



Sectional completion - pitfalls & risks

Shanand Thiru, Senior Consultant in the HKA Delay Team gives insight at the complexity and challenges of Sectional Completion.

With the world economic outlook being increasingly gloomy and uncertain, this can bring with it a commercial imperative for Employers to respond to these circumstances. We note that some are aiming to get construction projects to a stage where they can, at least in part, be operational in the shortest possible time, so as to have certainty of completion of elements of the required works. To do so, Employers can seek to achieve 'Sectional Completion' which can allow them to optimize the project timescales. However, the price of doing so can be to increase project complexity and risk. To pass this complexity and risk down to their Contractors can, in turn spell the difference between commercial success and failure for the supply chain.

Sectional Completion confers a contractual obligation on the Contractor to complete a defined part of the Works or "Section" by a prescribed date. By doing so, the aim is to enable the Employer to take over the Works on a phased basis whilst construction continues on other Sections. It is noteworthy that, typically, each Section attracts contractual damages in the event of late completion by the Contractor.

The contractual obligation under the JCT contract of Sectional Completion should not be confused with Partial Possession:

*"...the Employer may, with the **Contractors consent**, use or occupy the site or the Works or part of them, for storage or otherwise, before the date of issue of the Practical Completion Certificate or relevant Sectional Completion Certificate" [JCT SBC16 clause 2.6.1]*

The physical extent and scope of each Section should be clearly defined, giving due regard to constraints, limitations and risks imposed by other Sections. For example, testing and commissioning works that will be determined by the completeness of mechanical and electrical systems infrastructure and power distribution. However, their completion should give due consideration to other interdependent elements of work, so as to avoid imposing undue risk upon the Contractor. Such interdependencies, therefore, need to be given careful consideration during the drafting of the contract.

University of Warwick v Balfour Beatty Group Ltd [2018] EWHC 3230 (TCC) serves as a reminder of well-intended but loose contractual clauses. In this case, the defendant contended that it was not possible to achieve Practical Completion of a Section of the Works prior to the whole of the Works and, therefore, the



liquidated damages provision was inoperable. However, HHJ McKenna concluded that despite the definition of Practical Completion of a Section appearing illogical, the intention of the Parties was clear and unambiguous.

In *Vinci Construction UK Limited v Beumer Group UK Limited [2017] EWHC 2196 (TCC)* O'Farrell J held that whilst the contract provided for liquidated damages for Completion by Section, it did not define the works encompassed in each section with clarity. Notwithstanding this, O'Farrell J held that damages were still enforceable because, in essence, both Parties had agreed to damages in the event of late Completion.

Parties should therefore pay close attention to ensure that each Section is clearly and logically defined within the context of the entire Works.

Sectional Completion can, therefore, increase risk and correspondingly, the potential for disputes to occur. This is because each of the milestones represents a distinct contractual obligation to be managed on an individual basis, but within the context of overall progress of the Works. For example, in the instance that two Sections of a project change from being independent of each other, to a point where they are interdependent, then parties need to be aware of relevant Extension of Time (EOT) entitlement. That is, as a result of becoming interdependent, one Section may become affected by the "cascade effect" of delay events in the other Section.

Some guidance was offered in *Liberty Mercian v Dean & Dyball Construction Ltd [2008] EWHC 2617 (TCC)*. Here the Contractor sought an EOT for subsequent Sections as a consequence of its own culpable delay in a preceding Section. To avoid absurdities, LJ Coulson held that:

"... since the deferred possession in respect of sections 2, 3, 4 and 5, only arose because of the 4 week culpable delay on the part of the defendant in relation to section 1, it would be a nonsense to reward the defendant for that 4 week delay by giving him a full extension of time for it on the subsequent sections."

To minimize the risk of damages, Contractors should, therefore, ensure that a critical path for each Section is identified. In doing so, they should ensure dedicated resources are allocated to each Section and managed accordingly to discharge the obligation of Sectional Completion.

The absence or limitation of dependences between Sections should reduce risk of the "cascade effect" on subsequent sections.

Further issues for consideration prior to the formation of contract include whether:

- Sections be commissioned independently
- Services and power infrastructure are independent
- The scope of work and physical area clearly defined
- Completion of Sections recognises any physical dependencies.
- The physical proximity of Sections and implications for construction operations and sequencing have been examined
- Logistical issues have been assessed such as: vertical and horizontal access to other Sections post Completion

- The management of health and safety risks have been set out
- Processes and procedures for the management, supervision, and resource allocation across Sections have been agreed
- Contractor risk allowances have been considered
- Damages, release of retention, defects liability periods and warranties have been factored in
- Insurances are in place.

Construction programmes prepared to achieve completion of multiple Sections typically tend to be heavily constrained by interdependencies that increase risk and correspondingly, reduce the potential for mitigation. This is because, by implication, such programmes demonstrate reduced activity float. Whilst float is not a time risk allowance, it is often, incorrectly, relied on for this purpose. Contractors, therefore, need to consider realistic activity time risk allowances, as the ability of a programme to absorb culpable delay is significantly reduced.

Whilst the obligation of Sectional Completion may provide some benefit to the Contractor, such as improved cash flow through retention release and reduced exposure to damages, it also carries a significant risk of delay. Therefore, to ensure Sectional Completion can be delivered successfully requires both a careful pre-contract risk assessment and subsequent proactive post-contract management of risk.

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Contact details



Shanand Thiru
Senior Consultant
shanandthiru@hka.com
T: +44 (0)7544 158 347

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