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SUBSTANTIAL COMPLETION DATE – IS IT IMPORTANT?

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THE IMPORTANCE OF A CONSTRUCTION PROJECT'S DATE OF SUBSTANTIAL COMPLETION

“Substantial Completion” of a project is a date, when established by the prime professional on a project, carries with it immense importance. And is distinct from “final completion” of a project. The start of a project is fairly easy to determine as it is measured objectively, such as with:

- fill in the blank in the Owner-Agreement B101 (2017) § 1.1.4.2 Construction Commencement Date),
- a Notice to Proceed,
- a Notice of Commencement, or
- a ceremonial ground breaking.

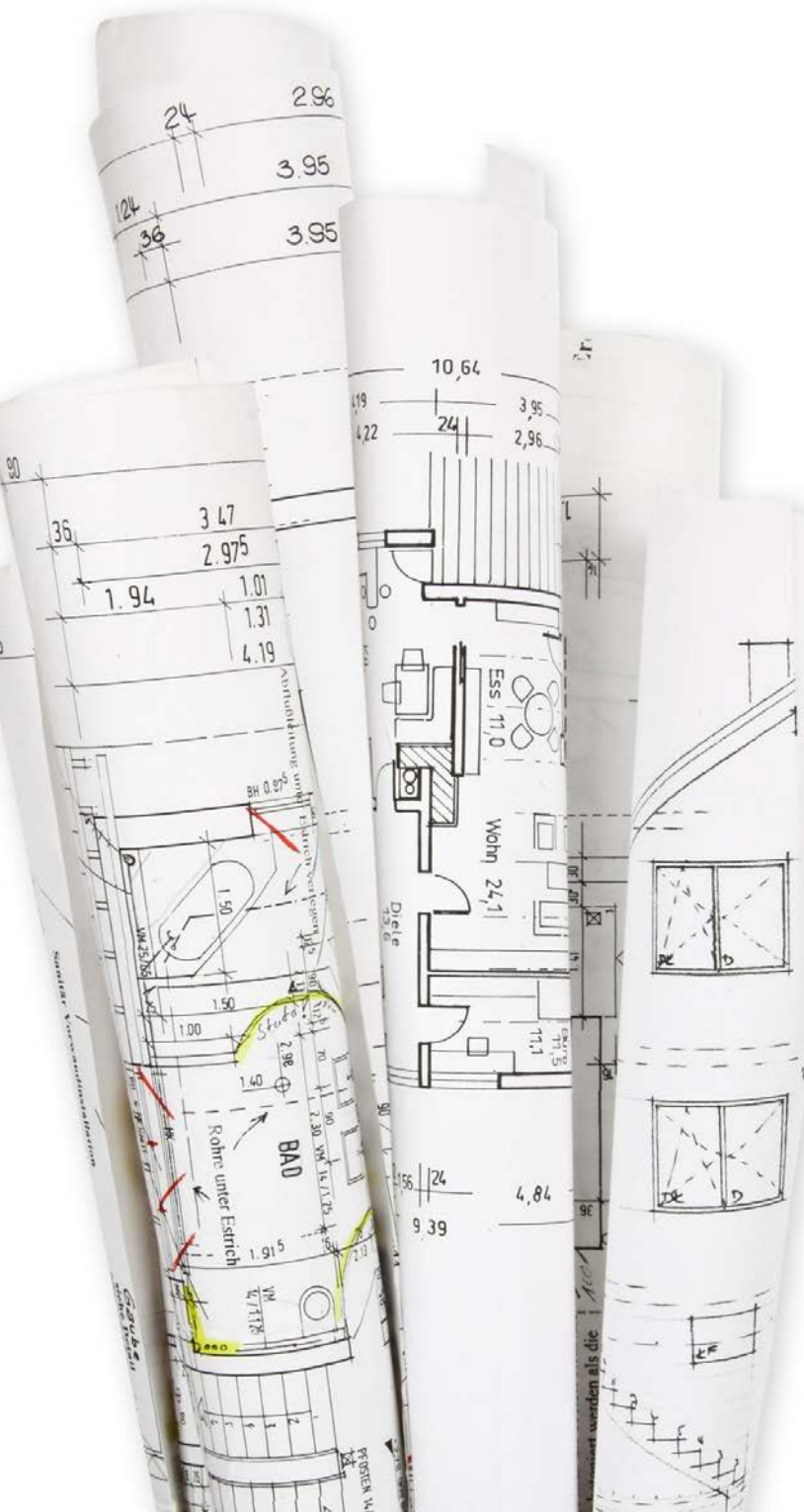
However, the end of a project may be more elusive.

A PROFESSIONAL DETERMINATION (FOR ITS INTENDED USE)

The Engineers Joint Documents Committee (EJCDC) *Standard General Conditions of the Construction Contract* EJCDC C-700, Article 14.04 *Substantial Completion* states:

IN THIS ISSUE:

SUBSTANTIAL COMPLETION DATE – IS IT
IMPORTANT?
PROGRAM SCHEDULE
SOCIAL MEDIA
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When Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete (except for items specifically listed by Contractor as incomplete) and request that Engineer issue a certificate of Substantial Completion.

Substantial Completion is defined, according to the American Institute of Architects (AIA), as:

The stage in the progress of the Work when the Work or designated portion is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use. (*AIA Certificate of Substantial Completion G704-2017 and also in the AIA General Condition of the Contract for Construction art. 9.8*)

Before we discuss what is sufficiently complete (that cannot be measured objectively), let's first dissect the AIA definition above, and examine its content. We need keep in mind that the "Work" is what the contractor does (labor, materials, means and methods on construction). The prime professional's services are apart from a construction contractor's duties and responsibilities, and may even go beyond the date of substantial completion (such as completion of corrective work under a warranty or a punch list).



The Work may relate to the entire project, or its subparts, as there may be a project with distinct stages that are separated in time and/or location, or even separate buildings on the owner's property. So it may be appropriate to designate portions of the project as substantially complete, and others not.

The Work is sufficiently complete when a subjective professional opinion is rendered by the prime professional, that the Owner can occupy or utilize the Work for its intended use. That occupation or utilization of the project can be measured by a

Certificate of Occupancy, but that is not always the case with Substantial Completion. There is no equal sign (=) between Substantial Completion and a C-of-O. Thus, a C-of-O may be an indicator of substantial completion, but there again that is where the subjective professional opinion that project can be occupied or utilized for its intended purpose comes into play.

THE IMPORTANCE OF SUBSTANTIAL COMPLETION

This milestone in a project's history has lasting importance. In construction law, the following must be considered.

A fully executed and dated Certificate of Substantial Completion triggers warranties and guaranties on a project. The clock starts to tick on the length of time on parts of the project that have assurances (warranties or guarantees) that the project will be built in accordance with the Contract Documents. And the Certificate of Substantial Completion also triggers timelines for statutes of limitations and statutes of repose applicable to the project.

Lastly, the assessment of liquidated damages may become an issue at the end of a project. A court of law or arbitrator may not always allow the assessment of liquidated damages beyond the project's substantial completion date. Thus, the assessment of liquidated damages may largely depend upon the determination of a substantial completion date. As an alternative, some construction contracts may have a two-tier liquidated damages clause – one amount for the date of substantial completion, a different amount calculated at final completion.

A MOVING TARGET

A word about "final completion." When a project could be thought of as complete may be out into the future, such as when a project owner calls the contractor or prime professional back to examine something that has a latent issue. Or the Owner that creates repetitive punch-lists, causing the project team members to revisit the project time and time again. More elusive than Substantial Completion, the AIA does not even

define the term, and notice that the “S” and “C” in Substantial Completion are capitalized, whereas the “f” and “c” in final completion are not. The closest that AIA comes to defining final completion is:

When the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's on-site visits and inspections, the Work has been completed in accordance with the Contract Documents and that the entire balance found to be due the Contractor and noted in the final Certificate is due and payable. (*AIA General Conditions of the Contract of Construction A201-2017 §9.10.1*)

And, the issuance of a Certificate for Payment may not necessarily occur when all of the parties to construction project involved consider the project is finally complete - the formula for a dispute.

WHAT IF I'M NOT HIRED TO DO CONSTRUCTION ADMINISTRATION

The EJDC has addressed this situation in its *Agreement Between Owner and Engineer for Professional Services E-500*, Article 6.02 A. *Design Without Construction Phase Services*, which states:

Engineer shall be responsible only for those Construction Phase services expressly required of Engineer in Exhibit A, Paragraph A1.05. With the exception of such expressly required services, Engineer shall have no design, Shop Drawing review, or other obligations during construction, and Owner assumes all responsibility for the application and interpretation of the Construction Contract Documents, review and response to Contractor claims, Construction Contract administration, processing of Change Orders and submittals, revisions to the Construction Contract Documents during construction, construction observation and review, review of Contractor's payment applications, and all other necessary Construction Phase administrative, engineering, and professional services. Owner waives all claims against the Engineer that may be connected in any way to Construction Phase administrative, engineering, or professional services except for those services that are expressly required of Engineer in Exhibit A.

That being said, it is still advisable that design professionals should include construction administration in their services, because that is the phase of the construction project when issues may resolved more easily before they evolve into a dispute. However, some project owners may prefer to only engage a design professional to prepare their construction documents to obtain building permits. This scenario raises at least two concerns, and maybe more. Those clients may have their own wherewithal to perform construction administration. Regardless of the reason:

- If the design professional is not engaged for the construction phase, should the A/E issue a Certificate of Substantial Completion anyhow?
- And should the A/E get involved in other aspects of the construction phase even when they are not engaged in that part of the project?

There is no black and white answer to these questions, as every project and situation differs. But the design professional who is not engaged for construction administration should consider writing a letter to their client stating that even though they were not engaged to provide construction phase services, to the best of their knowledge, information and belief, the project is substantially complete. This letter's date would then have the effect of triggering warranties and guarantees, and applicable statutes related to time.

IN CONCLUSION

Utilizing a Certificate of Substantial Completion, or a notice such as a letter to the owner, is the best way to close out a project in a professional manner. The objectively determined date of the start of a project can be overshadowed by the subjective determination of the end of a project. Without such tools, the difficulty in determination of the end may result in a dispute between all of the parties to a construction project.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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AIA Ohio Valley Convention
Cincinnati, OH
Hilton Netherland Plaza
September 20, 2019



“Ethical Concerns That Your A/E Clients May Encounter”

ae ProNet Fall Conference
Chicago, IL
October 4, 2019



“Empowering Your Ethics in a Changing Architectural Culture”

Architects' Association of New Brunswick
2019 Industry Forum
Saint John Trade and Convention Center
Saint John, NB, Canada
November 26, 2019

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