An immediate entitlement to payment would not be reasonable, because the suspension might only be a few days and might occur prior to payment becoming due under Clause 13. If the Contractor then requests the Employer to take over responsibility, the Employer must comply, but the Contractor must make the Plant and/or Materials available for these purposes.

8.10 Prolonged Suspension

If suspension under Sub-Clause 8.7 has continued for more than 84 days, and the suspension is not due to a cause attributable to the Contractor, the Contractor may by notice to the Employer's Representative require permission to proceed within 28 days. If permission is not granted within that time, the Contractor may treat the suspension as an omission under Clause 14 of the affected part of the Works. If such suspension affects the whole of the Works, the Contractor may terminate his employment, under Sub-Clause 16.2.

Clearly, a twelve week suspension brings into question whether it is reasonable to delay progress to this extent, unless it is due to the Contractor's shortcomings. No time limit is specified for the Contractor's notice; under Sub-Clause 1.8, the notice shall be in writing and not unreasonably delayed.

8.11 Resumption of Work

After receipt of permission or of an instruction to proceed, the Contractor shall, after notice to the Employer's Representative, and together with the Employer's Representative, examine the Works and the Plant and Materials affected by the suspension. The Contractor shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension.

If the Employer has taken over risk and responsibility for the suspended Works under Sub-Clause 8.9, risk and responsibility shall revert to the Contractor 14 days after receipt of the permission or instruction to proceed.

For some types of Works, the Employer may be understandably reluctant to allow the Contractor to resume his activities before risk and responsibility revert after the 14 days.

No mention is made of any payment due for these activities, because the Contractor's entitlement to compensation for the Cost incurred "in resumption of the work" is included in Sub-Clause 8.8: see above.