



Substantial Completion and the Impact of the Architect's Certificate

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The concept of substantial completion is a source of many construction project disputes. Generally, in order for party to a contract to fulfill his or her obligations under the contract, there must be complete or full performance. A party is not entitled to the benefit of the contract if it has not fully lived up to its end of the bargain. Construction contracts, however, are a different creature. They typically deal with two different stages of completion—substantial completion and final completion. Substantial completion is the point in the project where the building is fit to be used for its intended purpose. Any remaining work that needs to be completed is generally referred to as punchlist work. Completion of the punchlist work usually constitutes final completion.

Under most construction contracts, achieving substantial completion entitles the contractor to full payment for his work, less any damages flowing to the owner for defective or unfinished work or other losses sustained for less than complete performance. In other words, unlike in normal commercial disputes, a contractor is entitled to payment even at the stage where the project is less than fully finished. To help aid in the determination of whether substantial completion has been achieved, the parties will typically provide for the architect to issue a certificate of substantial completion.

What Is Substantial Completion?

Substantial completion, or "substantial performance," as some jurisdictions call it, is the stage in the construction of a building or structure where, although there is still be work to completed or minor defects that need to be corrected, the building or structure may be used as intended.¹

"There is substantial performance of a building or construction contract when all of the essentials necessary to the full accomplishment of the purpose for which the building has been constructed are performed or the building is fit for its intended purpose, or when the contract has been performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract."²

The most commonly used definition of substantial completion comes from the American Institute of Architects (AIA). According to the AIA, substantial completion is "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use."³

Two similar, but less frequently used, definitions have been formulated by the Associated General Contractors (AGC) and the Engineers Joint Contract Documents Committee (EJCD). According to the AGC:

"The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Architect/Engineer when construction is sufficiently complete, in accordance with the Subcontract, so the Owner can occupy or utilize the Work or designate portion thereof for the use of which it is intended."⁴

Likewise, the EJCD defines substantial completion as the point at which

"[t]he Work (or specified part thereof) has progressed to the point where, in the opinion of ENGINEER as evidenced by ENGINEER'S

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definitive certificate of Substantial Completion, it is sufficiently complete in accordance with the Contract Documents so that the Work (or specified part) can be utilized for the purposes for which it is intended. ..."⁵

What Is the Significance of Achieving Substantial Completion?

Aside from triggering the contractor's right to payment of the full contract amount, minus offsets, achieving substantial completion has many other significant impacts. First, the contractor likely can no longer be found in material breach of the contract for failing to perform. While the owner may be able to assert claims for defective construction, the contractor is able to meet its prima facie case of being entitled to the contract balance, subject to setoff, by virtue of having achieved substantial completion. Additionally, many contracts require the contractor to achieve substantial completion by a certain date. Missing that deadline may result in damages to the owner as well as impair the contractor's ability to insist on payment.

Achieving substantial completion typically will also result in the release of retainage being held back by the owner. Warranties that are required by construction contracts will often commence on the date of substantial completion. Similarly, statutes of limitations may begin running upon substantial completion, at least for construction defects that are either actually or constructively known by the owner. Substantial completion also typically establishes and transfers the parties' respective responsibilities for providing security, heat, utilities, insurance, and routine maintenance for the project. Finally, to the extent that the construction contract contains

a liquidated damages provision for failing to complete the project on time, achieving substantial completion will render that provision unenforceable.

How Is Substantial Completion Determined?

Ultimately, the parties to the contract determine what constitutes substantial completion through their negotiation of the terms of the contract. Courts generally will adhere to the definition found in the contract when determining whether substantial completion has occurred. Standard rules of contract construction apply: The language of a contract is to be given its clear meaning if clarity is present. When ambiguities or uncertainties exist, they are resolved against the party creating them. In addition, there are some general rules or standards applied by many courts with respect to what constitutes substantial performance.

"The ordinary rule applied in cases involving building contracts is that a builder is not required to perform perfectly, but rather he is held only to a duty of substantial performance in a workmanlike manner."⁶

"Where the contract specifies what [the contractor] is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part."⁷

In other words, the purchaser who receives substantial performance of the building must pay the contract price less any credits or offsets to cover the costs of any deficiencies resulting from incomplete or improper performance.

On the other hand, there can be no finding of substantial completion where the work is incomplete in any material respect or where the deviations from the contract are material.⁸ For example, where the defects cannot be corrected without damaging other parts of the building or where

simply affording an owner a right of setoff will not provide the owner with the benefit of its bargain, substantial completion will be found to be lacking.⁹

Courts acknowledge the difficulty in determining what constitutes substantial completion because that determination depends on the facts surrounding each contract or case. What appears to be an "approximation of complete performance" in the eyes of the contractor can also appear to be, in the eyes of the owner, a failure of the building to be "fit for its intended purpose." While the work on a project may be substantially finished, defects may exist or significant portions may remain to be completed that prevent the owner from using the project for its intended purpose, thereby precluding a finding of substantial completion. Moreover, the doctrine of substantial completion is intended to aid a contractor who has, in good faith, attempted to live up to the terms of its agreement. The doctrine, therefore, "applies only where the contractor has not willfully or materially breached the terms of the contract, and has not intentionally failed to comply with contractual specifications."¹⁰

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Often, in addition to defining what is substantial completion in their contract, parties will provide for the issuance of a certificate of substantial completion. Substantial completion in most cases occurs before what is termed "final completion." The key inquiry is to distinguish between those defects or incomplete work that prevent the owner's use of the project and those that do not interfere with a finding of substantial completion.

Typically, the determination of substantial completion is made by a design professional involved in the construction project. The owner and contractor may agree that a third person, usually an architect or engineer, will be responsible for evaluating a contractor's work and deciding when to issue a certificate of substantial completion. They may include language in their construction contract that substantial completion shall be effective when the work is sufficiently complete "to the satisfaction of the architect." For instance, when the construction contract is based on AIA documents, the architect is expressly designated as the person who will issue the certificates.¹¹ Further, in many instances, both the owner and contractor, in addition to the architect, will sign the certificate, thereby establishing the official date of substantial completion for the project.

What Weight Does the Architect's Certificate of Substantial Completion Carry?

In theory, once the architect has issued a certificate of substantial completion, one of the contractor's milestones has been met. Many times, however, a party may try to challenge the contractor's attainment of substantial completion. For instance, an owner may try to dispute the certificate and refuse to pay the contractor. The owner, though, has quite an uphill battle.

Almost uniformly, where the contract calls for the design professional to make final decisions on performance issues, such as substantial completion, those certifications are binding, conclusive evidence that the performance

issue in question has been attained. The majority of states hold that absent fraud or mistake, the certificate of determination of an architect or other third party, is conclusive on the parties if their agreement expressly or in effect so provides.¹² At least one state, however, while adopting the same standard, adds that the certificate is held to be only prima facie correct, with the burden upon the other parties to show fraud or mistake.¹³ In the overall analysis, however, this appears to be a distinction without a difference.

While attainment of a certificate of substantial completion "carries significant weight,"¹⁴ the parties need to remember that the "weight" is only as great as specified in their agreement. Where the construction contract itself fails to provide that the engineer's determination of completion should be final and conclusive, fraud and mistake need not be proven in order to dispute determination of completion.

A perfect example is *Flour Mills of America, Inc. v. American Steel Building Company*, where the engineer was responsible for certifying progress payments for the construction of a building. The contract required the engineer to certify the amount due the contractor, but also provided that the certificate would not be an acceptance of any work or materials not in accordance with the contract. And while the engineer was also responsible for rendering decisions on all claims between the owner and the contractor, the engineer's decisions were only final with respect to "artistic effect." When an issue arose with respect to the roof, the court held that "the parties to the contract were not conclusively bound by the engineer's determination concerning the roof." A specific provision was absent from the contract indicating that such a determination of the engineer would be binding and conclusive upon the parties.¹⁵

Just as the contract language controls the scope of the authority that can be bestowed upon the architect or engineer, the language of the certificate

controls the scope of the certification. Where the certificate fails to recite satisfactory completion of work, the certificate will not be conclusive evidence of contractor's performance. For instance, in *Zimmerman v. Marymor* the construction contract provided for the architect's final certification to be conclusive evidence of the performance of the contract. The architect's obligation, according to the contract, included the requirement to certify the satisfactory completion of the work. The last certificate, though, only certified that the contractor was entitled to payment. The court held that the contractor's reliance on the certificate as conclusive evidence of satisfactory performance was misplaced where the final certificate failed to include the averment of satisfactory completion of the work.¹⁶

The strength of the certificate of substantial completion is only as great as the authority provided in the contract.

Lessons Learned: Make It Clear in the Contract

Most construction contracts deputize the architect or engineer as the owner's agent in dealing with the contractor. The design professional typically is vested with vast authority and control over the contractor in administering a project, such as resolving claims between owner and contractor, authorizing changes to the scope of the project, and approving progress payments. Indeed, the architect or engineer may have the authority to withhold issuing the certificate of substantial completion altogether until the contractor completes certain punchlist items or other

unfinished work. Ultimately, the strength of the certificate of substantial completion is only as great as the authority provided in the contract.

From the contractor's perspective, the issuance of a certificate of substantial completion ought to be binding on the owner and should be proof that the contractor has achieved that milestone, thereby entitling it to payment of the contract balance less, of course, any damages flowing to the owner for defective or unfinished work. The contractor feels that it is incongruous to require it to substantially complete its work to the satisfaction of the architect, in order to secure the issuance of the certificate, but then to deprive the contractor of the presumption that it has materially performed its obligations. The contractor can protect himself or herself by insisting on clear language in the construction contract concerning the weight and impact of the architect's certificate.

From the owner's perspective, the certificate should merely be prima facie evidence of substantial completion. While the architect serves as the "front line defense" to verify sufficient performance by the contractor, the owner will want to reserve for itself the ability to contest the finding of substantial completion in the event that issues arise. The owner can achieve its goals by reserving rights and limiting the impact of the certificate in the terms of the construction contract. The owner, for example, may insist on a provision that requires its signature on the certificate before the certificate can be effective. The contract may allow the owner the ability to assume partial occupancy of the building without conceding substantial completion. Or the contract may effectively eliminate substantial completion altogether.¹⁷

In the end, both the owner and contractor must make sure they know and understand the effect of the design professional's certifications. In the absence of that knowledge, one or both are likely to encounter some surprises at the end of the project. ■

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Endnotes

- ¹ 17B CJS Contracts §590b (1999).
- ² 13 Am. Jur. 2d Building and Construction Contracts §48 (2000).
- ³ Article 9.8.1, AIA Document A201-1997.
- ⁴ AGC Document No. 430 (¶9.1.3).
- ⁵ EJDC General Conditions of Construction Contract (Standard Form No. 1910-8 (1990 ed.) (Art. 1.38).
- ⁶ *Brewer v. Custom Builders Corp.*, 42 Ill. App. 3d 668, 673, 356 N.E.2d 565, 570 (5th Dist. 1976). See also 17B CJS Contracts §590(b) (1999) ("Literal and precise performance is not demanded, and slight or trivial defects, imperfections, or variations will not bar an action for the balance due, if the contractor has made an honest endeavor to comply with and has

substantially done so.")

- ⁷ *Fuchs v. Parsons Construction Co.*, 172 Neb. 719, 111 N.W.2d 727, 730 (1961).
- ⁸ *Butkovich & Sons v. State Bank of St. Charles*, 62 Ill. App. 3d 810, 379 N.E.2d 837, 838 (2nd Dist. 1978); *County Asphalt Paving Co., Inc. v. 1861 Group, Ltd.*, 851 S.W.2d 577 (Mo. Ct. App. E.D. 1993).
- ⁹ 17B CJS Contracts §590(b) (1999).
- ¹⁰ *Id.*
- ¹¹ See Articles 9.8.2 and 9.10.1, AIA Document A201-1997.
- ¹² See generally *R.W. Dunteman Co. v. Village of Lombard*, 281 Ill. App. 3d 929, 666 N.E.2d 762 (1996); *May v. Dickerson Construction Corporation*, 560 So.2d 729 (Miss. 1990); *Cook d/b/a C&C Development Company v. Oklahoma Board of Public Affairs*, 736 P.2d 140 (Okla. 1987); *Raides Construction Inc. v. Gaspard*, 411 So.2d 81, 83 (La. 1982); *Board of Education v. A. Barabresi*, 269 N.Y.S.2d 823 (1966); *Eickhof Construction Company v. City of Grafton*, 123 N.W.2d 580 (N.D. 1963); *Trinity Universal Ins. Co. v. Willbanks*, 144 S.W.2d 1092 (Ark. 1940); *Southern Real Estate &*

Financial Co v. Bankers' Surety Co., 184 S.W. 1030 (Mo. 1916); and *W & J Sloane v. State*, 297 P. 194 (Wa. 1931).

¹³ See *James I. Barnes Constr. Co. v. Washington Tp. of Starke County*, 184 N.E.2d 763 (Ind. 1962).

¹⁴ *Hinkle, Buckner, Jr.* 16 Construction Lawyer 25, 27 (Jan. 1996) (this is so "even where the Architect has played only a limited role in the project"). See also, *Pete Wing Contracting, Inc. v. Port Conneaut Investors Ltd. P'ship*, Lexis 4341 at *3 (Ohio App. 1995), 110 A.L.R. 137, 140.

¹⁵ See *Flour Mills of America, Inc. v. American Steel Bldg. Co.*, 449 P.2d 861 (Okla. 1968).

¹⁶ See *Zimmerman v. Marymor*, 138 A. 824 (Pa. 1927).

¹⁷ We have encountered AIA contracts that were modified such that substantial completion was defined as occurring when all necessary governmental certifications and licenses are issued. In such a situation "substantial completion" effectively occurs contemporaneously with "final completion."



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