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## **STANDARDS OF COMPLETION**

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## I. INTRODUCTION

Completion is one of the most critical milestones in any construction project. From the outset, substantial completion dictates the project schedule and contractor's work plan. At the end of a project, the milestone governs potential assessment of liquidated damages, payment obligations, and the release of retainage. Substantial completion impacts the start of project warranties, punch list work, closeout activities, testing of equipment, operation training, and project documentation. It affects bond rights, contract defenses (including statutes of limitations), lien rights, and project financing. It is the date the owner assumes responsibility for and occupies the project, shifting risk allocation. Late substantial completion for revenue generating facilities results in lost use of a project and lost profits.

Substantial completion is a project milestone that impacts all parties to the project. Typically, a project owner or developer wants to be in a facility as soon as possible to start generating revenue. The owner wants to occupy the building without any further disruptions (*i.e.*, without the existence of punch list work, testing of equipment, etc.). To this end, an owner may use financial incentives to coerce completion. Although owners would like substantial completion earlier, in disputes they often view the date of substantial completion later in the project because of punch list work, warranty obligations, risk allocation, and costs. Contractors, on the other hand, want a finding of substantial completion earlier in the project, as soon as the owner can occupy the building, despite the existence of punch list work. In the contractor's opinion, substantial completion has occurred even though punch list items are continuing as these items can be tended to without impeding on the owner's use of the facility. The contractor wants to avoid any imposition of liquidated damages and, perhaps, qualify for incentive bonuses. Finally, the project architect, who typically has the responsibility for determining the date or dates of substantial completion, wants to insure proper timing of issuance of any certificates. If substantial completion is delayed, the project architect may face accusations of deficiencies in drawings, specifications, and/or slow response time.

The date substantial completion is achieved—and whether it is within the allotted contract time—is a widely litigated topic in the construction industry. Disputes over substantial completion are propounded by construction industry contracts that routinely contain generic (*i.e.*, form) clauses, poorly drafted clauses, and/or fail to take into account project specifics. It is apparent that practioners and drafters alike spend little time drafting completion clauses or simply adopt form definitions which, at the end of a project, do not meet the parties' expectations or get the job done.

Considering the vast implications the substantial completion date has on the project and the rights of the parties, practioners should spend more time in the drafting completion clauses. Extra time and attention in contract drafting can help manage expectations and eliminate uncertainty. To that end, this article analyzes standard completion clauses, when a project is deemed to be used for its intended purpose, and how tribunals interpret such clauses. The article also addresses competing substantial completion clauses and results when two contracts have different definitions of this milestone. The article recommends completion clauses based on project type and concludes by providing practice tips to assist parties and practitioners in alleviating ambiguity in the drafting of completion clauses.

## **II. INTERPRETATION OF SUBSTANTIAL COMPLETION CLAUSES AND WHAT CONSTITUTES USE FOR INTENDED PURPOSE**

Substantial completion is defined in AIA Document A201-1997, General Conditions of the Construction for Construction. Specifically, section 9.8.1 provides substantial completion is:

The stage in the progress of the Work where the Work or designated portion is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use.

Article 8.1.3 of the A201-1997 specifies the date of substantial completion as the date certified by the architect in accordance with article 9.8.

Construction contracts typically contain this general AIA definition of substantial completion or a definition that is innately similar. Notably, most courts generally interpret substantial completion as standard construction contracts do—namely, the state at which the project is suitable for the owner’s beneficial occupancy and can be used for its intended purpose.<sup>1</sup> As such, the essential question in pinpointing substantial completion is when can the owner use the work for its intended purpose.

At first glance, interpreting a party’s intended purpose may seem simplistic. However, at what point can an owner “occupy or utilize” the work for its “intended use?” Is it the owner’s first use of the facility? What if the owner is “using” the facility—not for the purpose it intended—but instead to mitigate damages? What if the owner is using only part of the facility for its intended use but remaining portions are still under construction? Does partial occupancy warrant a finding of substantial completion? What is the impact of issuance of certificates of occupancy on substantial completion dates? Perhaps substantial completion is the point when the contractor is essentially complete with construction, save punch list items? What if punch list work impairs the daily functions of the facility? Will the existence of defects negate a substantial completion finding? As illustrated below, courts have struggled with these questions in defining the point of substantial completion. Analyzing these factual scenarios is helpful to understanding how courts examine these issues and, ultimately, how to manage expectations and refine substantial completion definitions in construction contracts.

### ***A. Impact of Owner’s Partial Use or Occupancy***

Generally, an owner’s partial occupancy or use of a facility does not necessitate a finding of substantial completion. The AIA A201 contemplates partial use and occupancy of a project, but requires the parties establish in writing what that “occupancy” means. Specifically, section 9.9.1 provides:

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<sup>1</sup> See e.g., *Gibbens Pool v. Corrington*, 446 So. 2d 420, 422 (La. Ct. App. 1984).

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