

PB-13 SUBSTANTIAL PERFORMANCE

One of the most common terms found in construction documents is “Substantial Performance”. It is important for architects involved in administration of a construction contract to fully understand the significance of “Substantial Performance”.

The *Builders’ Lien Act* of Alberta defines “Substantial Performance” as:

“Substantial Performance

For the purposes of this Act, a contract or a subcontract is substantially performed

- (a) when the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and
- (b) when the work to be done under the contract or subcontract is capable of completion or correction at a cost of not more than
 - (i) 3% of the first \$500,000 of the contract or subcontract price,
 - (ii) 2% of the next \$500,000 of the contract or subcontract price, and
- (iii) 1% of the balance of the contract or subcontract price.”

RSA 1980 cB-12 s2;1985 c14 s3

CCDC contracts define “Substantial Performance” as follows:

SUBSTANTIAL PERFORMANCE OF THE WORK

“*Substantial Performance of the Work* is as defined in the lien legislation applicable to the *Place of the Work*. If such legislation is not in force or does not contain such definition, *Substantial Performance of the Work* shall have been reached when the *Work* is ready for use or is being used for the purpose intended and is so certified by the *Consultant*.”

Because the *Builders’ Lien Act* of Alberta has a definition for “Substantial Performance”, in Alberta, that definition governs on projects where CCDC contracts have been used.

The term “Substantial Performance” generally arises in four contexts:

- (a) To signify that the project is ready to be turned over to the owner;
- (b) Under the *Builders’ Lien Act* of Alberta;
- (c) In connection with the payment process on projects; and
- (d) The commencement date for warranty obligations under CCDC contracts.

A. TURNOVER OF THE WORK

In CCDC contracts, Substantial Performance is the benchmark for the Contractor satisfying the required time for Substantial Performance of the Work. The attainment of Substantial Performance signifies that the Contractor has reached a milestone. This term and this milestone

are generally significant with respect to delay claims by either the Contractor or the Owner or both.

B. BUILDERS' LIEN ISSUES

In Alberta, "Substantial Performance" is certified by the Contractor to trigger lien holdback releases. Once the Contractor is of the view that the work is "Substantially Performed" and meets the definition of "Substantial Performance" under the Builders' Lien Act of Alberta, (and if there is not a Consultant described in the Owner/Contractor Contract who is required to review the application) then a Certificate of Substantial Performance is posted on the jobsite and provided to the Owner. This triggers the commencement of a 45 day period, at the end of which claimants may file Builders' Liens if they want to share in the "major lien fund". If no Builders' Liens are filed within the 45 day period, the Owner is obliged to release holdback funds to the Contractor.

The Alberta Construction Association's "Plain Language Guide" to the Builders' Lien Act of Alberta is a useful reference with respect to Builders' Lien issues.

C. SUBSTANTIAL PERFORMANCE AND THE PAYMENT PROCESS

Under CCDC contracts, "Substantial Performance" is defined in relation to Builders' Lien legislation. The CCDC payment provisions provide for the holdback release following the 45 days that are triggered by "Substantial Performance". Under CCDC contracts, the Contractor prepares an application for a Certificate of Substantial Performance, but it is the Consultant who makes the determination as to whether or not substantial performance has been achieved, or what remains to be done before substantial performance can be certified.

The Alberta Construction Association's "Guide to Close Out Procedures" is a useful reference in this regard.

D. WARRANTY ISSUES

Under CCDC contracts, the Contractor's warranty commences on the date of substantial performance of the work as certified by the Consultant. Warranty and indemnity obligations are triggered by this important certification, and time limits run from that date. Those involved in the certification process should be familiar not only with the definition and requirements for substantial performance, but the significance of certifying that substantial performance has occurred.

TERMS NOT TO BE CONFUSED WITH 'SUBSTANTIAL PERFORMANCE'

The terms "**Substantial Performance**" and "**Substantial Completion**" are often used interchangeably in the construction industry. In Alberta, the term "Substantial Completion" has no meaning or significance for Builders' Liens. Similarly, in CCDC contracts, the term "Substantial Completion" is not used. It is important to note that this is not a statutory term so if it is being used in a contract, its definition and the expectations around it should be explicit and well documented.

Further to that, "**Total Completion**" is also **not** a statutory term. The CCDC contracts and the Alberta Builders Lien legislation do not recognize this as a legally binding milestone. If "Total Completion" is being used to define a point in the project then there should be an explicit and well documented definition attached to it that both parties to the contract can live with.

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DEFINITIONS

*Architect also taken to mean Licensed Interior Designer

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NOTES

The *Alberta Association of Architects* thanks Barbara Komisar for kindly providing this article. Ms. Komisar is a lawyer with *Ogilvie and Company* and practices in the areas of corporate and commercial law. December, 1995

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