

Construction Litigation Thought Leader: 4 Key Factors Affecting The Concept Of "Substantial Completion"

In A Post-Pandemic World, Layers Of Complexity Have Been Added To The Reality Of "Completion" In Construction

PHILADELPHIA, PA, USA, August 21, 2023 /EINPresswire.com/ -- "The pandemic has added some

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Experiences over the last two years have shown a spotlight on potential influences and weaknesses affecting substantial completion that have rarely been considered.”

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layers of complexity to the reality of “completion” in construction, which are likely to affect current projects as well as the shape of future construction contracts and litigation.” said E. Mitchell Swann, P.E., FCIBSE, LEED AP, a Managing Director at Resolution Management Consultants, Inc.

Substantial completion is described as a point of completion in a project that affects the rights and responsibilities of the owner and contractor. It is a prelude to final completion and acceptance, and the shift of the project from ‘construction’ to ‘operation’. There is still work to do (hence ‘substantial completion’ and not simply

‘completion’). But achieving ‘substantial completion’ signals a point which impacts financial issues like retainage percentages, liquidated damages and changes in loan terms. Value issues such as warranties, insurances and some critical ‘certifications’ can also be tied to substantial completion dates. Substantial completion can also mark the point at which any ‘clock’ relating to construction claims begin. Swann points out that as important as the timing of “substantial completion” often is, there is often no clear definition of what is meant by ‘substantial’. Swann notes that owners and contractors have often used the “substantial completion” milestone with its vague definition and at times, almost interchangeably with terms like ‘beneficial occupancy’ or ‘mechanical completion’, or even ‘certificate of occupancy’ (which generally has a codified meaning). We’ve even seen the terms ‘completion’ or ‘project turnover’ used interchangeably with ‘substantial completion’ in correspondence around a project. We have long advised owners, contractors and designers to more clearly define what meets the needs of the term substantial completion for their project. Given the increased use of performance-based contracts with M&V provisions, commissioning, and other ‘third-party’ verification or certification requirements, the

time span between what might be seen as the 'traditional' understanding of substantial completion and final completion and acceptance of a project has significantly increased. These third-party activities can create more quantifiable 'bars to clear' than 'acceptance' has often had in the past. Simply completing the punch list may no longer be enough. That lengthening can have big impacts on the financial situation of the project team members.

Says Swann, "The pandemic has further complicated the project delivery process, especially labor and materials availability (supply chain) and the need to incorporate safety protocols into the construction process (productivity) – all of which can impact timelines. This heightens the need to



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more rigorously consider and tightly define what is required for both 'substantial completion' and 'acceptance', or final completion." Going forward, he has identified several factors that will become elevated in their influence on the concept of substantial completion in contracts:

- Clarifying the definition of force majeure.

Force majeure has been considered to be an unforeseeable and/or irresistible force of nature, apart from human influence. Now we will need to bring some human aspect into that definition. For example, when a government shuts down a project or limits the ability for crews to 'work' on a site due to a pandemic or other event, that might be seen as an irresistible force too, but not necessarily 'natural' - it should be defined.

- Often any force majeure impact has been thought of only from the perspective of the contractor, but widespread or industry-targeted 'shut down' directives can be owner impacting first. Extending force majeure considerations to owners is a new perspective.

Until now, owners were not usually considered under the idea of force majeure. A natural disaster was expected to hit all parties relatively 'evenly'. However, the pandemic has resulted in shut down directives being issued with industry or sector specificity. "Essential" or 'non-essential' became 'a thing'; as well as a sliding or changing menu of what fell into those categories. The economic sector a project falls into is typically owner or 'intended use' driven. If that sector is deemed 'non-essential', what about projects in that sector? Is there a difference between

greenfield construction and renovation work? The potential impact of such directives on the ability of an owner to perform their duties on a project deserve consideration.

Said Swann, "It's not as though these issues were not there prior to the pandemic. However, experiences over the last two years have shown a spotlight on potential influences and weaknesses affecting substantial completion that had rarely been considered."

Swann suggests that project teams and contracts would all benefit from a more thoughtful definition of "substantial completion" and "acceptance" to gain greater predictability and consistency in addressing potential future disputes compared to depending upon a hodgepodge of various courtroom decisions and case precedents, or even more likely, understandings reached in settlement agreements that often aren't presented in a way that broadly 'informs' the industry.

About Resolution Management Consultants, Inc.

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ. There are two sides to the business: the construction planning and management aspect – helping clients build more successful projects – and the litigation aspect – should matters go to court, providing analysis and testimony as expert witnesses. Founded in 1993 by veterans in the construction, contracting and engineering professions, RMC has assisted numerous private owners, public agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties.

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