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CONSTRUCTION LAW ALERT

March 2021

New Law Will Address Abuse of "Substantial Completion" Schedule Milestone on New York Public Projects

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As we write this alert, new legislation is in its final stages of becoming law in New York State, which will address the longstanding abuse of the substantial completion schedule milestone in project closeout.

Few words have had as much impact in construction contract disputes as "substantial" and "completion." Taken together, "substantial completion" is the major schedule milestone in all public construction contracts. Substantial completion (should) mark the end of all but a *de minimis* amount of contract work, allowing for the issuance of a final punchlist, the release of retainage funds being withheld, and the curtailment of the running of the risk of substantial liquidated damages being assessed for late project completion.

The Subcontractors Trade Association (STA) and the Empire State Subcontractors Association (ESSA), which we are proud to be associated with, ended 2020 on a high note with this significant legislative victory in Albany. Their much anticipated "substantial completion" legislation sought to firm up the substantial completion process in New York public contracting and prevent future abuses by public agencies and, in turn, prime contractors in this process. In this regard, we should note that it is often difficult to ascertain at times whether a prime contractor is more victim than culprit. Either way, the continued impact on the contracting community of substantial competition "manipulation" was unacceptable.

The original legislative effort had sought to provide a statutory definition for substantial completion for all public contracts. Once substantial completion was achieved, the public owner would be required to provide the prime contractor with a complete *(i.e.*, only one bite of the apple) punch list, no later than 45 days after substantial completion was achieved. The prime contractor would then be required to provide all subs with their respective portions of the complete, job-wide punchlist within seven days.

Per this new law, achievement of the substantial completion milestone would trigger the reduction of retainage on public contracts from 5% to only two times the value of the punchlist, a major accomplishment.

In addition, public owners would no longer be able to delay the process by merging substantial completion with final completion. As a result, they would no longer be able to:

1. hold retainage until the entire punch list was completed, and

2. extend the period of contract performance for months, or even years, causing contractors and subs to perform what is essentially non-contract or maintenance work not contemplated in original job estimates thereby severely impacting project profitability.

The adoption of this legislation is a major victory for the contracting community in New York and represents a skillful effort to address long prevalent abuses of the substantial completion closeout process. As intimated above, however, a compromise was required in completely eliminating the substantial completion-caused "wiggle room," historically enjoyed by public agencies.

In the legislative process, most governors are hesitant to burden public agency leadership with specific contract language, so as to, in effect, "negotiate contracts through legislation." Governor Cuomo, in opposing a legislated definition of substantial completion, did, in the final draft bill, require that substantial completion be clearly defined by each particular state agency in its own contract rather than the new legislation.

As the final contemplated legislative language stated, a punchlist shall be issued "…when the project has reached substantial completion as that term is defined in the contract or as it is contemplated by the (actual) terms of the contract..." As a result, a clear definition of substantial completion must be included and/or be readily ascertainable in each contract.

MHH Commentary

This legislation goes a long way (if not all the way) in addressing the abuse of the substantial completion process. If it proves to be inadequate, particularly with regard to a standard definition of substantial completion, then the industry can and will attempt to revisit the issue. We believe, however, that with the spotlight now on the issue, reasonable definitions can and will be readily reached. It wasn't the definition of substantial completion that has been the culprit. Rather, it has been the abuse of contract closeout practices by agency personnel. No doubt the STA and ESSA will monitor the effectiveness of this important new legislation to assure that its full potential for reform is realized.

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