

SUBSTANTIAL COMPLETION

Beneficial Occupancy Ends Liquidated Damages...and More

The terms "substantial completion" and "beneficial occupancy" are both often used interchangeably to indicate the same thing: the time or date when a construction site becomes **useable for its intended purpose**. The beneficial occupancy date (BOD) serves as the cutoff date for assessing Liquidated Damages. That is to say, the Government or Owner may not assess Liquidated Damages after the beneficial occupancy date.¹

A project is said to be substantially complete when a high percentage of the work is complete and the project is available for its intended use.²

The concept of "substantial completion" has further been described as "read[iness] for beneficial occupancy" in the sense that the project facilities are ready to be "occupied or used by the Government for the purpose for which intended."³ Additionally, in order for beneficial occupancy to take effect, the Government must have some **notice** that the work has been substantially completed.⁴

The determination of when a project is ready for beneficial occupancy is a question of fact, based on the surrounding circumstances. While the contractor must show that performance is near completion, there is no set percentage or formula which establishes substantial completion. The Boards are usually more concerned about the availability of the work for its intended purpose, rather than the application of a standard rule based on the percentage of contract work complete. Therefore, if the project cannot be used as intended, liquidated damages may be assessed.

For example, In *Electronic & Missile Facilities, Inc.*,⁵ the Board found that although the project was 97% complete, the project **was not substantially complete** because without the remaining 3% of the work (for air conditioning) the facility was not usable for its intended purpose of housing temperature-sensitive equipment. In another appeal, the Board held that the project was not substantially complete where the remaining work on a mess hall would interfere with the preparation of food.⁶

Conversely, the Board has found that projects **were substantially complete** where the only remaining work to be done were punch list items, such as a missing trash can in one unit of a

¹ See *Dillon Construction Co., ENG BCA No. PCC-36, 81-2 BCA 15,416*.

² See *Lindwall Construction Co., ASBCA 23148, 79-1 BCA 13,822 (1979)*.

³ *Lindwall, supra*.

⁴ See *Seaboard Surety Company, ASBCA No. 43281, 93-1 BCA 25510 (1992)*.

⁵ *ASBCA 10077, 66-1 BCA 5493 (1966)*.

⁶ See *Pathman Construction Co., ASBCA 16781, 74-2 BCA 10,785 (1974)*.

housing facility, or a missing fire extinguisher in one area of a building. Accordingly, minor cleanup items typically will not prevent beneficial occupancy.

In determining the percentage of completion, the Boards will rely on the contractor's progress reports so long as the progress reports accurately reflect the actual percentage of project completion and invoicing supports these percentages.

Furthermore, it is possible for the Government or owner to take “**partial beneficial occupancy**” of a project. For example, on a project that calls for the construction of 10 dormitories, the Government may take beneficial occupancy of 8 of the dorms, while the remaining two are not substantially complete. In such a case, the Government could continue to assess liquidated damages on the 2 unfinished dorms, but not for the 8 substantially complete dorms.

Specifically, under FAR 52.211-13 – Time Extensions (assuming this clause is included in the Contract), a change order granting a time extension *may* provide that the contract completion date will be extended **only for specific elements** that are related to the changed work and that the remaining contract completion dates for all other portions of the work will remain intact.

In such a case, the change order may also “provide an **equitable readjustment of liquidated damages** under the new completion schedule, and such a readjustment could possibly change the rate at which liquidated damages are assessed, or how they will be assessed for the part of the project being extended. However, in every case the FAR clauses remain of critical importance and **the Contractor must be well aware of which clauses apply.**

CONCLUSION

The “beneficial occupancy date,” or “substantial completion date,” can be a crucial event in a construction project, because it may determine when liquidated damages can no longer be assessed.

Because the BOD is established based on the facts of whether the owner can use the project for its “intended purpose,” it can be tricky for a contractor to plan for and determine that date.

Excell Consulting has advised clients, both proactively and after the fact, of when their BOD occurred and whether the Government was correct in its assessment of Liquidated Damages. Please give us a call to discuss how your project’s BOD can affect you.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

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