Guide to: INTERIM, PRACTICAL, WORKS & FINAL COMPLETION

For use with:
Principal Building Agreement
N/S Subcontract Agreement
Minor Works Agreement

prepared by the JOINT BUILDING CONTRACTS COMMITTEE Inc

RECOMMENDED BY THE JBCC CONSTITUENTS
Association of Construction Project Managers
Association of South African Quantity Surveyors
Master Builders South Africa
South African Association of Consulting Engineers
South African Institute of Architects
South African Property Owners Association
Specialist Engineering Contractors Committee
COMPLETION

INTRODUCTION
The Principal Building Agreement and the Nominated / Selected Subcontract Agreement follow the same procedures for Practical, Works and Final Completion. The N/S Agreement has Interim Completion besides the afore named completions. It is vitally important that, in dealing with the completion process, the prescribed procedures in terms of the particular agreement are strictly followed. After payment, completion is probably the next most important aspect of the contract and therefore no “short cuts” should be taken in certifying any of the completion stages. The “rules” applying to completion need to be fully understood and time periods and bars carefully observed in the interests of all parties.

INTERIM COMPLETION (n/s only) (See diagram opposite)

PURPOSE
In some instances the contractor requires the n/s works to be completed at an date earlier than that set for practical completion so that other work can be progressed. Where this is not required the interim completion date can be the same as that required for practical completion.

N/S CONSTRUCTION PERIOD AND PROGRAMME
The n/s construction period is set by the principal agent in the pre-tender information and recited in the n/s contract data. Where the contractor has been appointed at the time of calling for the n/s subcontract tender, it is assumed that the principal agent will consult the contractor in setting these dates. The contractor and subcontractor should by mutual agreement set the stage completions required by the contractor in terms of his programme. Further, the parties have the right to vary the programme in relation to the start of the n/s construction period, stage completions and the intended date of interim completion.

ACHIEVEMENT OF STAGE COMPLETIONS AND INTERIM COMPLETION
The n/s agreement is silent on the requirements for the achieving of stage completions. It is in the interests of both parties that the criteria for stage completions are set at the start of the contract thereby avoiding later conflict. The contractor on being instructed to appoint a n/s subcontractor should inform the principal agent if the assistance of an appointed specialist agent will be needed in making the inspection for interim completion. The qualification regarding dynamic systemsshould be noted. A consequence of the achievement of interim completion is that the responsibility for the n/s works passes to the contractor. However this does not relieve the subcontractor of his responsibility in respect of defective or incomplete work.

DAMAGES
The n/s subcontractor should note that he is liable for damages to the contractor not only for the late achievement of interim completion but for stage completions as well. It is essential that the subcontractor ensures that he is given sufficient time to achieve stage and interim completions set by the contractor and that these are adjusted when a delay through no default of the subcontractor occurs. Adjustments to the subcontractor’s completions dates are not dependant on the contractor obtaining similar adjustments in terms of his contract with the employer.
INTERIM COMPLETION

PROGRAMME
C complies programme and agrees same with N/S

N/S notifies C of anticipated date for IC. C may request assistance from specialist agent

C inspects the N/S Works: IC is achieved

C inspects the N/S Works: IC is not achieved. C issues IC list to N/S

N/S notifies C of IC list completion

C inspects the N/S Works: IC is achieved

IC is not achieved. C issues further IC lists

C issues Certificate of IC forthwith. N/S Works passes to C

N/S achieves IC - deeming provision

Guarantee periods on N/S Works items put into use commences only at Practical Completion

INTENDED / ACTUAL DATE OF IC

C grants extension to date for IC

OTHER CONSEQUENCES
N/S or C liability for damages related to interim completion ceases

LEGEND
C CONTRACTOR
E EMPLOYER
N/S SUBCONTRACTOR
IC INTERIM COMPLETION

PA sets start of n/s construction period / interim completion date

N/S CONSTRUCTION PERIOD STARTS

PROGRAMME
N/S required to meet programme stage completions
PRACTICAL COMPLETION

PURPOSE
In terms of the JBCC definition of “practical completion” a subjective assessment from the principal agent is required. This may well vary from one contract to another depending on the nature and usage of the building. However the purpose remains that of providing the employer with a building that “… can effectively be used for the purpose intended …”. The achievement of practical completion is undoubtedly the most important of the various completions required in terms of the contract.

CONSTRUCTION PERIOD
The construction period is set by the principal agent in the pre-tender information and recited in the contract data. The employer has the option of having the works completed as a whole or in sections which the principal agent must identify in the contract data. Either the intended date for practical completion for the works as a whole must be provided or the dates for each section but not both. It should be noted that the last of the sections designated includes the works as a whole for final completion purposes.

During the construction period the principal agent is required to give guidance to the contractor “… on the building standards and state of completion of the works that the contractor will be required to achieve for practical completion …”. Note that any interpretations and guidance given to the contractor in this regard cannot be construed by the contractor as approval of any of the work inspected by the principal agent or work to which it is applied.

ACHIEVEMENT OF PRACTICAL COMPLETION
The principal agent must inform the contractor “… of the period required for inspection of the works related to the issue of the certificate of practical completion”. Coupled to this are the requirements that the “The contractor shall inspect the works to satisfy himself that the state of completion of the works has been achieved”[24.2] and “… shall give timeous notice to the principal agent of the anticipated date of practical completion to enable the principal agent to inspect the works on or before such date”.

These stipulations are important in that the contractor needs to make provision in his programme for the inspection period required by the principal agent and the principal agent, in turn, requires reasonable notice as to when the contractor requires the inspection to take place. It is vital that the inspection takes place “…so as to meet such date” as, should it occur later and practical completion is achieved, a legal lacuna or hiatus will have been created as to when practical completion was actually achieved. This in turn creates problems in relation to the application of penalties (should they apply) and the employer’s responsibilities in relation to taking possession of the works and the site.

The principal agent and other specialist agents in making their inspections must focus on whether the work being inspected is in terms of the definition of Practical Completion “… substantially complete and can effectively be used for the purpose intended …” and not on minor defects and incomplete items that are to be dealt with under Works Completion.

Should the principal agent consider that practical completion has not been achieved a practical completion list “… defining the outstanding work and defects to be rectified…” must be issued to the contractor. It is sensible to use the terminology of the agreement in naming these lists to avoid conflict and confusion. It is generally accepted that the principal agent should not add to this list once issued but, as he still has the right to issue contract instructions which includes this list, any aspect that hinders the achievement of practical completion can be added whether it occurred before or after the initial issue of the list.

When practical completion is achieved the principal agent must issue the certificate of practical completion forthwith. However, the issue of the certificate may not take place before the practical completion date (as revised) unless so agreed by the parties as it is the contractor’s obligation to hand over the works on the date for practical completion and not earlier. Note that although other appointed agents may assist in the inspections the issuing of the certificate is solely the responsibility of the principal agent. Failure by the principal agent to issue the practical completion list or its revision can result in the contractor being deemed to have achieved practical completion.

CONSEQUENCES
The achievement of practical completion results in the following:
• The responsibility for the works passes to the employer
• The value of the security provided by the contractor reduces
• The contractor is not obliged to carry out any contract instruction for new work
• The employer is entitled to possession of the works and site
• The principal agent must issue a works completion list (See Works Completion)
• The contractor is no longer liable for penalties
• The contractor becomes entitled to compensatory interest
• The principal agent must prepare the final account within 90 working days
PA informs C:
State of completion required
Standard of work
Period required for inspection

C inspects for PC (+ N/S work)
C notifies PA of date for PC

PA inspects the Works:
PC is achieved
PA informs C and E forthwith

PA inspects the Works:
PC is not achieved
PA informs C and E forthwith

PA issues certificate of PC forthwith
Not before PC date / revised date

C achieves PC - deeming provision
C not required to do extra work
E entitled to possession of Works

CONSTRUCTION PERIOD STARTS

PA inspects the Works:
PC is not achieved
PC list issued forthwith to C

C notifies PA of PC list completion

PA inspects the Works:
PC is achieved

PC is not achieved
Revised PC list issued forthwith

PA grants extension to date for PC

OTHER CONSEQUENCES
E responsible for the Works
Value of security reduces
C no longer liable for penalties
Compensatory interest due
PA to prepare Final Account

INTENDED / ACTUAL DATE OF PC

LEGEND
C CONTRACTOR
E EMPLOYER
PA PRINCIPAL AGENT
PC PRACTICAL COMPLETION
WORKS COMPLETION

PURPOSE

The definition of “works completion” is not very helpful in understanding the purpose of this stage in the completion process. The attainment of practical completion, where the works are “substantially complete”, obviously leaves some incomplete work and various defects that still have to be attended to by the contractor. Further there is a defects liability period that is applicable to the works before final completion can be attained. It is reasonable that all the incomplete work as well as the identified defects should be subject to the defects liability period. This is assured as the defects liability period commences only after works completion has been attained.

WORKS COMPLETION PERIOD

Works completion does not have a set period in which it must be achieved. However this does not mean that it is it open-ended. The contractor would be in default should he not proceed or should he take undue time in dealing with the works completion list issued by the principal agent at the commencement of the period. Notwithstanding the above the contractor’s main incentive towards achieving works completion is undoubtedly to start the clock on the 90 calendar day defects liability period that commences with works completion at the earliest opportunity.

Again, it is generally accepted that the principal agent should not add to this list once issued but, as he still has the right to issue contract instructions which includes this list, any aspect that hinders the achievement of works completion can be added whether it occurred before or after the initial issue of the list.

ACHIEVEMENT OF WORKS COMPLETION

On the achievement of practical completion the principal agent must “... issue to the contractor a works completion list defining the outstanding work and defects which were apparent at the date of practical completion ...”. As stated above there is no contractual time period related to works completion. It is expected that the principal agent will indicate to the contractor and the employer his assessment as to the time needed to complete the work listed.

As with practical completion the contractor is required to give the principal agent notice to inspect the works once he has completed the works completion list and similarly, if the principal agent is satisfied, he must issue the certificate of works completion forthwith. If not he issues a revised list.

Failure by the principal agent to issue the works completion list or its revision can result in the contractor being deemed to have achieved works completion.

Should the contractor fail to complete the works completion list within 20 working days of its issue he will no longer be entitled to compensatory interest on the incomplete items still listed.

CONSEQUENCES

The achievement of works completion results in the following:

- The defects liability period commences
- The date for the inspection for final completion is determined as the 91st day after works completion is achieved
WORKS COMPLETION

PA issues WC list of outstanding work and defects apparent at PC

C inspects for WC: WC list completed C notifies PA to inspect

PA inspects the Works: WC is achieved PA informs C and E forthwith

PA inspects the Works: WC is not achieved PA issues revised WC list

C notifies PA of WC list completion

PA inspects the Works: WC is achieved

WC is not achieved PA issues revised WC list

PA issues certificate of WC forthwith

C achieves WC - deeming provision

INTENDED / ACTUAL DATE OF WC

If C takes > 20 w days to complete WC list no compensatory interest payable on outstanding work

OTHER CONSEQUENCES
Defects liability period starts Final completion inspection in 91 c days

LEGEND
C CONTRACTOR
PA PRINCIPAL AGENT
WC WORKS COMPLETION

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FINAL COMPLETION

PURPOSE
The definition of final completion requires the principal agent to determine that a "... state of completion where the works are free from all defects ..." has been reached. The duly issued certificate of final completion in confirmation thereof is irrefutable evidence that the works comply in all respects with the terms of the agreement in this regard.

ACHIEVEMENT OF FINAL COMPLETION
With the achievement of works completion the defects liability period comes into effect and ends 90 calendar days from such date. As the defects liability period end date is known there is no requirement for notice to be given of the inspection of the works for final completion which inspection the principal agent must undertake forthwith. It is important that the principal agent appreciates that, within reasonable bounds of access, the whole of the works must be inspected for defects and not just areas that "are more likely to prove to be defective"

Where defects are detected the principal agent must issue a defects list forthwith to the contractor for rectification to achieve final completion. As with the previous completions when the contractor has rectified the defects he is required to give the principal agent notice to inspect the rectified items. This process is repeated until the item(s) is rectified to the satisfaction of the principal agent.

CONSEQUENCES
The achievement of final completion results in the following:
- The contractor’s public liability in relation to the works ceases
- The contractor’s security reduces in value but is only nullified on settlement of the final payment certificate
- The right related to n/s subcontractor’s guarantees, warranties or indemnities are deemed to be ceded to the employer
- The balance of the contractor’s latent defects liability period is determined (see below)
- The final payment certificate can now be issued

SECTIONAL COMPLETION

PURPOSE
Contracts involving major or a multiplicity of buildings are often required to be completed in sections. It is important to clearly define each section with particular care being taken in relation to common services required for each section. It is generally accepted that sectional completions are not advisable where each section cannot be defined as a homogeneous unit and where the completions do not allow a reasonable continuity of work for the contractor.

ACHIEVEMENT OF SECTIONAL FINAL COMPLETION
Where sectional completions are required each section (other than the last section) must be treated as though it is unique for completion purposes. Thus each section requires:
- Interim completion certificates for each n/s subcontractor
- A practical completion certificate
- A works completion certificate
- A final completion certificate (other than the last section)

CONSEQUENCES
For payment purposes the sections are ignored and the following documents are issued for the works as a whole:
- A monthly interim payment certificate
- A monthly recovery statement
- A final account
- A final payment certificate
- A final completion certificate for the works as a whole which incorporates the last section

The contract works insurance must be effected by the employer. This should prevent conflict between different insurers relating to the changed insurance requirements brought about by the multiple practical completions. It is further recommended that securities, guarantees, warranties and the like should be effected for the works as a whole and not for individual sections.
WORKS COMPLETION ACHIEVED

90 c days Defects liability period

PA inspects the Works
FC is achieved

PA inspects the Works:
FC is not achieved
PA issues D list to C

C notifies PA of D list completion

PA inspects the Works:
FC is achieved
FC is not achieved
PA issues revised D list

PA issues certificate of FC forthwith

DEFECTS LIABILITY PERIOD ENDS

C achieves FC - deeming provision

Where N/S defects liability period extends beyond that of C's, N/S's remaining period subject to a direct agreement between E and N/S

C's obligations in terms of 2.0 and 15.0 are fulfilled

OTHER CONSEQUENCES
C's public liability period ends
Value of security reduces
N/S guarantees etc deemed to be ceded to E (#)
Latent defects liability period ends 5 yrs (Private sector) or 10 yrs (State) from FC
Final payment certificate to be issued only after FC achieved

LEGEND
C CONTRACTOR
PA PRINCIPAL AGENT
D DEFECTS
FC FINAL COMPLETION
**LATENT DEFECTS LIABILITY PERIOD**

**PURPOSE**

In common law the liability of the contractor (and agents) to the employer for latent defects is open-ended and will only expire with the demolition of the building - quite clearly an untenable situation. In terms of the agreement the latent defects liability period seeks to change this condition by defining the elements of the works (latent defects) that will be the liability of the contractor for a specific period. The three aspects making up the term "latent defects liability period" need to be examined to gain a clear understanding of the concept:

1. The "latent defects" aspect is covered by:
   The definition of a latent defect which, in turn, is reliant on the definition of "defect". By including the defect definition the essence of the latent defect definition becomes "... any aspect of the works which ... includes an imperfection that impairs the structure, composition or function of any aspect of the works ... which a reasonable inspection ...would not have revealed before the issue of the defects list". This is further amplified in which states: "Defects which may appear up to the date of final completion shall be addressed...."

   The above does not specify how a defect that becomes apparent after final completion is to be dealt with. It is suggested that this would probably require the employer to give notice to the contractor to remedy the defect. Failure by the contractor to do so within a reasonable period would entitle the employer to use another party to do the work and to claim the loss and expense from the contractor.

2.1 The "period" aspect is straightforward where final completion is achieved:
   "The latent defects liability period shall commence at the start of the construction period and end five years (private sector) ten years (State) from the date of final completion". The time period is clear where the works does, in the normal course of events, reach final completion.

2.2 The "period" aspect is not straightforward where final completion is not achieved:
   This occurs where the contract is cancelled which will per se occur prior to the achievement of final completion. The termination clauses all require a final account to be determined but do not determine that the termination will in fact produce "final completion" as no certificate of final completion is issued in terms of the agreement. Either the five year period applies (contractor default) or no period is applicable (employer default). The ten year period set by the State applies in all circumstances.

3. The "liability" aspect is determined by:
   The contractor's responsibility and therefore liability is for the works to final completion; defects related to the works during this period; and defects appearing during the defects liability period. Once again, in the normal course of events, the liability of the contractor is clear. However the agreement states that: "The contractor shall not be liable to the employer for defects which may appear after the expiry of the latent defects liability period". Based on the premise set out in 2.2 above where the contract is cancelled the contractor's liability for further defects will not cease as it will revert to the common law condition. Clearly an untenable situation.

**Note:**
* The above conditions apply regardless of which party cancels - employer or contractor
* The liability of the principal and other agents is determined by the terms of their conditions of appointment and not those of the building contract

**PRESCRIPTION PERIOD**

All defects as defined in terms of the agreement are subject to prescription the period of which is determined by law. In South Africa this period is three (3) years. The prescription period begins to run only once the employer (principal agent) is aware of the default (defect). The employer's right to require the contractor to make good a defect that is identified prior to final completion is achieved in terms of a contract instruction which includes the lists related to the various completions and after final completion in terms of 1 above. It should be noted that the latent defect liability period is not extended by the prescription period.

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LATENT DEFECTS LIABILITY PERIOD

Latent Defects Liability Period commences

Defect identified

3 yr prescription applies

Variable period

Defect identified

3 yr prescription applies

CONSTRUCTION PERIOD STARTS

N/S's achieve Interim Completion

C achieves Practical Completion

C achieves Works Completion

Defects liability period 90 c days

C achieves Final Completion

CONSTRUCTION PERIOD ENDS

Remaining portion of N/S's defects liability period

Private sector - 5 years
Public sector - 10 years

Latent Defects Liability Period expires

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