

Advocate's View: Substantial Completion bill signed into law

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New York continues to provide legislation designed to speed up payment to contractors. Following on the heels of Prompt Pay Act, (albeit 11 years later) Gov. Andrew Cuomo signed into law the "Substantial Completion" act on Dec. 19, 2020.

Various versions of the law have been making the rounds in the state Legislature for the last couple years. The law's stated purpose is to clarify the term "substantial completion" for the purposes of requisition payments to contractors,

subcontractors and materials suppliers in construction contracts.

Substantial completion is a significant milestone in the life of a construction project. Contractors know that once substantial completion is achieved retainage, less twice the value of incomplete or incorrect work, is released by the owner. It also signals the commencement of warranties, corrective work, and (typically) resolution of claims, both within the contract's dispute resolution procedure and for purposes of litigation or arbitration. Finally, the law should aid in clearing up ambiguities on when a contractor's right to file a mechanic's lien for retainage accrues and the 90-day clock for filing begins.

The new legislation amends state finance law 139-f and applies to public contracts only. New York's General Business Law §756 ties an owner's withholding of payment to the value of incomplete or defective work on private construction projects. The law's critical new language is in bold below:

"When the work or major portions thereof as contemplated by the terms of the contract **has reached substantial completion which, for the purposes of this section, shall mean the state in the progress of the project when the work required by the contract with the public owner is sufficiently complete in accordance with the contract so that the public owner may occupy or utilize the**

work for its intended use; provided further, that “substantial completion” shall apply to the entire project or a portion of the entire project if the contract with the public owner provides for occupancy or use of a portion of the project, the contractor shall submit to the public owner and/or his agent a requisition for payment of the remaining amount of the contract balance.”

The law essentially codifies the definition of substantial performance contained in the AIA construction documents, and the typical definition relied on by the courts. (See *Phillips Const. Co. v. City of New York*, 61 NY.2d 949 (1984) (substantial completion means the completion of the actual physical work even though incidental matters relating to the project remained open).

The new legislation also starts the clock on the owner’s obligation to provide the contractor with a single defined “punchlist” of remaining open items of work:

“Not later than forty-five business days after the date when the project has reached substantial completion, the public owner shall submit to the contractor a written list describing all remaining items to be completed by the contractor. Not later than seven calendar days after receiving a written list describing all remaining items to be completed by the contractor, the contractor shall submit to each subcontractor from whom the contractor is withholding retainage a written list of all remaining items required to be completed by the subcontractor. Such list may include items in addition to those items on the public owner’s list.”

The inclusion of the punchlist requirement will be welcomed by contractors throughout the state. Too often public projects linger for excessive amounts of time due to the owner generating successive generations of punchlists; each of which must be completed by the contractor before the project can be closed out, and final payment received. The courts’ strict interpretation of this new provision should be an immense improvement in closing out public construction projects.

The new law enjoys broad support among affected trade groups, including NESCA, ESSA and AGC to name a few. The hope is the legislation will ensure contractors on public projects receive retainage in a timely manner, and will also prevent public owners from prolonging a project’s final completion through the issuance of numerous punchlists.

There are however, at least two significant caveats to consider. First, the law provides a different definition for school projects, and second, the law leaves in place the phrase “...

as contemplated by the terms of the contract.” The schools’ carve out is found at §3(1) where substantial completion:

“... shall mean, for school districts and boards of cooperative educational services, [the] date the partial or final certificate of substantial completion of the project which is the date certified by the architect or engineer when the construction is code compliant and substantially complete in accordance with the contract documents so the school district can occupy or utilize the project or portion thereof for its intended use...”

The differing language appears to be in response to objections raised by the New York State School Boards Association. It remains to be seen how the courts will interpret the legislature’s intent in leaving in place the “as contemplated” language.

The law should provide support to contractors who sometimes are at the mercy of public owners who unreasonably delay issuing a certificate of substantial completion. Taking the determination of when a project is substantially complete out of the control of a public entity whose interests may be at odds with a contractor or subcontractor will presumably result in a quicker release of retainage on public works contracts. Hopefully, the players in the construction industry, and the courts when necessary, will remember the stated purpose of the legislation, which is to streamline completion and final payment on public projects.

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