

PB-13 SUBSTANTIAL PERFORMANCE

Substantial Performance is one of the most common terms found in construction documents. It is important for architects and licensed interior designers involved in administration of a construction contract to fully understand the significance of the term “Substantial Performance.”

This practice bulletin has been revised to reflect a transition from the retired *Builders’ Lien Act* to the *Prompt Payment & Construction Lien Act* which came into effect on August 29, 2022. Refer to Practice Bulletin *PB-34 Prompt Payment and Construction Lien Act*.

BACKGROUND

The *Prompt Payment and Construction 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 a substantial part of the work under a contract or a subcontract is ready for use or is being used for the intended purpose, 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.*

CCDC contracts define “Substantial Performance” as follows:

Substantial Performance of the Work is as defined in the lien legislation applicable to the *Place of the Work*.

Relevant Legislation

- ▶ Prompt Payment & Construction Lien Act of Alberta
- ▶ CCDC
- ▶ RSA 2000, c P-26.4

SUBSTANTIAL PERFORMANCE OF THE WORK

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 *Prompt Payment and Construction Lien Act* of Alberta;
- (c) In connection with the payment process on projects; and
- (d) As a prerequisite for “Ready for Takeover,” as defined in CCDC.

PROMPT PAYMENT & CONSTRUCTION LIEN ISSUES

Based on the *Prompt Payment and Construction Lien Act*.

- 1) *Where a contractor is of the opinion that the contractor's contract is substantially performed, the contractor may issue and deliver to the owner a certificate of substantial performance in respect of the contract.*
- 2) *Where a contractor or a subcontractor is of the opinion that the subcontractor's contract is substantially performed, the contractor or subcontractor may issue and deliver to the owner a certificate of substantial performance in respect of that subcontractor's contract.*
- 3) *The certificate of substantial performance shall set out the date on which the certificate is issued.*

SUBSTANTIAL PERFORMANCE AND THE PAYMENT PROCESS

Under CCDC contracts, the consultant will review the work to certify or verify the validity of the application for "Substantial Performance of the Work" and will promptly, and in any event, no later than 20 calendar days after receipt of the Contractor's application:

- .1 advise the Contractor in writing that the Work or the designated portion of the Work is not substantially performed and give reasons why, or*
- .2 state the date of Substantial Performance of the Work or a designated portion of the Work in a certificate and issue a copy of that certificate to each of the Owner and the Contractor.*

The date of issue of a certificate of Substantial Performance starts the 60-day period in which an entity performing work on the project can issue a lien the project for non-payment.

The Prompt Payment and Construction Lien Act allows for substantial performance to be posted electronically although the Act does not specify how that posting should occur. It is advised that the method of posting electronically be a term of the construction contract.

WARRANTY ISSUES

Under CCDC contracts, the Contractor's warranty commences when the date of "Ready for Takeover" has been attained. Substantial Performance is a prerequisite for "Ready for Takeover."

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" is not a defined term and has no meaning or significance in the *Prompt Payment and Construction Lien Act*. 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 conditions should be explicit and well-documented.

Further to that, "**Total Completion**" is also **not** a statutory term. CCDC contracts and the *Prompt Payment and Construction Lien Act* do not recognize "Total Completion" as a legally binding milestone. If the term "Total Completion" is being used to define a point in the project, there should be an explicit and well-documented definition included to which both parties can agree.

WHERE IT DOES NOT APPLY

It should be noted that the Government of Canada, Government of Alberta, and P3 projects involving the Government of Alberta are not subject to the *Prompt Payment & Construction Lien Act*. Therefore, the CCDC reference to lien legislation for a definition of substantial performance does not apply.

Consultants should ensure that construction contracts for projects involving the above-noted entities provide clear definitions of substantial performance and clearly indicate closeout and takeover procedures.

NOTES

This practice bulletin should be read in conjunction with Practice Bulletin *PB-34 Prompt Payment and Construction Lien Act*.

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