

PC/OP/CC

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Many contracts in Hong Kong link the achievement of practical completion under the contract to obtaining an occupation permit (OP) from the Building Authority or a certificate of compliance (CC) from the Lands Department. This is inherently wrong as different authorities are involved in obtaining the OP and CC to those involved in determining when a building has been completed to the standard of practical completion. Therefore, anyone drafting a contract to include reference to an OP or CC should consider the different authorities involved and the respective obligations established by the Buildings Ordinance (Cap. 123).

Practical Completion

For practical completion, it is the architect under the main building contract who has to be satisfied that the building has "been substantially completed and shall have satisfactorily passed any tests that may be prescribed by the Contract, and/or any Named Sub-Contract, to be carried out before Practical Completion" (i.e. clause 15(1) of the Swire Standard Form of Building Contract for use in Hong Kong). Clause 15(1) of the HKIS Standard Form of Building Contract (May 1979 Revision) has a similar provision without the requirement for tests. The work, which has to be substantially completed, is usually defined as the Works, or a Section thereof, and it should have been constructed in accordance with the Contract.

Occupation Permit

For the OP, it is the Building Authority that has to be satisfied that the building (or a part thereof if a temporary occupation permit (TOP) is being sought) has been constructed in accordance with the Buildings Ordinance (Cap. 123). Obtaining an OP also involves several other authorities such as the Fire

Department, the Water Services Department, and the Drainage Services Department, to name just three. The main contractor and subcontractors therefore not only have to satisfy the Building Authority and Authorized Person that the building has been satisfactorily constructed and completed to OP standard as, before that can be done, other authorities have to be dealt with and satisfied that parts of the building, e.g. fire services, plumbing and drainage, have also been satisfactorily installed, completed and tested.

The works, which have to be completed, are those parts of the building for which an application for an OP is being made and those works should have been constructed to comply with Cap. 123. In addition, there must be a set of drawings and plans prepared by the Authorized Person, which are approved by both the Building Authority and the Fire Department. This approval is necessary before the Form 516 for the fire services inspection can be issued.

When he is satisfied that the building complies with Cap. 123 and the approved drawings and plans, the Registered Building Contractor has to submit, to the Authorized Person, a completed and signed Form BA13 to signify that the building has been constructed in accordance with Cap. 123, the drawings and plans approved by the Building Authority and the Fire Department, and has been completed to the standard required for an OP.

The Authorized Person then endorses the Form BA13 if he is satisfied that the building has been constructed in accordance with Cap. 123, the approved drawings and plans and has been completed to OP standard. It is then the Authorized Person who is finally responsible, in accordance with Hong Kong law, for obtaining an OP, it is the Fire Department who decides if the

building complies with fire regulations (similarly, the Water and Drainage Services departments decide on compliance for plumbing and drainage) and the Building Authority decides if the OP can be issued and, if not, what work has to be done before it can be issued.

Hence, it is clear that the authorities concerned with obtaining an OP are different to the authorities concerned with practical completion.

Certificate of Compliance

Similarly, where a developer has to apply for a CC before a development can be sold or used (irrespective of the OP having been obtained), then, again, it is a different authority, usually the Lands Department, that has to be satisfied with the status of construction work.

OP - Timing

Obviously, for every development, the Authorized Person has to obtain an OP before the building can be occupied but in the building contract there is no need to link this requirement to practical completion. An OP can be obtained at a date relatively earlier than the date on which practical completion is achieved as finishes and passenger lifts (to name just two items) do not have to be completed to obtain an OP but they would have to be completed, and the lifts successfully tested, to achieve practical completion.

The main contractor, and certain specialist subcontractors, has obligations under Cap. 123 regarding compliance with building regulations. Under Clause 4 of both the HKIS and the Swire Standard Forms of Contract, the main contractor is obliged to carry out the works in accordance with building regulations (BERA consider that this part of Clause 4 is unnecessary as contractors have this obligation at law in any case). Further, contractual provisions

relating to the OP are, therefore, unnecessary as the obligations are already defined in the Buildings Ordinance and exist at law.

Why should a contract refer to obtaining an OP at all when participation in the OP process and compliance with the Buildings Ordinance is part of the contractor's obligations at law? The answer is (or should be) timing. A developer may wish to obtain an OP at an early stage so that whilst the main contractor completes finishings and non-essential building services (for OP purposes) in one part of the building, the developer's tenants can commence their fitting out works in another part of the same building and vice versa.

Further, in a residential development, sale and purchase agreements may have provisions relating to the OP being obtained by a certain date. In such circumstances, a developer will want his building contract to reflect the provisions in the sale and purchase agreements.

Substantial Completion

What is the meaning of "substantially completed" as referred to in Clause 15(1) of the HKIS and Swire Standard Forms?

One of the tests for substantial completion is that the building should be suitable for its intended purpose. That would obviously include obtaining an OP, as, without such permit, the building is not suitable for its intended purpose as it cannot be occupied.

Therefore, where the standard form of contract requires the building to be "substantially completed" before an architect issues the practical completion certificate, it is obvious that the obligation would also include the Registered Building Contractor's issue of a valid Form BA13 and participation in obtaining the fire services certificate (Form 172) and the OP.

OP and LAD's

The recovery of liquidated and ascertained damages should not be linked to the OP as it is not wholly the contractor's responsibility to obtain the OP. The Authorized Person has to prepare and submit to the Building Authority plans and drawings to obtain the Building Authority's approval thereof and then he has to monitor the progress of construction and decide when to issue the Form BA13 to the Building Authority. This process can cause delay to the date when the OP can be obtained. Therefore, if liquidated and ascertained damages were linked obtaining to the OP, they would become void if it can be shown that delay in obtaining the OP was caused by anyone other than the main contractor. The main contractor, as the Registered Building Contractor, is responsible for issuing a valid Form BA13, but the issue of the Form BA13 may be delayed because of amendments made by the Authorized Person to previously approved drawings so that the final approved drawings depict what is built.

Although the foregoing refers solely to the Form BA13, the same applies to other submissions which have to be made by either the Authorised Person, the Registered

Building Contractor or a specialist subcontractor; e.g.:

Form 501 - for fire service;
Form FX172 - for ventilation;
Form H - for plumbing;
Form 5 - for lifts.
OP and General Damages

Swire Properties Limited deal with the OP procedures by including an item in the Preliminaries Bill which sets out separate obligations for the main contractor divorced from his performance obligations under the conditions of contract.

The preliminaries item refers to the OP procedures, which the main contractor has to participate in and ends with the issue of a valid Form BA13.91.

Not only are these obligations additional to the main contractor's performance obligations under the conditions of contract, but general damages for delay are also linked with the separate obligations in the event that the main contractor fails to comply therewith.

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