**Construction Contract Completion**

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How do you know when construction work is complete?

One level of completion is that the Contract Works are fit for use, so a warehouse can be used for storage, office workers can move into offices and start working, or homeowners can move into a house and start living in it.

When the Contract Works are ‘complete’, the Principal takes them over and becomes responsible for their operation and their care, so the Principal typically takes out insurance to cover against the various risks they are exposed to, especially fire and water damage.

Theoretically, if the Contract Works are complete, the Contractor should be able to leave the Site and never return to it, but theory and practice seldom completely match in construction work.

For various reasons [see below] the Contract Works may never be satisfactorily ‘completed’, not to a state of ‘perfection’, and certainly not to the state of completion a factory made piece of equipment bought from a supplier, made by experienced operatives and robotic machines can achieve.

Why would a building owner take possession of the Contract Works if they are incomplete?

It may be of less inconvenience to the Principal to move in to the Contract Works even though they are incomplete, particularly when the weekly cost of not moving in is greater than the weekly amount the Principal may recover from the Contractor as damages because of the Contractor’s late completion. This is especially so if it is likely that the Contractor may be having solvency issues.

Other pressures may force the Principal to take over the Contract Works if it has no alternative, for example a lease on its present premises may be coming to an end.

Whether the Principal will take over the Contract Works even though they are incomplete, depends in particular on how late the Contractor is in completing the work, and how much retention money the Principal holds on the Contractor.

Why would a building owner **not** want to take possession of the Contract Works even though they are supposedly complete?

This situation may typically occur when the Contract Works are a speculative development, for example an office building for which the Principal has no end tenant(s) in mind and rents have dropped to a figure below the liquidated damages figure written in to the contract. The Principal may be keen to find reasons of allegedly defective or incomplete work to delay having to take the Contract Works over.

Consequences of Principal’s desire, or lack thereof, to occupy the Contract Works

Contractors more often finish late than on time, and rarely do they finish before the Due Date for Completion, so it is usually an issue of how late they finish and whether and to what extent they are entitled to an extension of time for late completion.

If the Principal is anxious to occupy it will be more inclined to accept more work to be completed after it occupies the Contract Works, and if it is unconcerned over when it can occupy, it will tend to be fussier about what it is prepared to accept as being unfinished when it takes possession.

In a lump sum contract under conditions of contract such as **NZS 3910:2013** the “*Engineer*” supposedly acts independently in deciding what still needs to be completed that fits within the definition of completion. But the “*Engineer*” is bound by the relevant ‘inspection’ clause as to what it can accept as incomplete whilst s/he certifies completion.

S/he may expand the omissions and incompletions if the Principal has no objection, not because **NZS 3910** specifies it but because it may suit both Principal and Contractor. The Contractor is always keen to hand over the Contract Works so it is not liable to pay damages and the Principal may be anxious to take possession of them even though there is still work to do on them.

**Four types of completion**

**1..** Code compliant completion

**2..** Substantial/practical completion

**3..** Final completion

**4..** Completion after latent defects are corrected, if they arise

**1..** Code compliant completion

Under the **Building Act 2004** the *building consent authority* [7] will issue a *building consent* [12(1)] in accordance with *plans and specifications* [7] supplied by the applicant [45(1)(b)].

*An owner must apply to a building consent authority for a* ***code compliance certificate*** *after all building work to be carried out under a building consent granted to that owner is completed* [*92(1)*]*.*

*A building consent authority must issue a* ***code compliance certificate*** *if it is satisfied, on reasonable grounds* [*94(1)*] *that the building work complies with the building consent* [*94(1)(a)*]

To obtain the *building consent* the applicant must show that what *is* *to be* built complies with the **building code** and to obtain a ***code compliance certificate*** it has to be shown that what *has been* built complies with the *building consent*. If the work done complies with the *building consent* it automatically complies with the **building code**.

This changed the **Building Act 1991** which required that to obtain a ***code compliance certificate*** it had to be shown the work complied with the **building code** so work completed could be different from what was shown on the *building consent*. This allowed builders to make the work they did easier so it cost them less to do, for example to leave out a cavity that was put into residential dwellings behind the cladding to drain away moisture. The builder claimed the work still complied with the **building code**. Faced with a situation where the work had been done, the *building consent authority* typically issued a *code compliance certificate* anyway because they couldn’t prove the work *didn’t* comply with the **building code**. This was a principal reason for widespread leaking damage of residential dwellings. The water penetrated the cladding and then couldn’t escape. The timber was untreated pine as allowed by the regulations [a stupid decision possibly made by stupid people] and quickly rotted. The whole leaky building debacle is an illustration of widespread stupidity and corporate greed to promote products that in isolation may have been satisfactory, but when used in combination and involving incompetent designers and incompetent builders, they created a billion dollar disaster. But on a more positive note it created a lot of work for those who specialised in fixing the problems, especially the lawyers.

The **building code** is **Schedule One** of the **Building Regulations 1992** but meeting its requirements won’t necessarily satisfy all the construction contract requirements. For example it is not essential to have carpet on the floor to comply with the **building code** and the quality of the work is not such an issue. If a wall is out of plumb and a door opens in the wrong direction it won’t necessarily affect the issue of a *code compliance certificate* unless a fire escape route is affected, even if technically it does not comply with the *building consent*.

A *code compliance certificate* will however allow the owner to sell the building.

**2..** Substantial/practical completion

Writing *Substantial completion*, also known as *Practical completion*, is the same as “*completion*” without an adjective, in which case completion, especially *Practical completion,* means there is no more work to be done.

This had the potential to created difficulty when contracts were interpreted in this way, because a Principal reluctant to take over the Contract Works could find minor items of work which were arguably incomplete, as an excuse not to take the Contract Works over.

Main changes when the Principal can occupy the Contract Works include: [1] The Principal takes responsibility for the care of the Contract Works; [2] insurances are the Principal’s responsibility;

[3] if the Contractor has to return to the premises to correct work, because of a latent defect for example, the Contractor will be responsible for any interruption to the Principal’s work activity as damages caused by the Contractor’s breach of contract; [4] the Contractor’s obligation to keep a performance bond in place, if there is one under the construction contract, should end; and [5] the maintenance period starts

Number [3] above could have serious consequences for the Contractor, for example a factory producing cars might need a production line to be shut down to allow a defect to be attended to, and potential losses could amount to tens of thousands of dollars an hour.

To avoid potential problems arising out of defining when and whether completion has occurred, the concept of Practical completion/Substantial completion has been introduced into many standard conditions of contract of which **NZS 3910** is an example.

Completion of the Contract Works is typically defined at this stage as:

1.. Being such that the Principal can **occupy** the premises for the purpose of carrying out the

operations anticipated under the construction contract, for example completing a shed

to allow mechanical equipment to be installed for a production process.

2.. One where all work has been completed except for minor defects and omissions that the

Contractor has **good reason** not to have corrected. Reasons have been defined in court

as not including those for the contractor’s convenience e.g. if the Contractor has ordered

a piece of equipment in good time and it is now on board a ship that broke down in the

the Indian Sea, that would be a “good reason”, but not if it was late arriving on Site

because the Contractor overlooked ordering it in timely fashion.

3.. Anything both the Principal and Contractor **agree** can be left over for later completion.

Some builders think it unnecessary to finish everything because they will still have access to finish the work later even after the certificate of Practical/Substantial Completion is issued. As outlined above this depends on how anxious the Principal is to take possession of the Contract Works.

**3..** Final completion

After the maintenance period [see below] ends, and all unfinished work is completed or otherwise made good, a certificate of Final Completion is issued. This signals the preparation of the Final Account which sets out the complete financial position of the contract including the release of any money still kept back as retention money [see below], money withheld on account of unsatisfactory work that cannot be made good, damages payable for late completion, and any money outstanding for work satisfactorily completed. The overall balance is paid by the Principal to the Contractor or the Contractor is invoiced by the Principal for the money owed to it. It is preferable that the Principal and the Contractor can agree to a final arrangement for payment.

**4..** Completion after latent defects are corrected, if they arise

The Contractor remains responsible for any defects after Practical/Substantial Completion but by 11(1) **Limitation Act 2010** *it is a defence to a money claim* for breach of contract if it is brought *at least 6 years* after the breach. But the point when time starts to run is different if a claim is brought in *negligence*. For earlier contracts a claim may have had to be brought under the provisions of the **Limitation Act 1950**, but they would mostly be out of time now. For a summary of the differences see: <http://mccawlewis.co.nz/articles/article/144/contract-and-negligence-claims-how-late-is-too-late>. There is also a 10 year long stop provisions **393 Building Act 2004**.

**Maintenance Period**

See the word document **Maintenance Period** on MOODLE

**NZS 3910** now calls this period the *Defects Notification Period*