



## CONSTRUCTION LAW ALERT

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# The Doctrine of “Substantial Completion” on Construction Projects

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The doctrine of “substantial completion” (also known as “substantial performance”) is critically important to construction participants, such as owners, contractors and subcontractors. The date of substantial completion frequently triggers contractual provisions for liquidated damages, reductions of retainage, and the issuance of punch lists. Bond rights and defenses are often linked to the substantial completion date. In many states, statutes of limitations and statutes of repose for claims against contractors and subcontractors begin to run from the date of substantial completion. In Florida, courts apply the “substantial completion” test to determine when the 90-day period for recording a claim of lien begins to run. What is “substantial completion” and how is it determined?

### The Doctrine of “Substantial Completion”

Under the common law, strict performance of a contract is a prerequisite to a party enforcing a contract. However, the law recognizes the realities of construction projects – they are complex and perfect performance is difficult, if not impossible, to achieve. Accordingly, the

doctrine of substantial, rather than strict, performance applies to construction contracts.

Under the doctrine of substantial performance or substantial completion, strict and full compliance with the terms and specifications of the contract documents is not required for recovery under the contract. “Substantial performance” has been defined as:

“that performance of a [construction] contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny the promise [contractor] the full contract price subject to the promisor’s [owner’s] right to recover whatever damages may have been occasioned . . . by the promisee’s [contractor’s] failure to render full performance.”

The doctrine of substantial performance is based on principles of equity. It seeks to prevent an owner from becoming unjustly enriched where the contractor substantially performs its contractual obligations. The owner is not permitted to avoid payment of the contract because of minor items that must be corrected or completed.

A contractor that has substantially performed its contractual responsibilities and acts in good faith is entitled to enforce its contract even if it does not complete the work on the project.

Upon substantial completion of the contract, the contractor is entitled to recover the full contract price less the owner’s reasonable costs of correction and completion. Moreover, a contractor that substantially performs is entitled to file and foreclose its construction lien. However, if the contractor willfully and intentionally fails to perform the contract, *i.e.*, commits a material breach, a contractor cannot claim substantial performance.

### Determining Substantial Completion

Frequently, whether or not there is substantial performance on a given project is the subject of a dispute between the parties and subsequent litigation. Some of the factors used to determine whether there is substantial completion are the extent of the defect or non-performance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit to the owner of the work

performed.

One test used to determine substantial performance assesses the percentage of completion and the degree to which the building meets the purpose for which it is constructed. Courts have generally found that if an owner can use or occupy the structure for its intended purpose, the contractor has substantially performed and is entitled to payment.

For example, a Florida court held that substantial performance was achieved where the work was 99% complete at the time the contractor left the job site. Another Florida court found substantial completion where all the phases of a shopping center were sufficiently completed such that the city issued certificates of occupancy. The owner of the shopping center was capable of having tenants occupy the spaces and collecting rents. In another case, although as much as 10 percent of the job remained incomplete at the time the contractor stopped work, substantial performance was found where the contractor had a satisfactory excuse for not completing the project. Each case is fact specific.

Substantial performance has also been found despite minor items of inferior workmanship or the

substitution of inferior materials where the owner fails to give the contractor the opportunity to correct such deficiencies. Similarly, “punch list” work under a contract will not usually prevent a finding of substantial performance.

As discussed above, case law and statutes sometimes define substantial completion. The parties, however, can define substantial completion in their contract. Courts generally will look to the parties’ definition of substantial completion in the contract when determining whether substantial completion has occurred. One industry form contract defines “substantial completion” as the stage of progress of the project 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. In contrast, many owners include contract provisions specifically stating that occupancy of the project does not constitute substantial completion.

Contracts also provide for the issuance of a certificate of substantial completion by a design professional, such as an architect or an engineer, involved in the construction project. Such certifications may carry significant

weight that substantial completion has been attained. Some courts deem these certifications as binding, conclusive evidence of substantial completion.

## Conclusion

The difficulty of determining when substantial completion has been achieved has significant legal and financial implications. Delay damages, payments and retainage releases are almost always linked to substantial completion. Contracts should properly and sufficiently define “substantial completion” to meet expectations and avoid disputes. If the parties designate a design professional to decide whether substantial completion has been attained, they should make sure they know and understand the effect of the design professional’s certification. ■

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