



Defects and general rights against a construction contractor where they are detected

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Following the completion of a construction project many times defects will be detected in the building work for which most construction contracts will require the contractor to return to site in order to rectify the defects. A defect can be defined as work, which does not meet the standard or a specification required by the construction contract. A defect can be due to shortcomings in the quality of the work, in the materials used or in the design used to develop the works.

Contracts will specify a period after practical completion of the works, referred to as the defects liability period, during which such defects are identified for remedy. In this regard, practical completion means that the works are free from major patent defects (defects that are readily observable) and it will usually be the case that other defects, not obvious at practical completion will be discovered for rectification during the defects liability period.



The purpose of the defects liability period is therefore to allow a reasonable period for defects in the works to become apparent and for the contractor to rectify them. At the end of the defects liability period, the employer's representative will typically prepare a final schedule of defects in the works attributable to the contractor not complying with its obligations under the contract. The contractor usually then has a period of time in which to rectify the defects identified on the schedule. During this period, practical completion has been declared and the contractor no longer has possession of, or the right to enter the site and it is the defects clause that will provide the contractor with a contractual right to return to site.

The employer is entitled to recover the cost of having the defects rectified by a different contractor in instances where the defects are so widespread that no reasonable employer would have that contractor back on site. This will also be the case where the contractor had made it clear that it was

not prepared to rectify any defects, or there had been some fraud on the contractor's part. The employer is entitled to damages where defects are due to the contractor's failure to comply with the contract. However, where the employer exercises the option of using a different contractor for the remedial work he will still be expected to mitigate his loss. Meaning that the amount the employer will be able to recover will be the cost incurred in the reinstatement or making good of the works to the standard required under the contract.

When the contractor has made good the defects on the schedule, the employer's representative normally will examine the works. If the Employer is satisfied that the patent defects have been made good and the works are in accordance with the contract, it will typically issue a certificate (or other notification) to the contractor stating that all defects have been rectified and the works are completed in accordance with the contract.

At AIP Advocates, we have lawyers who will guide you on legal matters arising from construction contracts while ensuring your interests are protected.

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