

STATEMENT FROM STUART S. ZISHOLTZ

The provisions of substantial completion in any contract carry with it major ramifications. Yet, it is rarely understood and often glossed over superficially.

By usual definition, if the project can be used for its intended purpose, in spite of the defects and open items or punchlists, then substantial completion may exist.

The date of substantial completion varies in every contract. In some contracts it is the day on which the retainage monies are cut in half. In still others, it may mean the beginning of the Statute of Limitations. In others it could mean that the burden of proving a default on the contract shifts to the owner. In still others it means that liquidated damages can no longer be assessed.

In an AIA contract, the architect is vested with the responsibility of determining when substantial completion takes place. If he decides to be arbitrary and capricious or to collude with the owner, the Court will step in to establish the date.

Substantial Completion may or may not mean that a temporary Certificate of Occupancy was issued. It may nor may not mean that punchlist items remain. Where there are defects in the construction work, there could still be substantial completion. It depends upon the nature of the defect.

Once substantial completion has been reached, the contractor is entitled to the benefits under the contract, notwithstanding the fact that the architect has not issued the Certificate of Substantial Completion. Under normal circumstances, substantial completion triggers the contractor's right to get paid in full less the reduced retainage amount. This does not mean, however, that you will get paid.

If the owner has legitimate backcharges and is in danger of not receiving everything under the contract, he will withhold payment in spite of the Certificate of Substantial Completion. The difference, however, is that it is the owner and not the contractor who has the burden of proof. The owner must come forward and establish the defects, etc. to justify his failure to make the payments.

All of this, again, is governed by the contract. It is essential that you review the terms of the contract regarding substantial completion prior to executing the contract. It will serve you well and avoid a lot of grief.

Never let your lien time run out!

For a free copy our updated pamphlet pertaining to Mechanic's Liens and Payment Bond Claims, feel free to contact me.

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