

Owner's Declaration of Substantial Completion is a Condition Precedent to Accrual of a Claim

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The dates that a claim or cause of action “accrues” are very important and distinct events. Accrual means that a contractor’s rights have matured and it is permitted to take certain steps to enforce such rights. This could be the right to challenge the denial of a request for a change order through an alternative dispute claims process or the commencement of a binding resolution process (litigation or arbitration). The date that a claim or cause of action accrues is often governed by contract. Contracts will specify the procedures and timing of the submission of claims, as well as the date in which any litigation or arbitration must be commenced. Sometimes, the exhaustion of the claims process is a prerequisite to the commencement of the binding resolution process. With government or public contracting, accrual and claims processes may also be governed by statute.

Many times accrual is conditioned on the happening of an event, e.g., a formal denial or declaration. In the absence of that event, however, contractors are often left in limbo and are unable to take action to enforce their rights.

In a recent case, the court was asked to determine when a claim accrued and whether a contractor failed to timely file a claim. In this public contracting case, a dispute arose as to the performance of certain extra work allegedly performed by the contractor. The contractor contended that after the contract was executed, the public owner issued a series of directives to perform extra work. The contractor further contended that it complied with the provisions of the contract by submitting change orders for the owner-directed additional work and completing the physical work constituting the extra work. The parties engaged in extensive negotiations relating to the change orders over a protracted period of time. As part of the negotiation process, the public owner’s representative requested that the contractor provide copies of written work directives for each of the change orders. The contractor contended that it could not provide such documentation because it had been verbally directed to perform certain of the extra work. Ultimately, the change order claims were not resolved and the contractor commenced an action against the public owner for, among other things, breach of contract.

The public owner moved to dismiss the contractor’s complaint for a number of legal reasons, including the expiration of the statute of limitations. The public owner contended that the contractor’s cause of action for breach of contract accrued in 2007, which was the date that the physical work was completed. The public owner contended that the action was untimely, which was commenced in 2016, approximately nine years after the date that the work was completed. The contractor opposed the motion.

The court began its analysis with the premise that absent a contractual provision stating otherwise, the six-year statute of limitations governing actions for breach of contract

commenced by a contractor against an owner begins to run upon substantial completion of the work. To dismiss a cause of action for breach of contract based upon statute of limitations, the defendant bears the initial burden of demonstrating that the time to commence the action has expired. In an attempt to meet that burden, the public owner asserted that the cause of action accrued when the physical work was completed. The court found this argument was unconvincing and would require the court to disregard the clear and unambiguous language of the parties' contract.

According to the parties' contract, "Substantial Completion" is defined as the "stage of the construction at which the Owner determines that there is minimal amount of the Work to be completed, or Work to be corrected." The contractual provision required the public owner to make a unilateral determination as to whether Substantial Completion, as defined by the contract had, in fact, occurred. The public owner argued that it was irrelevant whether it ever made a determination because the contractor alleges in the complaint that the physical work was completed nine years before the action was commenced. The court rejected this argument and stated that to accept the public owner's argument would render clear and unambiguous terms of the contract meaningless. The court, in reviewing other similar cases, held that the public owner's declaration of Substantial Completion is a condition precedent and a necessary step before the contractor could receive payment for the work. The public owner never declared the project substantially complete, therefore, the court held that the public owner failed to meet its initial burden that the time to commence the action had expired. As a result, the claim was deemed timely filed and the contractor was entitled to pursue its claims in the litigation.

Commentary

Here, the court reached the right decision and required the public owner to follow its own contract. The public owner was not rewarded with the dismissal of the contractor's claims based upon its own failures to declare substantial completion.

This case is the epitome of an all too common occurrence where public owners refuse to take necessary steps – required of them under the contract – to close out projects. Often times, payment, whether upon substantial completion or final completion, is tied to the public owner making a determination. This leaves contractors in limbo waiting for payment until the public owner makes that determination.

While this case is a lesson that a contractor's cause of action may not accrue until the owner makes the contractually required determination, a contractor should not be lulled into waiting endlessly for such determination. Proactive steps must be taken to push the public owner to make the required determinations so that payment can be made and projects closed out. This may require a contractor to commence an action for breach of contract based upon the owner's failure to issue such determination.

Feel free to call me regarding accrual of claims, closing out projects and getting paid.