



CONSTRUCTION LAW E-UPDATE

THE “SUBSTANTIAL COMPLETION” TRIGGER POINT: - WHAT CONTRACTORS MUST DO TO PRESERVE ALL RIGHTS

By Henry L Goldberg

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It would be difficult to overstate the significance of reaching substantial completion under the provisions of New York City’s standard construction contract. Contractors must anticipate, far enough in advance, the actions they must take at that milestone in order to properly protect their claim rights. These requirements apply to both prime and subcontractors, either directly, under the City’s standard contract, or indirectly, pursuant to a subcontract’s flow-down provision. In the latter case, in fact, time frames are often even shorter than those found in the City’s standard contract, since prime contractors need to first receive a sub’s claim information and still have time to meet the strict deadlines of the City’s standard contract.

VERIFIED STATEMENT OF CLAIM, BILL PARTICULARS, AND E.O.T. REQUEST

The first major obligation triggered by substantial completion is the filing of a substantial completion requisition pursuant to Article 44 of the City contract. It is not the requisition itself, but the documentation that must be submitted along with the requisition, with which this article is concerned. Pursuant to Article 44, the contractor is required to file with its substantial completion requisition: (1) a “Final Verified Statement of any and all alleged claims,” (2) a “Final Approved Punch List,” and, if applicable (as is usually the case), (3) “a request for

substantial or final extension of time” (E.O.T) consistent with the requirements of Article 13 of the City’s standard contract. While it is not the purpose of this brief article to address the content of these important submissions, which would be better left to future columns, keep in mind that the Verified Statement of Claim must contain “all alleged claims against the City” and an itemized breakdown of the damages alleged to have been suffered as a result of each claim, as well as the details of any alleged delay claims.

E.O.T. REQUEST

As indicated, with both the substantial completion requisition (Article 44) and the final completion requisition (Article 45), E.O.T requests must be made under Article 13 of the City’s standard contract. If the project (typically) is behind schedule, then an EOT must be obtained to avoid any holdup in the payment of either (i.e.,substantial or final completion) requisition due to the imposition of theoretical liquidated damages.

THEN DO IT ALL OVER AGAIN

The claim documentation must again be submitted (with any updates) with the final payment requisition pursuant to Article 45 of the City contract. Failure to submit such



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documentation with the substantial completion requisition AND the final payment requisition pursuant to Article 45 will result in a waiver of all of the contractor’s claims. The following caveat appears in both Articles 44 and 45:

“The Contractor is warned that unless such claims are completely set forth as herein required, the Contractor upon acceptance of the substantial completion (or final completion) payment pursuant to this article, will have waived any such claims.”

TIME TO FILE SUIT

It is important to note, however, that under the NYC standard construction contract it is substantial completion, and not final payment, that determines when a contractor must file its required lawsuit against NYC. In many instances, therefore, a lawsuit must be started prior to the final payment requisition being submitted because of the extremely shortened contractual suit limitations period unfairly imposed in the standard City contract.

Pursuant to Article 56 of the City contract, any lawsuit against the City must be commenced within six months after the date a Commissioner issues a Certificate of Substantial Completion. This represents a drastic shortening of the

normal, statutory six year statute of limitations for a breach of contract lawsuit. It is hard to contemplate why NYC has done this, other than to facilitate waiver or forfeiture by a contractor’s failing to commence a formal legal proceeding against the City within such a short time frame. Few contractors are even contemplating litigation at the substantial completion stage when their project-wide claim has just been submitted for the first time. Also misleading to a contractor, is that this very short six-month period to sue is also running while discussions may be ongoing with the Comptroller’s Office to resolve the claim. Nonetheless, if this six-month limitation period is not observed by a formal lawsuit having been started within that period of time, all claims may be forfeited.

BEWARE OF THE “RETRO-ACTIVE” DECLARATION OF SUBSTANTIAL COMPLETION

These substantial-completion-triggered obligations are onerous enough, especially to those contractors inexperienced in doing work for the City. However, further exacerbating matters is that City agencies often try to manipulate the date of substantial completion. The issuance of the Certificate of Substantial Completion declaring the date of substantial completion is entirely within the control of the City’s agency commissioners pursuant to Article 14 of the City’s contract.



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An especially unfortunate technique that the City employs in this regard is to attempt to “retroactively” declare the date of substantial completion. A “retroactive” declaration occurs when the City, at a date later in time, identifies an historic date as the date of substantial completion. This has the practical effect of further shortening the already unreasonable six-month limitation period. In some cases, we have seen attempts to declare substantial completion as having occurred more than six months earlier than the date of declaration, thereby making compliance with the six-month limitation period of Article 56 impossible. Such efforts should never be allowed to stand without being vigorously challenged.

G&C Commentary

It is clear a contractor must be prepared, in advance, to comply with the many obligations triggered upon reaching substantial completion. Although the City controls the actual declaration of the date of substantial completion, as the contractor, only you can gauge when your work is approaching substantial completion. If you believe you have any claims against the City, as you approach substantial completion, you should begin to prepare the extensive documentation referenced above in order to ensure complete and timely submission of same and the preservation of all of your rights. The message is essential - anticipate; start early; get experienced counsel if you are not familiar with these procedures; and pro-actively protect your project’s profitability.