

SWK Completion Warranty Regulation 2024

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Part 1 Introduction

SWK

Established in 1978, SWK is the brainchild of *Neprom* and *VGBouw*, two Dutch trade associations for the construction industry. The biggest contractors involved in developing and completing a wide variety of construction works, both nationally and internationally, are affiliated with SWK.

Contractors affiliated with SWK distinguish themselves in the market by having their own quality service. Many of them also have a certified quality system.

Every year, the financial position of SWK's affiliated contractors is assessed and random checks are carried out on the quality of the structures built by them. SWK itself also closely monitors developments in quality using a computerized complaints system. In addition, SWK can mediate in the event that problems arise between principals and contractors.

On behalf of the insurer, SWK issues warranty certificates to parties instructing contractors affiliated with SWK to build a building. This SWK warranty certificate protects the principals, within the parameters of the SWK Completion Warranty Regulation, against completion risks.

Broadly speaking, SWK's work is as follows:

- assessing and registering contractors and building plans;
- financial and technical screening of affiliated contractors;
- providing information and advice;
- complaint handling and mediation;
- issuing SWK warranty certificates (on behalf of the insurer);
- receiving notifications of loss or damage.

Under the Dutch Quality Assurance (Building Sector) Act (*Wet kwaliteitsborging voor het bouwen*, "Wkb"), SWK occupies the role of instrument provider. SWK has developed the Enhanced Quality Assurance instrument (*VKB Instrument*) for quality assurance providers.

SWK Completion Warranty Regulation 2024

This Regulation is intended for non-consumer principals such as investors and housing associations and relates to new build projects, renewal construction projects and projects for the renovation of various types of property. The most common projects are those involving residential buildings, parking garages and commercial properties, but this Regulation may also be declared applicable to utility buildings.

Alternative to a bank guarantee

This Regulation is an excellent alternative to the bank guarantee that is usually required by a non-consumer principal from a building contractor to cover the risk of the contractor going bankrupt during construction. A bank guarantee ensures that if the contractor should go bankrupt, the principal receives payment of an amount equal to 5% to 10% of the building sum. The principal will then have to arrange for completion of the property with this limited sum of money.

The SWK Completion Warranty Regulation completely unburdens the principal because completion of the property is ensured if the contractor should go bankrupt. In accordance with Article 8.3 of this Regulation, the insurer also has the option to refund to the principal the instalments that have already been paid. At the time of writing (mid-2023), this option has never been chosen at any point during SWK's existence, however, and all projects under construction have been completed in cases where the contractor went bankrupt.

Completion warranty

Under the warranty described in Article 8.3 of this Regulation, the principal is protected against the consequences of the contractor becoming insolvent during construction. The cover of the completion warranty is 20% of the building sum.

In the official text of the SWK Completion Warranty Regulation, the completion warranty is referred to as the **insolvency warranty**.

Insurer

The SWK warranty certificate states the name of the insurer that provides the warranty. SWK works with this insurer. The beneficiary should contact SWK to invoke the warranty.

Buyers with an SWK warranty certificate have the security that they have insurance with a licensed insurer.

Arbitration

The final element of the SWK Regulation is its low-threshold dispute settlement procedure. Usually, disputes between the contractor and the principal about the contract or the SWK Regulation can be resolved by agreement. If this proves to be impossible, SWK can mediate to find a solution. If a dispute cannot be resolved amicably, it may be submitted to the Woningbouw Complaints Board (*Geschillencommissie Woningbouw*) of the Dutch Foundation for Consumer Complaints Boards (*De Geschillencommissie*) in The Hague.

If a dispute arises with SWK or the insurer mentioned on the SWK warranty certificate regarding the implementation of the SWK Regulation, the dispute may also be submitted to *De Geschillencommissie*.

Part 2

Official text of the SWK Completion Warranty Regulation 2024

Definitions

Building Sum

The amount agreed for carrying out the building work described in the Contract.

Property Division Deed

The notarial deed setting out the division into Condominiums.

Handover of Communal Areas

The Handover of Communal Areas is deemed to have taken place once the handover report has been drawn up and signed by or on behalf of the Contractor and one or more representatives of the Owners' Association.

Condominium

A share in the property involved in the division, carrying entitlement to the exclusive use of certain parts of the Building which, according to their design or layout, are or will be intended to be used as a separate whole and to the extent that an SWK warranty certificate has been issued in respect of that Condominium. This share may also include entitlement to the exclusive use of certain parts of the land belonging to the works.

Beneficiary

The Principal within the meaning of this Regulation, or otherwise the party which, according to this Regulation, may exercise the Principal's rights under this Regulation.

Bbl

The government building rules that all structures (including conversions) in the Netherlands must comply with. Any reference to Bbl in this Regulation is a reference to the Structures (Living Environment) Decree (*Besluit bouwwerken leefomgeving*) that applies to the (technical building activity) environmental and planning permit (*omgevingsvergunning*) obtained for the Property. The Structures (Living Environment) Decree provides limited options for custom rules in the environment plan or for custom regulations. The building rules applicable to this Regulation include the rules provided in the Structures (Living Environment) Decree as well as any custom rules provided in the municipal environment plan and any custom regulations that have been stipulated. The Structures (Living Environment) Decree applies if the application for an environmental and planning permit was submitted after the Dutch Environment and Planning Act (*Omgevingswet*) entered into force.

Buildings Decree

The government building regulations that all buildings (including conversions) in the Netherlands must comply with. Any reference to the Buildings Decree in this Regulation is a reference to the version of the Buildings Decree that applies to the environmental and planning permit (subactivity 'construction') obtained for the Property.

The building regulations that apply to this Regulation include the regulations in the Buildings Decree and the regulations explicitly referred to in the Buildings Decree.

The Buildings Decree applies if the application for an environmental and planning permit was submitted before the Dutch Environment and Planning Act entered into force.

De Geschillencommissie

The Dutch Foundation for Consumer Complaints Boards, based in The Hague. The complaints board designated for this Regulation is the *Woningbouw* Complaints Board (*Geschillencommissie Woningbouw*).

Building

A building or complex of buildings divided (or yet to be divided) into Condominiums and containing Individually Owned Units.

Communal Areas

The parts of the Building which, according to the Property Division Deed, are not or will not be intended to be used as Individually Owned Units.

Insolvency Warranty

The insurance that covers completion of the construction in the event that the Contractor becomes insolvent before the Handover. The Insolvency Warranty is also referred to as the completion warranty.

Additional Work

The additional work on the Property agreed in writing between the Contractor and the Principal after the original Contract has been concluded and approved by SWK.

Property

The property covered by the warranty that is specified on the SWK Warranty Certificate and that is built at ground level and/or forms part of a Building.

Contractor

A contractor listed in SWK's Register of Affiliated Contractors as well as (as regards Articles 3 et seq) the contractor who was listed when the SWK warranty certificate was applied for.

Principal

The legal entity which has entered into a Contract with the Contractor.

Handover

The Handover of the Property will be deemed to have taken place if the Beneficiary has taken receipt of the keys and the Handover report has been drawn up and signed by or on behalf of the Contractor and the Beneficiary.

Contract

The actual contract entered into between the Contractor and the Principal in respect of the Property.

Plan Acceptance

The written confirmation, provided by SWK to the Contractor, that the Property included in the submitted building plan has been listed in the Register.

Individually Owned Unit

A part of a Building that is intended to be used as a separate whole according to the Property Division Deed.

Register

The register kept by SWK listing the building plans that have been accepted under this Regulation.

Register of Affiliated Contractors

The register kept by SWK listing all Contractors affiliated with SWK.

Construction Start Date

The earlier of the start of construction of the Property on site on the basis of an irrevocable environmental and planning permit (*omgevingsvergunning*) by excavating the construction pit, or the start of the foundation work.

SWK

SWK, having its registered office in Rotterdam.

SWK Warranty Certificate

A certificate of insurance on the basis of which the Beneficiary is covered by the Insurer under the Insolvency Warranty.

Owners' Association

The association of which the Principal or the Beneficiary automatically becomes a member upon the transfer of title to the Condominium.

The insurer mentioned in the SWK Warranty Certificate.

General

General provisions

Article 1

- 1.1 The Contractor undertakes to construct and/or transfer title to the Property listed in the Register, as provided below.
- 1.2 The Insurer provides insurance cover under the Insolvency Warranty.

Applicability

Article 2

- 2.1 This Regulation applies to Principals and Beneficiaries as defined in this Regulation.
- 2.2 This Regulation applies to a Property as defined in this Regulation, as well as to Additional Work notified to the Insurer through SWK.
- 2.3 The Insurer reserves the right to make acceptance of a building plan by SWK conditional on the exclusion from the Regulation of certain components, goods or services in respect of the Property by specifying such exclusions on the SWK Warranty Certificate.

Section I: Obtaining the SWK Warranty Certificate

SWK Warranty Certificate

Article 3

- 3.1 The Contractor will submit an application for an SWK Warranty Certificate to the Insurer through SWK for the benefit of the Beneficiary within two weeks of the conclusion of the Contract, enclosing a copy of the Contract.
- 3.2 The Insurer will then issue an SWK Warranty Certificate to the Beneficiary within four weeks of receiving the application, provided that:
 - the building plan that includes the Property has been accepted by the Insurer and is listed in the Register at the time the application is received; and
 - the Contract approved by the Insurer has been used; and
 - any additional security required by the Insurer in relation to the building plan has been provided; and
 - there are no other impediments to certification in the opinion of SWK and the Insurer.The Insurer also reserves the right to wait until the suspensory conditions included in the Contract have been fulfilled before issuing the SWK Warranty Certificate.
A copy of the SWK Warranty Certificate will be sent to the Contractor.
- 3.3 If an application for the issue of an SWK Warranty Certificate is submitted before the conditions for issue set out in this Article have been met, a decision on the application will not be made until those conditions have been met. The SWK Warranty Certificate will then be issued to the Beneficiary within four weeks of the date on which those conditions are met.
- 3.4 The Insurer may reject the application if it is established that the conditions mentioned in this Article have not been or will not be met or that the Contractor is insolvent as defined in Article 8.2.

On the day that the Contractor becomes insolvent, the Properties in the relevant Contractor's building plans for which the Insurer and/or SWK has not yet received an application for an SWK Warranty Certificate will be automatically removed from the Register.

- 3.5 The Insurer may also issue an SWK Warranty Certificate to the Beneficiary at the Beneficiary's request.
- 3.6 Once the SWK Warranty Certificate has been issued and the other conditions set out in this Regulation have been met, the Beneficiary has cover under the Insolvency Warranty for the Property, as referred to in Section III.

Cover for Communal Areas

Article 4

- 4.1 If an SWK Warranty Certificate has not been issued for all the Condominiums in a common property, a pro rata cover applies to the Communal Areas.
- 4.2 In the situation described in Article 4.1, the Insolvency Warranty in respect of the Communal Areas is limited to the sum of the shares (fractions) in the common property which, according to the applicable Property Division Deed, are represented by the Condominiums for which an SWK Warranty Certificate has been issued pursuant to Article 3.
In case of a secondary division (*ondersplitsing*) into Condominiums, the cover of the warranty rights referred to in this Article is limited to the pro rata portion for which the sub-Owners' Association is required, pursuant to the deed of principal division into Condominiums (*akte van hoofdsplitsing*), to contribute to the costs of construction of the Communal Areas of the registered property, multiplied by the sum of the shares (fractions) in the sub-Owners' Association/s for which an SWK Warranty Certificate has been issued pursuant to Article 3 (all to the extent that, according to the provisions in the regulations of the principal division (*hoofdsplitsing*), the costs are not payable by certain owners or by parties other than the owners).
When SWK accepts a building plan, the Insurer may limit the scope of the warranty for such building plan, and SWK may require the Contractor to notify the Beneficiary of this in writing.
- 4.3 In any circumstances other than the situation described in Article 4.1, there is no pro rata cover for the Communal Areas.

Section II: Standards

Standards for the Insolvency Warranty

Article 5

- 5.1 The Property meets the applicable requirements of the Buildings Decree and/or the Bbl, subject to:
 - a. any exemptions granted by the local authority and/or other public authorities from the requirements of the Buildings Decree and/or the Bbl or from any other requirements or regulations;
 - b. any exclusions mentioned in this Regulation and/or on the SWK Warranty Certificate;
 - c. any contract reductions agreed between the Contractor and the Principal.
- 5.2 Under reasonably foreseeable circumstances, the Property meets the requirements of good and sound work, subject to:
 - a. any exclusions mentioned in this Regulation and/or on the SWK Warranty Certificate;
 - b. any contract reductions agreed between the Contractor and the Principal.
- 5.3 The Contract is the basis for the Insolvency Warranty.

The SWK Completion Warranty Regulation as a supplement to the Contract

Article 6

The rights and obligations under this Regulation do not affect or limit the other rights and obligations that the Contractor and the Principal have vis-à-vis each other pursuant to the Contract.

Disputes between the Beneficiary and the Contractor

Article 7

- 7.1 The Beneficiary and the Contractor will endeavour to resolve any disputes concerning or arising out of this Regulation amicably. Either party may contact SWK with a request to mediate between them if required. SWK can also suggest mediation. If the Beneficiary and the Contractor are unable to resolve a dispute amicably, then the dispute settlement procedure referred to in Article 7.2 will apply between them.
- 7.2 All disputes between the Contractor and the Beneficiary concerning the SWK Completion Warranty Regulation, including claims for performance, cancellation and compensation, will be settled by *De Geschillencommissie* in accordance with the Dispute Settlement Regulations of *De Geschillencommissie* as they read on the date when the dispute is submitted.

Section III: Insolvency Warranty

The Insolvency Warranty

Article 8

- 8.1 The Beneficiary will notify SWK in writing of the Contractor's insolvency as soon as possible but within fourteen days of becoming aware that the Contractor is insolvent.
- 8.2 Under this Regulation, insolvency includes solely the following:
- the Contractor's bankruptcy, a court-approved composition or a private composition with all or a majority of the Contractor's creditors;
 - the situation in which, in the sole opinion of the Insurer, sufficient facts and circumstances have been established showing that the Contractor has ceased making payments and/or is in a situation that in fact corresponds to the situation described in clause a.

If a situation as referred to in clause a. or b. arises as a result of acts of war or similar occurrences (*molest*), it will not be regarded as insolvency within the meaning of this Regulation. Acts of war or similar occurrences are defined as described in the text filed with the Registry of the District Court of The Hague by the Dutch Association of Insurers (*Verbond van Verzekeraars*) on 2 November 1981. If that text is amended, the amended text will apply to cases for which the SWK Warranty Certificate is issued on or after the date on which the amended text takes effect.

- 8.3 If the Contractor defaults on its obligations under the Contract as a result of insolvency, the Beneficiary will be indemnified by the Insurer subject to the following terms and conditions. The Insurer may choose between the following options when paying indemnification:
- the Insurer makes an arrangement for completion of the construction with a construction company other than the Contractor and pays the costs incurred by the Beneficiary for completing the Property over and above the Building Sum specified in the original Contract;
 - the Insurer refunds the Beneficiary the instalments already paid by the Beneficiary to the Contractor under the Contract, plus statutory interest from the date of payment to the date when the amount is refunded in full.

If the Insurer chooses option b., it will acquire ownership of the property purchased by the Beneficiary to the extent that the instalments already paid by the Beneficiary to the Contractor are repaid to the Beneficiary by the Insurer.

- 8.4a. By signing the Contract, the Beneficiary irrevocably authorizes the Insurer, to the exclusion of any other party, to do the following for and on behalf of the Beneficiary in the event that the Contractor becomes insolvent: to address the consequences of the Contractor's insolvency, including conducting negotiations with the liquidator (*curator*) and making an arrangement for completion of the construction. In addition, the Insurer is entitled to take all such measures in relation to the Property under construction as the Insurer deems necessary or useful to limit or settle the loss or damage.
- 8.4 b. After the Contractor's insolvency has been disclosed, the Insurer will, on the Beneficiary's behalf, send the liquidator a written demand requesting confirmation of the completion of the Property, in accordance with the relevant provisions of the Dutch Bankruptcy and Insolvency Act (*Faillissementswet*). If such confirmation is not provided within the period stated in that demand, or if the liquidator issues a written notification that it will not fulfil the Contract, the

indemnification arrangement set out in Article 8.3 will apply and the Beneficiary will be deemed to have invoked this Insolvency Warranty.

- 8.5 The Beneficiary is obliged to do the following, with the proviso that failure to do so will result in forfeiture of his right to indemnification:
- a. to provide the Insurer with all the requested information, documents and cooperation;
 - b. to provide all reasonable cooperation to calculate and settle the loss or damage;
 - c. to allow the Insurer or expert/s appointed by the Insurer access to the Property/House/Building under construction upon request;
 - d. to immediately report any suspected criminal offence to the police;
 - e. to assign to the Insurer his claim against the Contractor under the Contract in respect of the loss or damage suffered and yet to be suffered.

If, at the time of the Handover, the Beneficiary has exercised the right to withhold an amount pro rata to the defects for the rectification of those defects, or if the Contractor has provided equivalent security for the benefit of the Beneficiary, the Beneficiary will also be obliged (subject to forfeiting his right to indemnification) to assign to the Insurer any claim he has against the Contractor or the equivalent security in respect of the costs of rectification of Handover defects. In case of Condominiums, the Beneficiary is also obliged to assign to the Insurer, at the Insurer's first request, any claims against co-owners who do not hold an SWK Warranty Certificate. These include demands to cooperate with the completion of the Building and to contribute financially to the costs of completing the Communal Areas, which are considered joint costs within the meaning of Section 112(1)(a) in conjunction with Section 122(3) in Book 5 of the Dutch Civil Code. Offsettable claims as referred to in Article 8.10 are not assigned. The same applies to any subrogation of the Insurer to the Beneficiary's rights. Rights are not subrogated in the case of offsettable claims as referred to in Article 8.10.

If the Beneficiary does not, or does not fully, fulfil the obligations referred to in this Paragraph with the intention to deceive the Insurer, any right to indemnification will lapse unless this is not warranted by that deception.

- 8.6 If Article 8.3 applies, the maximum indemnification is 20% of the Building Sum (excluding the price of Additional Work not notified to the Insurer through SWK).
- 8.7 If, at the time of the Handover, the Beneficiary did not exercise his right to withhold an amount pro rata to the defects for the rectification of those defects until the Handover defects have been rectified, an amount equal to the actual costs of rectifying these defects will be deducted from the indemnification referred to in Articles 8.3 and 8.6, but only up to 5% of the Building Sum. This provision does not apply if the Contractor has provided equivalent security of 5% of the Building Sum for the benefit of the Beneficiary in a timely manner, such as a bank guarantee, and the Beneficiary maintains that security until the Handover defects have been rectified.
- 8.8 The following payments made by the Beneficiary under the Contract or contracts resulting from it are at the Beneficiary's risk and expense and are not covered by the Insolvency Warranty:
- a. payments made prior to the unconditional notarial transfer of title;
 - b. payments made before the Contractor has carried out the work in question in the context of the instalment scheme agreed between the Contractor and the Beneficiary and approved by the Insurer;
 - c. payments made after the date of the Contractor's insolvency, unless the Insurer authorized them in writing beforehand.

The following do not qualify for reimbursement either:

- d. discounts granted by the Contractor in connection with subsidies or payments by third parties. The Beneficiary himself must take the necessary measures to obtain and/or retain any subsidies;
 - e. the financial consequences of cancellation of the Contract without the Insurer's authorization.
- 8.9 In the event of an arrangement for completion of the construction on the basis of Article 8.3.a., the Insurer will again request the payments referred to in Article 8.8 from the Beneficiary. If the Insurer pays indemnification on the basis of Article 8.3.b., the aforementioned payments will be deducted from the amount payable to the Beneficiary by the Insurer.

- 8.10 If the Beneficiary has claims that can be set off against any outstanding claims of a bankrupt Contractor, the Insurer will set off such claims of the Beneficiary against the bankrupt Contractor's outstanding claims on behalf of the Beneficiary. Such offsettable claims are explicitly not covered by the Insolvency Warranty.
- 8.11 The beneficial ownership and legal ownership of the Property are free of contractual or actual restrictions that could delay and/or impede the performance by or on behalf of the Insurer of its obligations under the Insolvency Warranty if it is invoked. If the Contract (or a subsequently amended version of the Contract) deviates from these principles, the Insurer will not be required to do more than it would be required to do if the principles had been included in the Contract.
- 8.12 If the Contractor becomes insolvent as described in Article 8.2 prior to the unconditional notarial transfer of title and prior to the Construction Start Date, the Insolvency Warranty will cease to have effect.
- 8.13 If the Insurer has rejected a claim under the Insolvency Warranty in writing and the Beneficiary does not institute legal proceedings against the Insurer within one year of the date of the written rejection, any right to indemnification will lapse.
- 8.14 The Insolvency Warranty will cease to have effect if the Beneficiary becomes insolvent.

Subrogation and right of recourse

Article 9

After the Beneficiary has invoked the Insolvency Warranty and after the Insurer has met its corresponding obligations, the Insurer will be subrogated to the Beneficiary's rights vis-à-vis the Contractor. As far as necessary, the Beneficiary will cooperate in the assignment to the Insurer of its claims against the Contractor.

Other warranties and/or insurance policies

Article 10

- 10.1 If it transpires that the risk covered under this Regulation is also covered by other warranties and/or insurances (whether or not predating this Regulation) or would be covered by such other warranties and/or insurances if this Regulation had not existed, the Insolvency Warranty provides a cover supplementary to such other warranties and/or insurances.
- 10.2 If no compensation can be obtained under the other warranties and/or insurances referred to in Article 10.1, the Insurer will pay compensation if and to the extent that loss or damage is recoverable under this Regulation – whereby the Beneficiary's rights vis-à-vis the provider of the warranty in question and/or the insurer in question are assigned to the Insurer – whether or not as an interest-free advance that does not have to be repaid if recovery under such other warranties and/or insurances proves to be impossible.

The Dutch Wages and Salaries Tax and Social Security Contributions (Liability of Subcontractors) Act and the Dutch Foreign Nationals (Employment) Act

Article 11

- 11.1 The Insolvency Warranty also covers claims against the Beneficiary by the Tax Administration and the Employee Insurance Agency (UWV) under the Dutch Wages and Salaries Tax and Social Security Contributions (Liability of Subcontractors) Act (*Wet ketenaansprakelijkheid* of 4 June 1981, Bulletin of Acts and Decrees 370), as well as any claims against the Beneficiary by the government, government agencies and/or third parties under the Dutch Foreign Nationals (Employment) Act (*Wet arbeid vreemdelingen*).
- 11.2 If the Beneficiary wishes to invoke the Insolvency Warranty, it must do so within six months of the Handover.
- 11.3 The maximum amount covered under the Insolvency Warranty for claims in connection with the Dutch Wages and Salaries Tax and Social Security Contributions (Liability of Subcontractors) Act is an amount equal to 10% of the Building Sum.
- 11.4 The maximum amount covered for claims in connection with the Dutch Foreign Nationals (Employment) Act is an amount equal to 5% of the Building Sum.

Section IV: Other provisions

Passing of the Beneficiary's rights under this Regulation and the SWK Warranty Certificate

Article 12

The Insolvency Warranty is considered a qualitative right as referred to in Section 251(1) in Book 6 of the Dutch Civil Code. This means that the warranty rights under this Regulation pass to the successor owner by operation of law when the notarial deed of transfer of title to the Property is executed. When invoking this Regulation, the Beneficiary must be able to prove upon request that he is the owner of the Property.

Section 251(1) in Book 6 of the Dutch Civil Code reads as follows:

“A contractual right capable of transmission which is so closely linked to certain property belonging to a creditor that he has an interest in that right only as long as he retains that property, will pass to the person who acquires that property by particular title.”

Disputes between the Insurer/SWK and the Beneficiary

Article 13

- 13.1 The Beneficiary and the Insurer/SWK will endeavour to resolve any disputes concerning or arising out of this Regulation amicably. If the Beneficiary and the Insurer/SWK are unable to resolve a dispute amicably, the dispute settlement procedure referred to in Article 13.2 will apply between them.
- 13.2 All disputes between the Insurer/SWK and the Beneficiary concerning the SWK Completion Warranty Regulation, including claims for performance, cancellation and compensation, will be settled by *De Geschillencommissie* in accordance with the Dispute Settlement Regulations of *De Geschillencommissie* as they read on the date when the dispute is submitted.

Effective date

Article 14

This regulation enters into force on 1 January 2024 and applies solely to Properties the plans for which are submitted to the Insurer through SWK on or after 1 January 2024.