



UNRAVELLING THE COMPLEXITIES IN COMPLETION OF CONSTRUCTION PROJECTS

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INTRODUCTION

One of the most persistent challenges in construction projects is determining when a construction project is truly "complete." This article explores the complexities interlinked with the completion of construction projects.

THE ROLE OF COMPLETION CERTIFICATES AND THEIR IMPORTANCE IN THE PROJECT

A completion certificate signifies the formal acknowledgment that the work has met contractual obligations. Most projects provide for two types of completion certificates: Provisional Acceptance Certificates (PAC) and Final Acceptance Certificates (FAC).

- **Provisional Acceptance Certificate (PAC):** This certificate is issued when the project is substantially complete and can be used for its intended purpose, even if minor defects or pending works remain. The PAC usually marks the start of the defects liability period, during which the contractor remains responsible for rectifying any outstanding issues.
- **Final Acceptance Certificate (FAC):** The FAC is issued once all contractual obligations, including any required rectifications and defect corrections, are fully satisfied. This certificate signifies the official handover of the project, releasing the contractor from any further liability.

Disputes often arise when an employer refuses to issue an FAC due to unresolved defects, even when a PAC has already been granted.

DISPUTE OVER THE DEFINITION OF 'COMPLETION IN CONSTRUCTION PROJECTS

In construction projects, one of the most contentious issues is the definition of "completion." Disputes arise due to varied contractual interpretations amongst contractors, employers, and project managers as to when a project is truly complete.

More often, disagreement stems from the concept of "snagging" or the "punch point list." While contractors may argue that minor outstanding works do not prevent the project from being complete, employers insist that completion can only be acknowledged when every defect or outstanding task has been rectified. These disagreements delay handovers, payments, and contract closeouts.

In FIDIC based contracts, completion is assessed and confirmed by the engineer. This leads to the contractor bringing claims against the engineer's failure to issue completion certificates.

Employers often hesitate to issue a completion certificate due to concerns about lingering defects, and the legal implications associated with completion. The issuance of a completion certificate is also a triggering event for various contractual obligations which further adds to the hesitation:

Transfer of Risk and Possession

Upon issuance of completion certificate, the possession and risk in the works is contractually transferred to the employer. Thereafter, the employer would have to ensure that it has taken sufficient insurance to protect the works.

Commencement of Defects Liability Period

The issuance of a completion certificate usually marks the commencement of the defects liability period, during which period contractor's responsibility is limited to rectifying defects identified post-completion. From an Employer's perspective, it is always preferred that the defects liability period commences at a later stage to ensure the contractor's assistance in the project remains for a longer period.

Demobilization

Once a project is certified as complete, the contractor begins to withdraw resources, which can make it challenging to rectify any last-minute defects. A very limited number of the contractor's representatives stay on site during the defects liability period.

Financial Closeout

Completion triggers the financial closeout process. One of the key actions following the certificate's issuance is the payment of the final bill, i.e., reconciliation of all invoices for payment of outstanding amounts owed to contractors. Additionally, this phase includes resolving any remaining claims and releasing retention funds.

End of Employer's Right to Levy Liquidated Damages

The Employer can no longer levy liquidated damages after completion. Therefore, employers are careful that the completion certificates are granted only after all the tests are passed and there is no scope for repair of defective works or any additional work or rework.

Return/Reduction of Securities

The completion certificate often triggers the reduction of performance bond (upon issuance of PAC) and return of the performance bond (upon issuance of FAC) which serve as financial security for the employer.

The reluctance to issue the certificate can sometimes be a strategic move by employers to maintain leverage over contractors, ensuring that any outstanding issues are addressed promptly. The employer also levies delay damages in the event that the contractor fails to complete the project as per the contractual timelines.

ISSUE OF PRACTICAL COMPLETION VS. CONTRACTUAL COMPLETION

Another key area of dispute is the difference between practical and contractual completion. Practical completion occurs when the project can be used for its intended purpose, even if some minor defects or non-critical works remain unfinished. Contractual completion, on the other hand, requires full compliance with all contractual obligations, including rectifying all defects, completion of all tests and fulfilling all outstanding work.

Employers argue that any remaining defects or incomplete work prevents them from formally recognizing completion, while contractors claim that the project is operational and fit for use. This results in disputes relating to the issue of abandonment wherein the contractors demobilize once they consider the project practically complete, while employers may view this as a breach if contractual obligations remain unfulfilled. This misalignment frequently leads to arbitration proceedings, as both parties seek to enforce their interpretation of completion.

Standard form of contracts like the FIDIC overcome this issue by allowing deemed taking over in certain circumstances. For example, sub-clause 10.2 of FIDIC 1999 Red Book. Employers circumvent deemed taking over by including special conditions that delete such provisions.

PREVENTIVE MEASURES FOR A SMOOTH ROAD TO COMPLETION

Clear Contractual Terms

It is crucial for contracts to clearly define completion terms and criteria. Ambiguities in the contract language often lead to unnecessary arbitration proceedings. Therefore, legal teams need to draft precise terms regarding completion, defect liability period, inspection and parties' legal obligations. Disputes often arise when the provisions relating to completion are scattered throughout the contract, making a harmonious interpretation of the provisions extremely difficult.

Implementing a phased completion mechanism in the project can help mitigate disputes. Breaking down the completion milestones of large-scale projects into clearly defined phases, reduces the risk of disagreement over when a project is sufficiently finished.

Another way of reducing the possibility of disputes is by ensuring that the completion provisions under the contract are objective. For instance, ensuring that the contractor has the right to inspect by itself if the employer unreasonably refuses to attend inspections, a clearer mechanism to close punch-list issues etc. will ensure smooth completion of the project.

Provision of regular joint inspections by employers and contractors under the contract can also help identify and resolve issues before they escalate into formal disputes.

Provision of performance-based incentives motivates contractors to meet completion targets, minimizing disputes over final project status.

Contractors should also be careful to avoid succumbing to unrealistic deadlines in their contract terms. However, this becomes extremely difficult in projects that are granted through competitive bids.

Multi-tiered Dispute Resolution Mechanism

Another effective approach is to establish pre-arbitration resolution mechanisms before resorting to arbitration. Settlement negotiations and mediation can provide quicker and less adversarial solutions. Encouraging open communication and proactive resolution strategies can help both parties achieve fair outcomes without prolonging the dispute.

Maintaining Project Documentation

Maintaining thorough project documentation is key. Keeping detailed records of progress, quality control measures, and snagging lists ensures a solid evidentiary foundation. When disputes arise, well-documented evidence can expedite resolution and clarify whether the project meets practical or contractual completion standards. Effective construction project management software eases the documentation process.

Effective training

Additionally, training contractors' employees on the completion mechanism is essential to prevent oversight of critical steps required to ensure completion. Contractors can proactively meet completion condition by training personnel on snagging, documentation requirements, and procedural compliance. This will reduce delays and disputes at the final project stage.

Issues pertaining to Subcontracts

To further minimize disputes, subcontractors should ensure that completion in their subcontracts is not directly tied to completion in the main contract. If a subcontractor's completion certificate is dependent on the main contract's completion, it can result in prolonged stays on-site, leading to additional costs and resource allocation issues. Establishing clear, independent completion criteria within subcontracts can help avoid such complications.

EXPERT DETERMINATION

In construction arbitration, resolving disputes over completion often involves expert determination. Independent experts assess whether the project meets the necessary completion criteria. The expert's role is to evaluate whether outstanding defects or unfinished works significantly impact the project's intended use or if they are minor.

By relying on technical expertise, arbitrators can reach fair resolutions that consider both legal and practical perspectives. In many cases, arbitration panels weigh expert findings heavily when deciding whether to enforce contractual or practical completion

CONCLUSION

While it is true that disputes often arise at the stage of completion, there are several ways by which parties can prevent such disputes at the outset of the project – clear contractual terms, regular inspections, and effective training can ensure a smoother completion of the project. Parties have now become proactive and agree on bespoke contracts wherein the completion mechanism is clear and objective.