



DEFINING "SUBSTANTIAL COMPLETION" FOR LIEN LAW AND CONTRACT PURPOSES

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This past legislative session, a bill made its way through the legislature that would have amended the New York State Finance Law and General Municipal Law to provide a definition for "substantial completion" of public works contracts. Although the bill passed in the Senate, time was not on its side in the Assembly, and AGC NYS along with its partner subcontractor associations will make another run at passing this important legislation next year.

The proposed legislation seeks to add a definition now missing from applicable law, and close a loophole which sometimes leaves contractors at the mercy of municipal representatives who delay issuing Certificate of Completion. Legislating a definition of "substantial completion," rather than leaving that determination in the hands of an individual whose interests may be at odds with a contractor or subcontractor, would presumably enable contractors to realize a speedier release of retainage funds on public works contracts. This would be a welcome relief.

With regard to the Lien Law, a similar problem exists. You may already know that Section 10 of the Lien Law requires a notice of mechanics' lien against an owner within eight months (or four months for single-family dwellings) of completion of the contract, final performance of the work, or the last date labor and/or material is provided. Where a lien is filed against retainage due, the notice must be filed within 90 days from the date "retainage was due to be released." The statute does not define "final performance," which may be akin to "substantial performance" but is not quite the same threshold. Nor does the Lien Law clarify what is meant by the date the retainage is "due to be released." Under those circumstances, the Court will look to the intention of the parties and language of the agreement between them, and therein lies the critical point.

For the most part, contractors who utilize AIA contracts in their practice may be of the opinion that the sample form of these documents are drafted to generally favor an owner. And that opinion may be right. Nevertheless, under general contract law, parties live and die by the language in their agreement.

Thus, accepting an owner's definition or non-definition of "substantial completion" is not required, and should

not be assumed. Contractors would be wise to take the time to review a proposed contract with an owner, and insist on benchmarks defining "substantial completion" for the purposes of the Lien Law and recovery of payment due. With all due deference to the courthouse, leaving a contractual interpretation in the hands of a judge is risky, at best.

By way of example, in one recent case, a contract directed that the project architect's issuance of a Certificate of Substantial Completion was the act which set the "substantial completion" date. That date, favorable to the owner and detrimental to the contractor beholden to the owner's architect's whims, was at the contractor's peril. Thus, the Court rejected the contractor's date of "actual physical completion," adopted the architect's determination as to when the clock began to run on the contractor's claim for non-payment, and held that the contractor was time-barred using the earlier (architect's) date.

Relying on the draft AIA contracts without revision is not much wiser. For instance, Section 2.3 of A105, the Standard Short Form Agreement Between Owner and Contractor, defines "substantial completion" as the time provided in the contract documents, referring to Section 12.5, of the entire project. Section 12.5 describes substantial completion as 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 the Owner can occupy or utilize the Work for its intended use."

Contractors on public works contracts are rightfully hopeful that New York State will enact the proposed legislation to amend applicable law by defining "substantial completion," thereby enabling contractors to realize a speedier recovery of retainage funds. In the meantime, contractors engaged in the private sector should take the opportunity to consider their contractual engagements, and think about applying definable benchmarks to what would be a "substantial completion" of a project.

For now, efforts filling in the contract gaps at the outset may save a bundle litigating the ambiguities later.

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