

Delay and Disruption - Completion

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The Use of the Term Completion		Legal Definition			
EXPRESS TERMS OF STANDARD FORMS					
FIDIC 1999	ICE 7 Ed	ECC 2 Ed	MF/1 Rev 4	IChemE Red Book	JCT 1998
JCT 1998 WCD	JCT 1998 PC	IFC 1998	JCT Minor	CECA Blue	DOM/1

SUMMARY

Completion may have a number of different meanings depending upon the obligation completed. There are a number of definitions of "substantial" or "practical" completion in relation to the obligation to complete within a period or by a date. These are examined together with the provisions of standard forms.

1. THE USE OF THE TERM COMPLETION

The completion of an obligation by the contractor will usually mark the transfer of certain risks or the crystallisation of certain rights. The term "completion" may therefore have a number of different meanings in a contract, depending upon the obligation. For example, completion for the purposes of payment may differ from that defining the end of the construction stage which in turn may differ from that defining the end of the defects correction period.

The term "completion" may be used in different parts of a contract without identifying what state of completion is required. In terms of the whole works, completion may mean completion for the purpose of handover and commencement of the defects liability period. It may instead mean completion including the remedy of all defects and any outstanding work sufficient for the issue of a Final Certificate. The term "completion" may also be used to determine the extent of the right to interim payment in cases of stage payments.

The meaning of "completion" depends upon the proper interpretation of the contract and the related obligation.

If the contractor is required to "complete" the works in accordance with the contract before he is entitled to payment, then the contract is said to be an entire contract **Sumpter v Hedges(1898)**. The rule is strict so that if work is completed but not in accordance with the contract no payment is due **Bolton v Mahadeva(1972)**

Construction contracts involve the fixing and incorporation of the works on land, with the consequent transfer of ownership. The owner is therefore likely to receive substantial benefit even if the works are not entirely complete. The doctrine of substantial performance mitigates the harshness of the above rule and allows the contractor payment for work if substantially completed with an allowance for defects. It is a question of fact whether the contractor has substantially performed his obligations. The contractor cannot rely on the doctrine to seek payment for work carried out if he has abandoned the works. It applies where the work has been completed except for minor defects or minor outstanding works.

The requirements of "completion" in relation to a time obligation are likely to be different than for the obligation for payment, particularly when the contract makes provision for the contractor to remedy defects and/or outstanding work in the defects liability or correction period. So for instance occupation by the Employer may good evidence of completion for payment purposes, particularly with the Employer's exercise of the right of abatement of price. It will not necessarily be relevant evidence of completion of the time obligation.

The general meaning of "completion" for the obligation to complete the construction or installation of the works is that the works should be free from known or patent defects and that any outstanding work is minor or *de minimus*, so that the use for the purpose intended is not affected or beneficial occupancy as intended is not prevented.

Standard forms of contract generally do not require complete performance by the date for completion of installation or construction, but allow a defects liability period for the correction of minor defects and defects which only become apparent later. Completion is normally identified by the date stated in a certificate by the Architect/Engineer stating that completion has taken place. The date stated in the certificate will mark the end of the period for which the contractor is liable for liquidated damages ceases; mark the change in responsibility to insure; require the release of retention and mark the commencement of the defects liability period.

In some standard forms "completion" of the construction or installation stage is defined by achieving specified standards in tests. In other forms completion of construction is defined by the term "substantial completion". The ICE Form is such a form and provides for the contractor to apply for a Certificate of Substantial Completion together with an undertaking to carry out outstanding work in the Defects Liability Period. It is suggested that the outstanding work may include the making good of defects identified before the issue of the Certificate. In any event it is suggested that the ICE Form places an obligation on the contractor under Clause 49(2) to correct defects "of whatever nature" which is wide enough to cover defects known at the date of the Certificate. This is to be contrasted with the term "practical completion" used in JCT Forms. Clause 17.2 of JCT 1998 for instance relates to the making good of defects which appear within the Defects Liability Period. There is no power for the Architect to issue instructions for the remedy of defects which were known or patent at the date of the Certificate of Practical Completion. As a matter of interpretation therefore the Architect is not required to issue a Certificate if there are known or patent defects. The contractor's obligation of practical completion is therefore different to the obligation of substantial completion under the JCT and ICE forms respectively.

2. LEGAL DEFINITION

There have been a number of decisions attempting a legal definition of the terms "practical completion" and "substantial completion".

In **J. Jarvis and Sons -v- Westminster Corporation (1978) 7 BLR 64 HL**, Lord Justice Salmon defined practical completion as completion for the purpose of allowing the employers to take possession of the works and use them as intended. He held that practical completion did not mean completion down to the last detail, however trivial and unimportant. Lord Dilhorne's definition was that practical completion meant almost but not entirely finished.

In **H.W. Neville (Sunblest) Ltd -v- William Press and Son Ltd (1981) 20 BLR 78**, it was held that practical completion did not mean that very minor de minimus work had to be carried out, but did mean that if there were any patent defects the Architect should not give a certificate of practical completion.

In **Emson Eastern Ltd -v- E.M.E. Developments Ltd (1991) 55 BLR114**, Emson were the contractors and E.M.E. developers under the JCT 80 Form. Practical completion was certified but some time after Emson went into administrative receivership and his employment in compliance with clause 27.2 of the conditions of contract was automatically determined. The issue was whether Emson were entitled to further payment. The matter turned on whether completion under Clause 27 meant the same as practical completion, or whether it meant that all snagging and remedial works has to be made good at the end of the defects period before the works could be said to be complete.

His Honour Judge John Newey QC, in arriving at a decision, took account of what happens on building sites. He considered he should keep in mind that building construction is not like the manufacture of goods in a factory. The size of the project, site conditions, use of many materials and employment of various types of operatives made it virtually impossible to achieve the same degree of perfection as can a manufacturer. His view was that it must be rare for a new building to have every screw and every brush of paint correct. Further a building can seldom be built precisely as required by the drawings and specification. Judge Newey in considering the meaning of practical completion thought he stood somewhere between Lords Salmon and Dilhorne in the Jarvis case. He concluded that there was no difference in meaning between completion and

practical completion. Completion he considered was like practical completion, something which occurs before defects and other faults have to be remedied. Were it otherwise the deduction of liquidated damages under clause 24 would be unworkable he considered. In view of this reasoning Judge Newey held that the contractor was entitled to be paid as practical completion had been achieved.

The Court of Appeal of Hong Kong in **Big Island Contracting (H.K.) Ltd -v- Skink Ltd (1990) 52 BLR 110** upheld the decision of the judge at first instance that in deciding practical completion account should be taken of the value of work outstanding and the importance of defects to the safety of the facility.

In **Voscroft (Contractors) Ltd -v- Seaboard plc (1996) 78BLR 132** His Honour Judge Humphrey Lloyd QC was required to consider the operation of Clauses 14.1 and 14.2 DOM/2 (in this respect the same as DOM/1) Form of SubContract. Clause 14.1 required the Sub-Contractor to give notice when he considered practical completion of the SubContract works had been achieved. The Form made provision for the parties to agree the date of Practical Completion, but in the event of disagreement practical completion was deemed to be the date of Practical Completion of the main contract works. There was however no provision for the situation which occurred of the SubContractor not giving notice. It was argued that in that situation practical completion was a question of fact to be decided by an arbitrator.

It was held that from the other provisions of the contract that the presumed intention of the parties was that there should be some definition and certainty attached to practical completion. Without a firm or contractually ascertainable date the parties' obligations as set out in the insurance and indemnity provisions became uncertain in duration, the extension of time clauses became in part unworkable and there was no certainty as to when a part of retention might be paid. The point of defining terminal dates would be lost if the effect of the SubContractor failing to give notice was to make practical completion a question of fact and would deprive the definitions of practical value.

It was held that a SubContractor who failed to operate Clause 14.1 could not achieve a result other than the one which would have been achieved had he given notice but not reached agreement. He could not have the benefit of Clause 14 in establishing a date for practical completion other than the deemed date. The date of practical completion was therefore the date of Practical Completion under the Main Contract.

3. EXPRESS TERMS OF STANDARD FORMS

The standard forms adopt different procedures for the identification of completion. Generally a certificate is issued.

FIDIC 1999 Forms

Completion is defined by tests and the completion of specified work. The Contractor's obligation under Clause 8.2 is to complete the whole of the Works including the passing of the Tests on Completion and all work stated in the Contract as being required for the Works to be considered to be completed for the purposes of Taking Over under Clause 10.1.

Clause 9.1 requires the Contractor to carry out the Tests on Completion within 14 days of the date notified 21 days in advance. The Contractor is required to issue a certified report of the results of the Tests.

Clause 10.1 provides that the Employer takes over the Works when the Tests have been successfully completed, the specified work has been completed and a Taking Over Certificate has been issued by the Engineer or deemed to have been issued.

Clause 11.9 provides that the Contractor's obligations are not completed until the Engineer (Employer under the Silver Form) has issued the Performance Certificate. The Engineer (Employer under the Silver Form) is required to issue the Performance Certificate within 28 days after the latest of the expiry of the Defects Notification Period, issue of all Contractor's Documents and the completion and testing of all the Works including remedying defects.

ICE 7th Edition

Clause 48 provides that when the Contractor considers that the whole of the Works has been substantially completed and has satisfactorily passed any test that may be prescribed in the Contract, he may give notice to that effect. The notice must be accompanied by an undertaking to finish any outstanding work in accordance with Clause 49(1). This states that the undertaking may state a specified time (agreed with the Engineer) for the outstanding work to be completed. If there is no agreement then the work must be completed as soon as practicable during the Defects Correction Period.

Clause 48(2) allows the Engineer to issue a Certificate of Substantial Completion stating the date when the Works were substantially complete or give instructions specifying all the work which in the Engineer's opinion is required to be done before the issue of such a certificate.

Clause 61(1) provides that at the end of the Defects Correction Period and when all outstanding work referred to in Clause 48 and all works of repair etc have been completed, the Engineer issues to the Employer a Defects Correction Certificate stating the date on which the Contractor completed his obligations to construct and complete the Works to the Engineer's satisfaction.

ECC 2nd Edition

Clause 30.2 requires the Project Manager to decide the date of Completion and to certify completion within one week of completion. Normally, the Contractor will request a certificate as soon as he considers he is entitled to it, but such a request is not essential. Clause 11.1(13) defines the meaning of Completion as the date when the Contractor has done all the work which the Works Information states that he is to do by the Completion Date and corrected notified Defects which would have prevented the Employer using the Works. The concept under the ECC form is that Completion is defined by the Employer's ability to use the Works. It is suggested that this is essentially "substantial completion" or "practical completion" as understood in other standard forms, despite the view to the contrary in the Guidance Notes. The Works Information may however expressly state that all Work is to be completed including making good of defects before completion. This would then be contrary to the notion of substantial completion, and require the Works to be free from defects.

There is no specific provision for the possibility of carrying out performance tests prior to or after take over and the issue of an Acceptance Certificate. If Option S (Low Performance Damages) is used then without such a specified Schedule of Tests it may be difficult to establish the level of Low Performance.

The Employer is required by Clause 35.2 to take over the Works within two weeks after Completion. The Employer may state in the Contract Data that he does not wish to take over the Works before the Completion Date. It is not clear when the Employer in such a case is required to take over if the Contractor completes before the Completion Date. It is likely that this will be no later than the Date of Completion if Completion is more than two weeks early.

Clause 43.2 requires the Supervisor to issue the Defects Certificate at the later of the *defects date* and the end of the last *defects correction period*.

MF/1 (Rev 4) 2000

The MF/1 Form relating to mechanical/electrical plant has comprehensive provisions for completion, testing, taking over and performance tests.

Clauses 28.1 to 28.5 provide for Tests on Completion. Clause 1.1 (v) defines Tests on Completion as the tests specified in the Contract (or otherwise agreed by the Purchaser and the Contractor) which are to be made by the Contractor upon completion of erection and/or installation before the Works are taken over by the Purchaser. Under Clause 28.1 the Contractor is entitled to make Tests on Completion within 31 days of giving notice that he will be ready.

Clauses 29.1 to 29.4 deal with Taking Over. Clause 29.2 provides that when the Works have passed the Tests on Completion and are complete, except in minor respects that do not affect their use for the purpose

for which they are intended, the Engineer shall issue a Taking Over Certificate to the Contractor and to the Purchaser. The Engineer shall in the Taking Over Certificate certify the date upon which the works passed the Tests on Completion and were so complete. Clause 29.2 also states that the Purchaser shall be deemed to have taken over the Works on the dates so certified. Clause 29.3 provides that from the date of taking over, as stated in the Taking Over Certificate, risk of loss or damage to the Works to which the Taking Over Certificate relates shall pass to the Purchaser.

The Taking Over requires both the passing of the Tests on Completion and completion. As defined in Clause 29.2 completion is in effect substantial completion.

Clause 29.4 provides that the Contractor shall rectify and complete to the reasonable satisfaction of the Engineer within the time stated in the Taking Over Certificate any outstanding items of work or plant noted as requiring rectification or as incomplete. To be effective, Clause 29.4 requires the Engineer to list outstanding Works on each Taking Over Certificate.

Clauses 35.1 to 35.8 deal with performance testing. Clause 35.1 states that where Performance Tests are included in the Contract they are to be carried out as soon as is reasonably practicable and within a reasonable time after the Works have been taken over by the Purchaser. Clause 35.2 requires a Performance Test to be carried out by the Purchaser or the Engineer under the supervision of the Contractor and in accordance with the procedures and under the operating conditions specified in the Contract. They are also required to be in accordance with such other instructions as the Contractor may give in the course of carrying out such tests.

IChemE Red Book

Clause 13.1 of the Red Book places an obligation on the Contractor to complete the construction of the Plant ready for the carrying out of the Take Over Tests on or before the date or dates or within the period or periods specified in Schedule 5 (Times and Stages of Completion).

Clause 33 describes the procedure to be followed for establishing the completion of construction, in particular Clauses 33.2 and 33.4, ready for the Take-Over tests and involves issue of a Construction Completion Report stating that the Contractor has demonstrated that the Plant was substantially complete and procedures to put the Plant in operation can be safely carried out.

Clause 34 provides a Taking-Over procedure. Clause 34.2 states that as soon as the construction of any part of the Plant has been demonstrated to be complete in accordance with the provision of sub-clause 33.2, the Contractor is to notify the Project Manager and specify the time when the procedure specified in the Schedule of Take- Over procedures is to be commenced. If the Contract does not include a Schedule of Take-Over Procedures Schedule 6, any Take-Over procedures required by the Project Manager are treated as a variation.

Under Clause 34.7, as soon as the minor items noted by the Engineer on the Construction Completion Report have been successfully completed, and when all the procedures specified in the Schedule of Take-Over Procedures have also been successfully completed, the Engineer is required to issue to the Purchaser and to the Contractor copies of a Taking-Over Certificate. This may include a list of minor items still to be completed by the Contractor. It is to be noted that under Clause 34.10 if by reason of any act or omission of the Purchaser or the Engineer or any other contractors employed by the Purchaser, the Contractor is prevented from carrying out the Take-Over Test then a Taking-Over Certificate is deemed to have been completed. The Contractor may then give the Engineer notice stating the Contractors claim to a Taking-Over Certificate as soon as all other relevant Take- Over Procedures have been successfully completed as provided in Clause 34.7.

It is only on the issue of the Taking-Over Certificate that the Purchaser can take over the Plant. It is at this point that risk passes to the Purchaser. This is reflected in the insurance provisions in Clause 32. Clause 31.1 provides that the Plant shall be under the direction and control of the Contractor until the Plant is taken-over by the Purchaser. Under Clause 31.4 the Contractor is liable for the cost and expense of making good

loss or damage however caused that may occur to the Plant before the Plant is taken over. The Defect Liability Period starts after the date of the Take-Over Certificate, Clause 36.

Clause 38.1 provides that as soon as the Defects Liability Period has expired and the Contractor has made good all defects that have appeared in the Plant in that period, the Project manager issues the Final Certificate. Clause 38(4) states that the issue of the Final Certificate shall be conclusive evidence for all purposes and in any proceedings whatsoever between the Purchaser and Contractor that the Contractor has completed the Works and made good all defects in all respects in accordance with his obligations under the Contract, subject to fraudulent misrepresentation or fraudulent concealment.

JCT 1998 Forms

JCT 1998 Clause 17.1 requires the Architect to issue a certificate when he is of the opinion that Practical Completion of the Works has been achieved. Practical Completion is deemed for all the purposes of the contract to have taken place on the day named in the Certificate. Practical Completion is not defined.

The issue of the Practical Completion certificate starts the Defects Liability Period and marks the end of the period for deduction of any liquidated damages.

Clause 30.8.1 requires the Architect to issue the Final Certificate not later than 2 months from the later of the end of the Defects Liability Period or the date of issue of the Certificate of Completion of Making Good Defects or the date on which the Architect makes the ascertainment of Final Adjustment to the Contract Sum with the Quantity Surveyors Statement under Clause 30.6.1.2. Clause 30.9 defines the extent to which the Final Certificate has effect as conclusive evidence in adjudication, arbitration or legal proceedings.

JCT 1998 with Contractor's Design

JCT 1998 With Contractor's Design Clause 16.1 requires the Employer to issue a statement when the Works have reached Practical Completion to that effect. The written statement is not to be unreasonably delayed or withheld. Practical Completion is deemed for all the purposes of the contract to have taken place on the day named in the statement. Practical Completion is not defined.

The issue of the Practical Completion certificate starts the Defects Liability Period and marks the end of the period for deduction of any liquidated damages.

Clause 30.5.1 requires the Contractor to issue a Final Account and Final Statement within 3 months of Practical Completion for agreement by the Employer. Clause 30.5.5 provides that the Final Account or Final Statement become conclusive as to the balance between the parties except to the extent that the Employer disputes anything in them before 1 month of the latest of the end of the Defects Liability Period or the day named in the Notice of Completion of Making Good Defects or the date of submission of the Final Account and the Final Statement. Clauses 30.5.6-8 define the issue of the Employer's Final Account in the absence of the contractor's Final Account and Final Statement. Clause 30.8 defines the extent to which the Final Statement or the Employer's Final Statement has effect as conclusive evidence in adjudication, arbitration or legal proceedings.

JCT 1998 Prime Cost Contract

JCT 1998 Prime Cost Clause 2.8.1 requires the Architect to issue a certificate when he is of the opinion that Practical Completion of the Works has been achieved. Practical Completion is deemed for all the purposes of the contract to have taken place on the day named in the Certificate. Practical Completion is not defined.

The issue of the Practical Completion certificate starts the Defects Liability Period and marks the end of the period for deduction of any liquidated damages.

Clause 4.12.1 requires the Architect to issue the Final Certificate not later than 2 months from the later of the end of the Defects Liability Period or the date of issue of the Certificate of Completion of Making Good Defects or the date on which the Architect makes the ascertainment of Final Adjustment to the Contract

Sum with the Quantity Surveyors Statement under Clause 4.9.2. Clause 1.17 defines the extent to which the Final Certificate has effect as conclusive evidence in adjudication, arbitration or legal proceedings.

IFC 1998

IFC 1998 Clause 12.9 requires the Architect to issue a certificate when he is of the opinion that Practical Completion of the Works has been achieved. Practical Completion is deemed for all the purposes of the contract to have taken place on the day named in the Certificate. Practical Completion is not defined.

The issue of the Practical Completion certificate starts the Defects Liability Period and marks the end of the period for deduction of any liquidated damages.

Clause 4.6.1 requires the Architect to issue the Final Certificate not later than 28 days from the later of the sending of the computations of the adjusted Contract Sum to the contractor or the date of issue of the Certificate stating that the contractor has discharged his obligations in relation to defects under Clause 2.10. Clause 4.7.1 defines the extent to which the Final Certificate has effect as conclusive evidence in adjudication, arbitration or legal proceedings.

JCT Minor Works

JCT 1998 Minor Works Clause 2.4 requires the Architect to issue a certificate when he is of the opinion that Practical Completion of the Works has been achieved.

The issue of the Practical Completion certificate starts the defects liability period and marks the end of the period for deduction of any liquidated damages.

Clause 4.5.1.1 requires the Architect to issue the Final Certificate within 28 days from the submission of documentation from the contractor provided that the Architect has issued a certificate under Clause 2.5 for the making good of defects.

CECA Blue Form 1998

Clause 13(1) requires the Sub-Contractor to maintain the Sub-Contract Works in the condition required by the Main Contract (fair wear and tear excepted) to the satisfaction of the Engineer and make good every defect and imperfection therein from whatever cause arising, from the completion of the Sub-Contract Works to substantial completion of the Main Works. Clause 13(2) provides that after completion of the Main Works, the Sub-Contractor shall maintain the Sub-Contract Works and make good such defects and imperfections therein as the Contractor is liable to make good under the Main Contract for a like period and otherwise upon the like terms as the Contractor is liable to do under the Main Contract.

Clause 15(7) provides that the Contractor shall not be liable to the Sub-Contractor for any matter or thing arising out of or in connection with the Sub-Contract or the carrying out of the Sub-Contract Works unless the Sub-Contractor has made written claim to the Contractor before the Engineer issues the Defects Correction Certificate in respect of the Main Works.

DOM/1

Clause 14.1 DOM/1 provides for the Subcontractor to notify the Contractor in writing of the date in his opinion when the Subcontract Works were practically completed. If not dissented from in writing by the Contractor within 14 days of receipt of the notice, then Practical Completion is deemed to have taken place on the date notified. If the Contractor dissents then he is required to give reasons in his written notice. In such a case, under Clause 14.2 Practical Completion is the date agreed, otherwise the date certified by the Architect under Clause 17.1 of the Main Contract.

Clause 21.9 defines the amount in the Final Payment which depends on whether the sub-contract is for a lump sum or subject to re-measure. Clause 21.9 provides that the Final Payment is due not later than 7 days after the date of issue of the Final Certificate issued by the Architect under Clause 30.8 of the Main Contract Conditions. Clause 21.10 defines the extent to which the Final Certificate has effect as conclusive evidence in adjudication, arbitration or legal proceedings.