

## **Successful Project Close Out**

What does it take to successfully close out a project and why does it take the same amount of time to complete the 5% to 10% balance remaining on a project as it takes to build the first 90% to 95% of the same project? It appears that the combination of increased regulatory requirements compounded by a lack of leadership is the perfect storm to improper close out. Certainly close out is the least attractive part of what we do in construction but without it we risk claims exposure, compromise warranty period coverage, and adversely affect the Owner's ability to plan future projects.

Why do we allow projects to be occupied sometimes well over a year before filing a Notice of Completion? Why do Owners think they are held hostage by incomplete punch list activities and settlement of claims? As managers we need to help guide the process and put in place the proper controls to facilitate its successful outcome. The following are close out activities for your review with risk management and legal experts within your respective organizations to help you get to the finish line.

### **When Should I File a Notice of Completion?**

What do the contract documents say? Is there language in the documents regarding beneficial occupancy, substantial completion, phased occupancy, which is it and when do warranty periods begin? There is no simple answer to these questions which is why we always find ourselves in the same predicament on every project...asking the same questions...and fumbling once again. Careful review of the contract documents is essential before you go out to bid. Part of the confusion is due to conflicting language in the documents especially when multiple participants are involved in the preparation of these documents. The Architect may provide the Division One Specifications which may include close out provisions in direct conflict with the Owner's General and/or Supplemental Conditions. The Owner may also have other standard specification regulatory criteria which conflict with the aforementioned documents and all of the above may be in conflict with the contracting laws of the particular state in which the work is being performed or in some cases not adequately defined. Review your documents and be sure that expectations are clearly stated.

## **What Should be Included on the Punch List and How Do I Ensure Timely Completion?**

Once contract billing(s) are at 100% completion and only retention billing(s) remain it seems projects move into the third stage of construction. Stage 1 is the *dip your toe into the water* phase up to the first 5% to 10% progress billings, Stage 2 is the *sink or swim* phase, and finally Stage 3 is the *lost on a desert island* phase. I can't tell you how many times I have seen protracted punch list completions which seem to range from a week to week "*we're almost there*" reporting, to endless months with the hope that the contractor will complete his or her punch list scope of work, until finally all of the original parties to the contract have long since departed the island leaving the Owner marooned with a beached rowboat without oars. Is the contractor always at fault? Absolutely not, punch lists should more appropriately be referred to as wish lists. I can't understand why this process eludes even the most experienced construction Team members. Clearly the documents either include scope or exclude scope. Only contracted scope of work is the responsibility of the contractor; either scope of work was missed, damaged by a trade, or not installed per the plans and specifications. Any other items listed on the punch list may include user group wish list items, design deficiencies, construction change directives that were never pursued on an approved change order, or damage caused by Owner; all of these should be included on a separate Owner's list but not on the Contractor's contractual punch list. So once again be clear and don't make the contractor responsible for something he or she has no control over.

## **How do I motivate Consultants to see Close Out Through to Completion?**

Assuming you are now alone on the desert island with no way off the island, unless a passenger on a passing cruise ship happens to hear your cries of distress, you pretty much are left high and dry. The added cost of correcting work which could have been remedied under the original contracted scope of your last project and now, also invalid warranty period, is impacting your budget for the next construction project (unless latent defects can be proven within the statutory limits and then of course you are at the mercy of the courts).

Additionally, for school funded projects you never received the appropriate Division of the State Architect (DSA) Certification proving that the last project was completed per the approved plans and specifications leaving your ability to work on your next renovation project either impossible or at best next to impossible since the original Architect of Record has since died and the Inspector of Record left the country. Now you are back to pre Stage 1 which is the *digging for the well* exploratory/destructive testing phase to prove to DSA that in fact what you built is what is shown on the approved plans and specifications unless of course items on your original punch list were never corrected. Just as retentions are withheld from the General Contractor to ensure successful project close out, so should retentions or lump sum set aside amounts for specific close out activities be considered in your various consultant agreements depending on the type of Agreement.

## **How Do I Resolve Outstanding Claims?**

Don't confuse close out with claims resolution. The two should be kept on completely separate tracks. If you are waiting to receive those credits you are owed and expect them to be fair and haven't heard a peep from the Contractor after 6 months of constant reminders it's time to call the shots. By demonstrating consistent and fair treatment of the contractor throughout construction, timely processing of change orders, and prompt payments it is very likely that a judge and jury would rule in your favor on a final payment which may include an unsigned change order by the contractor to deduct fair assessed value for any credits owed. The same holds true for monies claimed by the contractor for outstanding change orders that are far in excess of fair value. While it is understood that you pay a premium for change orders there is a difference between a 10% to 15% premium vs. 20% and beyond. Don't forget about reminding the contractor about the False Claims Act and never think that you should be coerced into paying unfair pricing but more importantly don't delay close out because you can't reach agreement, only pay what is fair. The contractor is entitled to file a claim for the balance. Just because a claim is filed doesn't mean you are going to court. Generally these types of issues can be resolved in settlement hearings before the trial date through: Mediation, Arbitration or other Alternate Dispute Resolution methods as specified in the contract. Notice of Completions can be filed and final payments made even if there is an outstanding claim. These special circumstances should be noted, however, on the documents for clarification to agencies who will be receiving late settlements requiring approvals and processing of payments.

## **When Do I Make Final Payment and What Do I Owe?**

Once a Notice of Completion is filed, must one release balance of payment owed in full? Again, look at your contract documents and confirm close out provisions. Most contract provisions allow the contractor a timeframe to cure and/or remedy contractual deficiencies including incomplete punch list scope and/or submittal of close out documents. Proper notice should be issued identifying any assessed value if applicable, then once the proper period of time has past deduct the balance from any final payment owed...be careful of timing...you must make final payment within the statutory regulations from the filing of the Notice of Completion. Don't forget that punch lists are not just a listing of workmanship deficiencies but should also include any other contractual close out items listed in the project specifications such as delivery of excess materials, turn over of as-built documents, warranty submittals, issuance of keys, and more. Value must be assessed and if the contract includes a percentage for withheld funds then apply the correct multiplier to the final assessed value.

By forcing timely processing of Notices of Completion and managing tight deadlines to complete punch list items including submittal of close out documents the process is controlled and expectations met. More importantly if you don't close out your projects in a timely manner, you risk payment of penalties to settle claims including assessment of interest charges for unfairly withholding funds. The contract documents should clearly set the expectations for these activities and indicate deadlines to mitigate and control your exposure at the project level vs. the trial level when you are at the mercy of individuals who are least familiar with your project and what I like to refer to as Stage 4 the *shark feeding frenzy* phase as you attempt to leave the island in your oar-less rowboat.

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