



CONSTRUCTION LAW E-UPDATE

DON'T GET "KNOCKED OUT" BY PUNCH LISTS –

Protect Your Rights

JUNE 2010

We are witnessing an increasing abuse of punch lists, as well as substantial completion procedures, by public owners. Contractors and subcontractors must protect their rights by being as vigilant with regard to punch lists as they are with any other issue that could potentially increase project costs.

As we all know, punch lists, issued upon the declaration of substantial completion, should represent minor work items that need to be addressed in order for the owner to accept the work as finally completed. Instead, we have repeatedly witnessed: (1) certifications of substantial completion by owners (and accompanying punch lists) being issued months after the declared date of substantial completion (i.e., the notorious "retroactive" declaration of substantial completion);¹ and (2) punch lists requiring the performance of substantial work items that are either extra work, or alleged remedial work that was previously inspected, approved and accepted by the owner.

Too often, contractors accept punch lists and, with little question, proceed to have them completed as soon as possible in order to finish the project, receive the final contract balance and retainage, and move on to the next job. In doing so, contractors overlook their rights regarding work being unreasonably demanded in punch lists. As a result, they also overlook contractual notice and recordkeeping requirements thereby waiving any right to fair compensation.

What is the Correct Response to Protect Your Rights?

Upon receipt of a punch list, you should, as a matter of course: (a) compare the punch list to your contractual requirements, plans and specifications; (b) determine if punch list items are actually tantamount to a request to perform extra work or a maintenance or warranty item of work; (c) check your contract for notice requirements regarding extra and/or disputed work, as well as owner-caused delays or interferences; and (d) properly notify the owner or its designated representative, in writing and in strict compliance with contractual notice requirements, of "punch-listed" items of work that are extra work, entitling the contractor to additional compensation and/or an extension of the project schedule. Where the declaration of substantial completion, or a punch list, is issued long after substantial completion is actually achieved, some of the items on the punch list may not truly be defects in contract work but, rather, maintenance issues which arose after the owner already received beneficial use and occupancy of some, or all, of the project.

As indicated, contractors and subcontractors must carefully follow their particular contract's "extra work" and "dispute" provisions to receive appropriate compensation and time extension, if needed.

Pursuant to the New York City Standard Construction Contract, by way of example only, where there is a dispute



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as to whether the extra work will cause delay, the contractor must so notify the Engineer, in writing, within seven days of the issuance of the punch list. (Article 11)

A contractor or subcontractor should also submit a written notice of dispute to the Agency Commissioner within thirty days of receiving a punch list from the Engineer containing additional or extra work and, thereafter, follow the dispute requirements of NYC Standard Construction Contract Articles 27 and 30.

While conducting the disputed work, the contractor should keep time and material records and submit three copies of the records, daily, to the Engineer (NYC Standard Construction Contract Article 28).

Failure to follow the aforementioned dispute, notice and recordkeeping requirements could result in a loss of all rights to seek appropriate compensation or extensions of time.

G&C Commentary

At the end of a project, contractors are often justifiably focused on closing out the job, obtaining final payment and release of retainage and moving to the next job. As such, questionable punch list items can sometimes "slip under the radar" and be ignored (and, by neglect, be deemed "agreed" to) by a contractor who is looking to just be finished and get paid. But just as it is imperative to reserve all rights throughout the

project, it is equally important to protect your rights at the end of the project. Carefully review and consider all items of your punch list and be sure to comply with your contract's dispute, notice and recordkeeping requirements to protect your rights.

A corollary problem is the abuse of the change order process late in the game. As indicated, we have seen public owners issue new change orders for significant additional/extra contract work long after substantial completion.

This, in turn, raises a number of other issues such as the appropriateness of the substantial completion declaration itself, the delay and impact of major work being done out of sequence and in a later pay period, and the partial occupation of the site at such a late date, so long after substantial completion, by the owner. These issues will be addressed in a future Update.