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**SPEED PROJECT CLOSEOUTS AND STREAMLINE LOCAL
FINANCING
NYS DOT PROJECT C-01-60**

FINAL REPORT

June 2005

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16. Abstract This study has identified the general causes of numerous issues that slow or prevent project closeout and recommends actions that address these causes. With a flow diagram of a generic procedure for public closeout as a point of departure, NYSDOT's current procedure was diagrammed. Then, having identified "time of the essence" as an inherent flaw in the NYSDOT process that prevented it from determining the point at which it was entitled to treat a contractor as having waived its rights to the final retainage amount, and armed with reviews of relevant sections of the Court of Claims Act, State Finance Law, the State Highway Law and case law, it was determined that two years should be set as the legal "time of the essence" limit for settling closeout claims. Following upon this, NYSDOT's current procedure was modified and recommended for adoption and implementation. Three draft letters of notification and instruction to contractors were recommended for adoption.					
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EXECUTIVE SUMMARY

This study has identified the general causes of numerous issues that slow or prevent project closeout and recommends actions that address these causes. With a flow diagram of a generic procedure for public closeout – Figure 1 – as a point of departure, NYSDOT’s current procedure was diagrammed – Figure 2. Then, having identified “time of the essence” as an inherent flaw in the NYSDOT process that prevented it from determining the point at which it was entitled to treat a contractor as having waived its rights to the final retainage amount, and armed with reviews of relevant sections of the Court of Claims Act, State Finance Law, the State Highway Law and case law – Appendix 1 -- it was determined that two years should be set as the legal “time of the essence” limit for settling closeout claims. Following upon this, NYSDOT’s current procedure – Figure 2 – was modified and recommended for adoption and implementation – Figure 3. Three draft letters of notification and instruction to contractors were recommended for adoption – Appendix 5.

INTRODUCTION

Background

Several issues that generally affect the termination of an infrastructure contract and transfer of project ownership to a government agency are discussed in the literature (7,12,15,17,18). Some of these issues are project construction claims, dispute resolution and cost overruns. Research studies have analyzed the nature of such claims and specific insights are offered into the fundamental causes of claims that delay projects. Dispute resolution in the construction industry is another concern for project delay. Disputes can be expensive and litigation can cause even longer delays. Research sources offer solutions into both the classification and frequency of disputes and claims with respect to damage type, highway project element and fundamental causes. Alternative dispute resolution methods are available in the literature for further reference.

Although specific research references to project closeout procedures appear to be few, one research source discusses concession strategies for deciding when the project ownership will be transferred from the contractor to the government agency (16). Project closeout procedures generally determine the contract deliverables, authorities of the contractor and the agency, and the responsibilities between the parties. Some studies have produced techniques and methods for organizational structure, contracting procedures, methods of project funding, and risk allocation strategies. Contract closeout periods can be established for critical reviews that protect the interests of both the contractor and the owner agency.

Government agencies have developed procedures for administering multi-jurisdictional infrastructure projects (14), and for capital planning and funding of these municipal infrastructure systems (5,13,20). Agencies have developed empirical approaches to these problems that may be useful in optimizing the functional effectiveness of publicly financed projects. In the contest for optimizing public transportation funds and for political decision-making processes, methods were developed as a framework for project funding and utilizing interagency metropolitan planning organizations.

Objectives

The objectives of the study are twofold, as follows:

Phase 1. Identify the causes of delays that slow or prevent construction project closeouts, and present recommendations for actions that would resolve them.

Phase 2. Identify the variety of problems that can occur when NYSDOT includes improvements for local governments as part of State highway construction projects, and recommend alternative approaches, with their advantages and disadvantages, to resolve them.

This task memorandum report documents the Phase 1 activities.

ADVISORY BOARD

It was intended that an Advisory Board, consisting of UTRC researchers, NYSDOT construction and design engineers, the NYSDOT project manager, and an FHWA representative, be formed to:

- oversee, monitor and coordinate the research study;

- provide guidance for the selection of construction projects for the review;
- set priorities for the review of projects;
- set guidelines for the identification of causes of delays and the problems associated with local governments' improvements.
- direct identification, analysis of problems and proposed solutions;
- develop a list of contracts that are not closed out, and the criteria to determine if the lack of closeout is caused by a particular problem, and then identify the problem;
- expedite the review of files and information for analysis of problems; and
- review the research findings and recommendations for the final disposition of the recommendations.

The intended outcome was the determination of a contract closeout period based on rational assumptions and examination of case law.

What eventually happened in terms of guidance were the following:

- Two meetings were held at NYSDOT, as follows:
 - First (09/17/03). In attendance were Neville Parker, Robert Baker, and Camille Kamga, representing the research team; and Jodi Riano, Marcia Hunter, and Jay Hagle, representing the NYSDOT team. At this meeting, it was agreed that it was necessary to have a legal opinion of what would constitute closeout for NYSDOT, an opinion that would in turn provide guidance for the selection of construction projects for review, and for categorizing said projects. The NYSDOT team confirmed that they had about 60 candidate projects for review and resolution.
 - Second (02/17/04). In attendance were the above, plus John Osborne and Christopher Platt of John E. Osborne, PC, a legal firm specializing in construction, and a member of the research team. At this meeting, it was agreed that a legal opinion would be sought regarding “time of the essence” issues regarding substantial completion, punch list completion, consent of surety, release of retainage and certification of final completion, as well as any other issue that might impede and delay project closeout. It was also agreed that the sixty or so “open” files that had been identified by NYSDOT would be sent to the Region 11 office for detailed review by the research team, as per guidelines to be developed by John E. Osborne.

What emerged as the single most critical issue for NYSDOT, was the following:

In instances where a contractor fails to submit final paperwork and apply for the final retainage amount, under its contract with the New York State Department of Transportation, at what point is the NYSDOT entitled to treat the contractor as having waived its rights to the final retainage amount?

In the end, on the basis of the legal opinion that was developed – see following section -- NYSDOT determined that it was not necessary to ship the open contracts to Region 11 for review, the legal opinion being sufficient for it to move forward on the process of closing out the open contracts.

LEGAL OPINION

The full text of the legal opinion is presented in Appendix 1. The legal opinion was based on a review of NYSDOT Standard Specification contracts, relevant sections of the Court of Claims Act, State Finance Law, State Highway Law, case law information, and information provided by NYSDOT. Essentially, it focuses on the “time of the essence” issue regarding NYSDOT’s entitlement “to treat the contractor as having waived its right to the final retainage amount”. NYSDOT contracts contain no time provision regarding the completion of the final agreement. However, a Court of Claims Act provides that any breach of contract claim against the State of New York must be filed within six months of the accrual of the claim, unless the claimant serves a written notice of intention to file a claim, in which event the claim can be filed within two years of the accrual. Similarly, the Court of Claims Act provides that where the contractor is terminated by the NYSDOT, the date of accrual is the date from which the two years begins to run. It seems clear, therefore, that two years is the “time of essence” trigger for NYSDOT to treat the contractor as having waived its rights to the final retainage amount, and that this should be incorporated in NYSDOT’s contract provisions.

PROJECT CLOSEOUT

The project closeout phase is the last phase in a construction project life cycle. Project closeout begins when substantial completion is achieved and the owner finally accepts the project after the architect or engineer concludes that the project meets the goals established.

Project closeout includes the following elements (19):

- turn over of project deliverables to operations;
- redistributing resources, staff facilities, equipment and automated systems;
- closing out of financial accounts;
- completing, collecting and archiving project records;
- documenting lessons learned; and
- planning for post implementation review.

Project closeout serves at least four crucial purposes (19):

- transferring of cost to appropriate accounts;
- reprogramming excess funds;
- recording of post completion events and decisions made;
- providing an administrative record to serve as a basis for judicial review; and community relations. It is also important to reference lessons learned.

Technically project closeout includes dealing with guarantees, operating instructions for equipment, record drawings, bonds and similar items. It also deals with mechanics of liens that can possibly be filed against the property by subcontractors and suppliers.

The principal closeout activity summary for medium-sized to large public project is shown in Figure 1 (4). Note the suggestion that the public agency hold retainage for 30 days, during which time unconditional waiver of liens, verification of payments to subcontractors and consent of surety are secured, whether or not the punch list work has been completed. Note also the suggestion that some multiple of the value of the uncompleted punch list – in this case, 1.5 –

should be withheld from the final payment, the implication of which is that substantial completion should be quantified at the point where the cost of the punch list items does not exceed the retainage, divided by the withholding multiple. Another implication from Figure 1 is that the time period for completion of the punch list should be contractually set, in order to fix the time of determination of whether the punch list is or is not completed.

There are any number of reasons for delayed closeout, the more significant of which are listed here, as follows (2, 4, 16) – see Appendix 2:

- Claims and disputes
- Lack of proper procedure and time frame
- Delinquency of owners
- Non-responsiveness of the contractor
- Beneficial use of part of the project before the total completion of the project
- Issuance of substantial completion certificate for partially completed projects
- Lack of mutually agreed dispute resolution method
- Contractor-owner relationship
- Contractor going out of business
- Liens and stop orders

Delay in the closeout process hinders the closing of financial accounts and reallocation of excess funds. This would create a burden on the owner in its effort to efficiently utilize the resources available. Methods for avoiding and resolving the issues that lead to these delays are discussed in Appendix 3.

LOCAL PROJECT FINANCING

Project closeout can be further slowed when State Departments of Transportation include improvements for local governments as part of State highway construction projects. In general, upon completion of such projects, the local agency is responsible for ensuring that all work has been accomplished in accordance with the approved agreement with the State DOT, including any approved changes. Any deficiencies on the project must be corrected and reinspected before acceptance.

After final acceptance and documentation review, the final payment estimate is processed for payment by the local agency, following which the local contractor is notified of the final acceptance of the locally financed project. The appropriate State DOT office is then notified of the local project completion. This triggers an audit of the local project costs, preparatory to the issuance of a final payment voucher to the local agency, which is required to keep copies of all payment estimates and supporting documentation on file for a specified number of years after payment of the final voucher. Waivers of liens and consent of surety for the locally financed project are the responsibility of the local agencies.

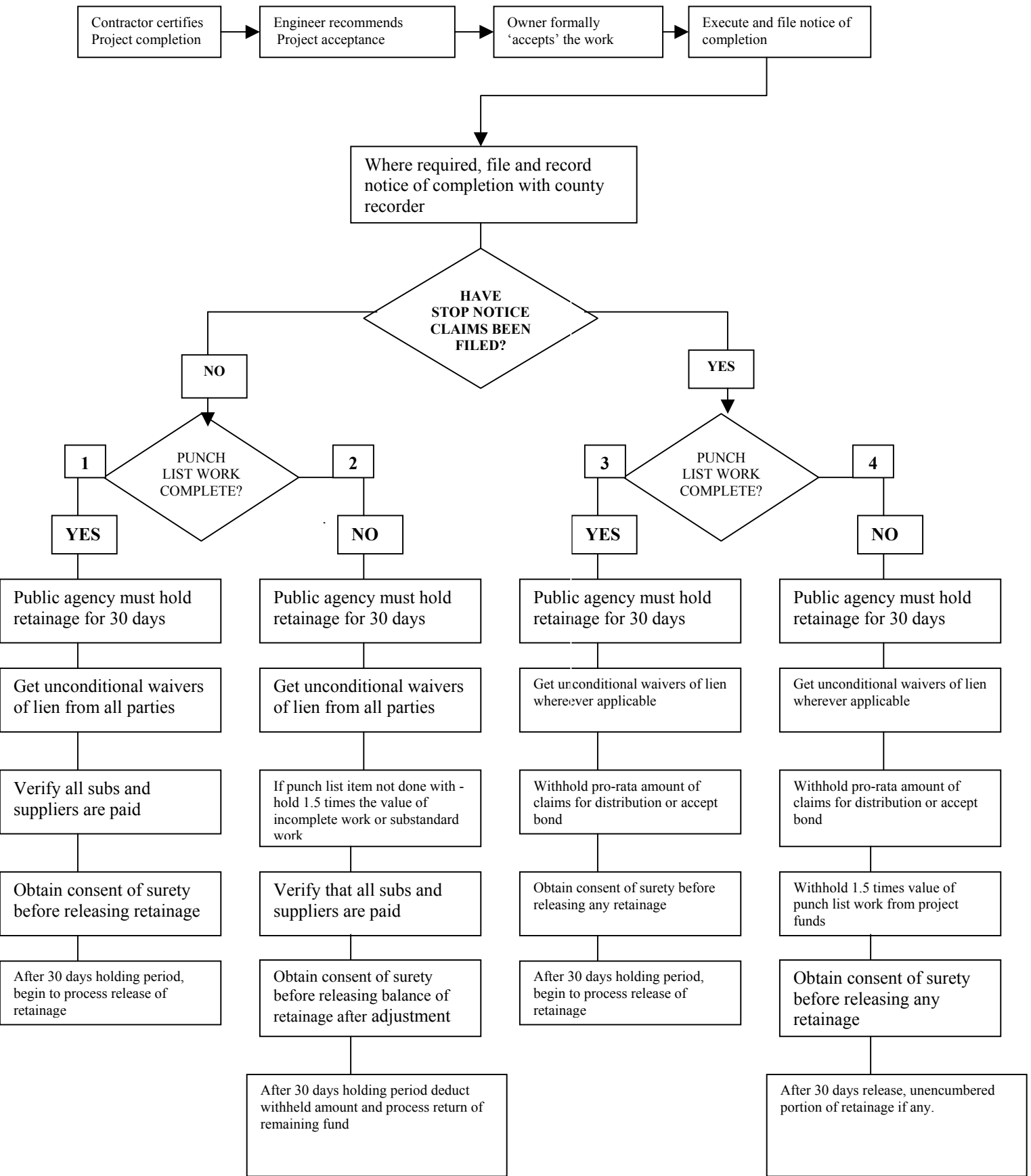


Figure 1. Flow Diagram Showing Typical Closeout Procedure for Public Projects
 Source: Fisk (4)

NYSDOT POLICIES AND PROCEDURES

Current Closeout Procedure

A flow diagram showing a typical closeout procedure for NYSDOT projects is shown in Figure 2. This diagram is a modification of Figure 1, which is used as a point of departure for guidance, comparison and analysis, vis-à-vis typical closeout procedures for public projects. According to Figure 1, there are typically four pathways contract closeout:

1. no stop notice claims filed; punch list work completed;
2. no stop notice claims filed; punch list work not completed;
3. stop notice claims filed; punch list work completed; and
4. stop notice claims filed; punch list work not completed.

As provided in the NYSDOT Standard Conditions of Contract, if the Commissioner accepts the contractor's work as being completed, up to 70% of the money held as retainage is released to the contractor (11), pending final inspection of the work, not to exceed 30 days. The actual amount of release depends on the judgment of the inspector as to whether or not the potential exists for a substantial negative final estimate. Should the final inspection lead to a recommendation of contract acceptance, and there are no liens or other apparent obstacles, NYSDOT begins to process release of balance of retainage and prepare the final agreement, to be completed within 75 days. This is NYSDOT's current Pathway #1 – Figure 2. Pathway #2 speaks essentially to the situation where it becomes necessary to estimate the value of uncompleted work and protect the agency from paying for work not done, even if the project is substantially completed. Pathways #3 and #4 speak to situations complicated by claims, in cases where the punch list work may or may not have been completed. In both these cases, the major challenge is proration of the claims.

It has been noted, and so stated, in the legal opinion, that NYSDOT's contract conditions contain no time provision regarding the completion of the final agreement, and as such is not included in Figure 2. In fact, it has also been noted that the conditions provide no explicit time provision for completion of the punch list, except that it might be construed that the time limit for final acceptance is governed by the end date of the period before liquidated damages can be assessed. These two "omissions" literally invite indeterminate contract closeout dates.

Current Local Financing Closeout Procedure

NYSDOT's local financing closeout procedure is documented in its manual of Procedures for Locally Administered Federal Aid Projects (LAFAP), Chapter 17, developed in cooperation with the Federal Highway Administration and representatives of the NYS Association of County Highway Superintendents (10). For completeness of this report, Chapter 17, **Local Project Closeouts**, is reproduced as Appendix 4. Essentially, this chapter outlines the responsibilities of the State sponsor and regional authorities, and the sponsor and NYSDOT submission requirements. By letter to the contractor (RF CUNY – UTRC2), from the Director, Construction Division (NYSDOT), dated April 11, 2005, contractor was informed about a NYSDOT initiative, in cooperation with the Office of the State Comptroller, to resolve issues with Local Programs and their funding, and that said effort has been productive and nearing completion.

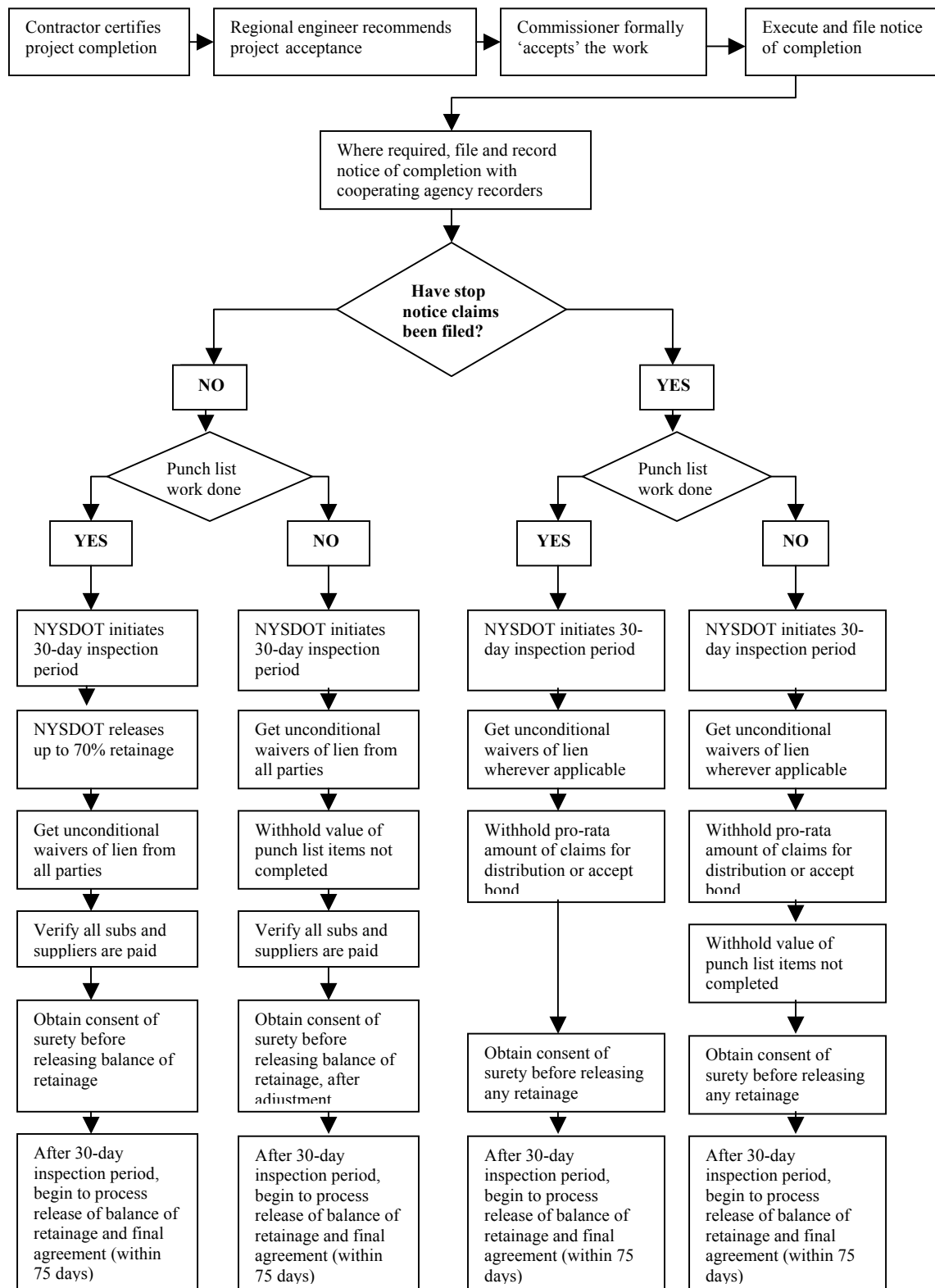


Figure 2. Flow Diagram Showing Current Typical Closeout Procedure for NYSDOT Projects

Recommended Closeout Procedures

A flow diagram showing a recommended typical closeout procedure for NYSDOT projects is shown in Figure 3. This is essentially Figure 2 with additional steps addressing the ‘time of the essence’ issue identified by NYSDOT as being the major obstacle to contract closeout. The procedural implications of the legal opinion – Appendix 1 – reflect the Court of Claims Act provision regarding time limits for contract claims against the State of New York, as well as for completion of the final agreement and application for final retainage amount.

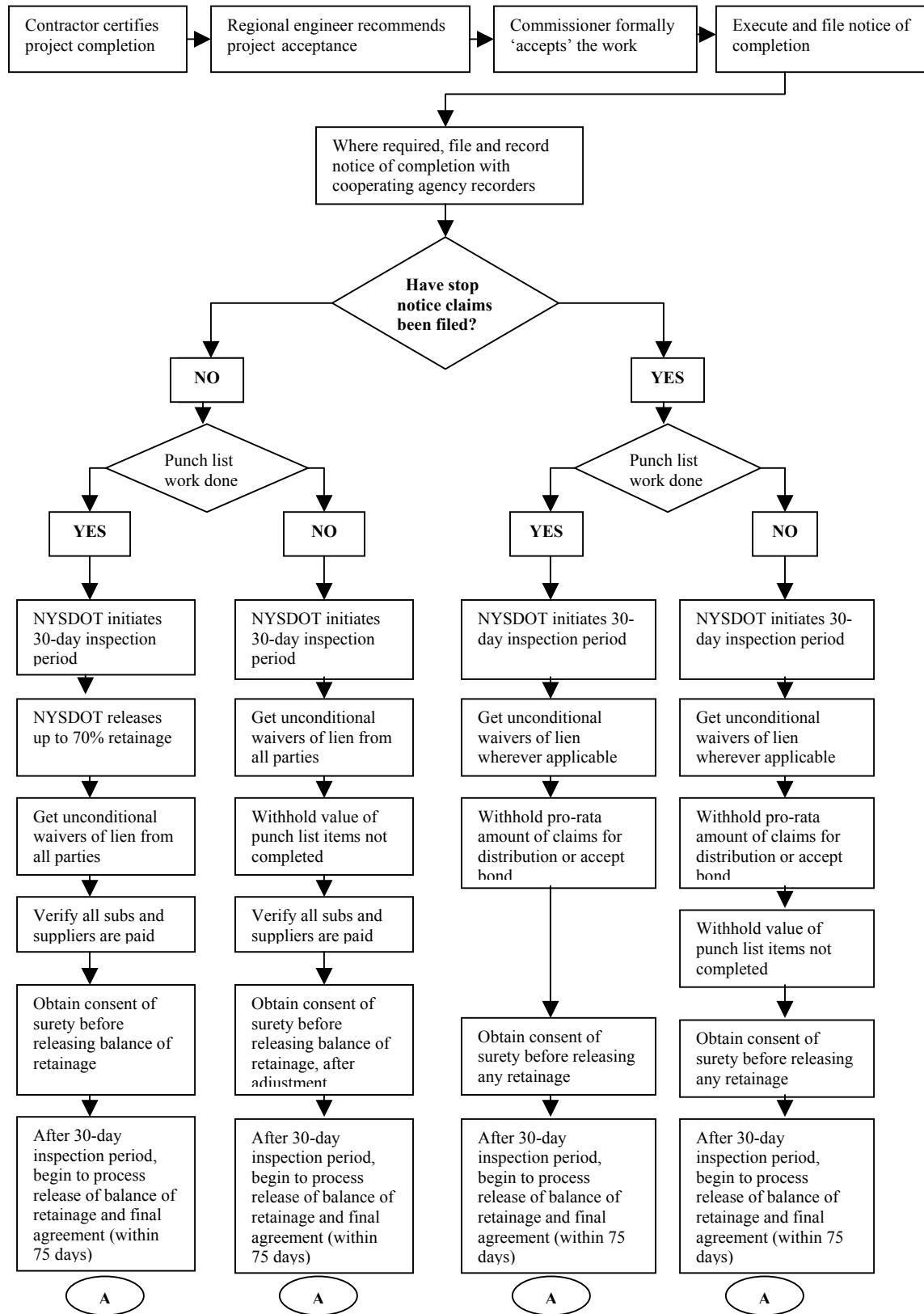


Figure 3. Flow Diagram Showing Proposed Typical Closeout Procedure for NYSDOT Projects (cont'd next page)

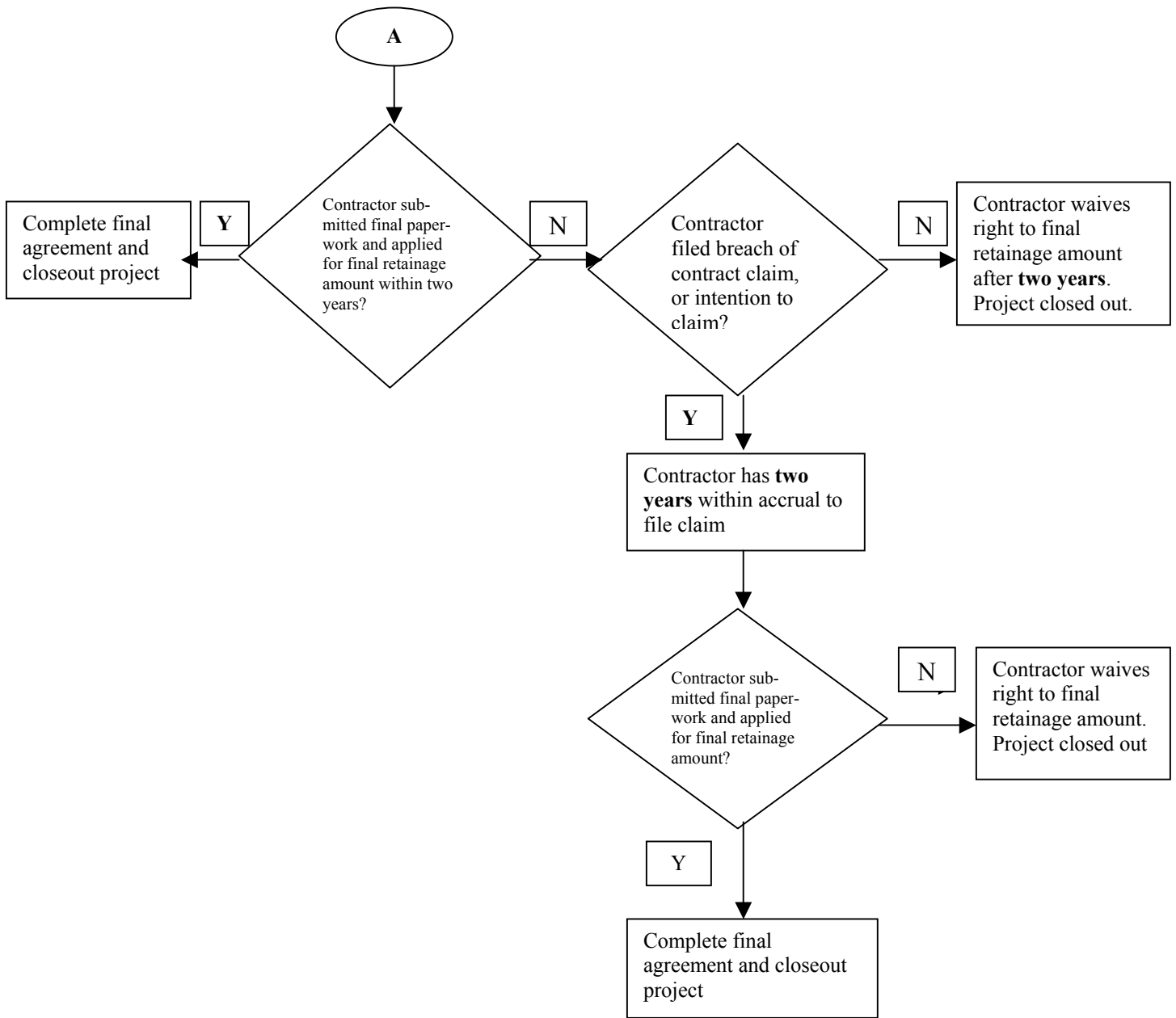


Figure 3 (Cont'd). Flow Diagram Showing Proposed Typical Closeout Procedure for NYSDOT Projects

CONCLUSIONS AND RECOMMENDATIONS

This report provides a review of contract closeout procedures in general, and those for NYSDOT in particular, and pinpoints “time of the essence” omissions as the critical obstacles to reaching final agreement. Beginning with a flow diagram for typical closeout procedures for public projects (Figure 1), as a point of departure, NYSDOT’s current procedures have been diagrammed (Figure 2), and informed by a legal opinion based on a Court of Claims Act regarding “breach of contract claims” and “failure to complete the final agreement” (Appendix 1), an amended flow diagram was developed (Figure 3).

Following are recommendations for changes in contract conditions and contract administration:

- Explicitly define the time limit for completion of punch list work as that for contractual completion of work, or the start date of liquidated damages. This would legally bind the contractor to reach substantial completion ahead of contract end date, and allow for punch list items.
- Insert “time of the essence” clauses in the contract conditions, regarding completion of the final agreement, in consonance with the legal opinion provided (Figure 3 and Appendix 1).
- Amend the Contract Administration Manual, to include the following (Appendix 5):
 - standard letter of transmission, to be sent with the first issuance of the Final Agreement;
 - standard letter of reminder, to be sent one year after date of Final Acceptance; and
 - standard letter of notification of contractor’s implicit waiver of rights to receive final retainage or any other remaining payments, to be sent two years and 30 days after date of Final Acceptance.

This report also includes the responsibilities of the State sponsor and regional authorities, and the sponsor and NYSDOT submission requirements, in respect of local project financing -- see Appendix 4. Given that NYSDOT, in cooperation with the Office of the State Comptroller, is in the process of reviewing and resolving issues with Local Programs and their funding, no recommendations in this respect are advanced at this time.

ACKNOWLEDGEMENTS

The researchers acknowledge the invaluable contribution of John E. Osborne, P.C., Attorneys and Councilors at Law, in respect of its research into case law relevant to construction closeout in New York State, as well development of draft letters of notification and instruction. The researchers also acknowledge the assistance of Ms. Jodi Riano, NYSDOT, for her patient explanations of the challenges facing the department.

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APPENDICES
1. Legal Opinion

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VIA E-MAIL

December 6, 2004

New York State
Department of Transportation
State Office Campus
1220 Washington Ave
Albany, NY 12232

Re: New York State Department of Transportation re: Close Out Procedures
(Our File No. 1835)

Following up our meeting on February 17, 2004, we have reviewed the New York State Department of Transportation Standard Specification contracts provided, relevant sections of the Court of Claims Act, State Finance Law, the State Highway Law, case law, and information provided by the Department of Transportation ("NYSDOT"), in order to respond to the following issue raised by the NYSDOT:

Issue: "In instances where a contractor fails to submit final paperwork and apply for the final payment, under its contract with the New York State Department of Transportation at what point is the NYSDOT entitled to treat the contractor as having waived its right to the final payment.

Answer: Two years from the date the NYSDOT accepts the work, the contractor shall be deemed to have waived its right to the final payment.

RATIONALE

As provided in the New York State Department of Transportation, if the Commissioner accepts the contractor's work, up to 70% of the money held as retainage is released to the

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contractor. Once the retainage is released, the contractor *knows or should know* what paperwork is required to complete the final agreement.

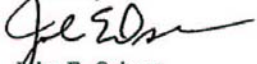
The contract contains no time provision regarding the completion of the final agreement.

Court of Claims Act §10(4) provides that any breach of contract claim against the State of New York must be filed within six months of the accrual of the claim, unless the claimant serves a written notice of intention to file a claim, in which event the claim can be filed within two years of the accrual.

In instances where the contractor has simply failed to complete the final agreement for a period of two years from the date of contract acceptance, policy arguments and the Court of Claims Act dictate that the contractor will have waived all rights to the remaining payment.

Similarly, in instances where the contractor is terminated by the NYSDOT, the date of accrual (i.e. the date upon which the amount due to the contractor is ascertainable) is the date from which the two years begins to run. In these instances as well, if more than two years elapses, the contractor shall be deemed to have waived its right to the final retainage amount.

Sincerely



John E. Osborn

*cc via e-mail: Robert Baker
Neville Parker
Camille Kamga
Jodi Riano
Jay Hagle
Marcia Hunter*

2. Identification and Analysis of Problems

Success in project closeout will provide for efficient reallocation of financial and other resources for future planning or ongoing projects, which suffer a financial deficit. Conversely, delays in project closeout will have a negative impact on efficient utilization of said project related resources. The major causes of delay in project closeout have been cited above in the main body of this text; these are discussed at some length below.

Claims and Disputes

In most cases it can be said that disputes and claims are inevitable for all construction contracts. Claims can be defined as “differences that developed during the life of the contract that are not yet resolved while the contractor returns to the proposed final estimate of additional money or time asked for”. (4)

Highway contractor claims are becoming both numerous and more costly. The major cause behind the increase may be linked to the following trend in the construction industry (10):

1. Increasing litigious nature of society in general.
2. Industry procedures and customs that inhibit or delay resolution of disputes, such as deep organizational structures or limitations in authority of field personnel.
3. Lack of appreciation or awareness by field personnel for the need to resolve disputes at an early stage.
4. Narrow contractor profit margins that necessitate alternative income generation strategies.

During the course of construction, claims can arise due to a variety of events that lead to added cost and extended performance time. Claims can be made by project owner, prime contractor or by any of the project trade contractors or suppliers. There are early stages of claims or events, which eventually lead to claims, protests and potential claims. Protest refers to a dispute arising out of issuance of a change order by the architect/engineer against the objection of the contractor. Potential claims are any difference arising out of performance of work that might reasonably lead to the later filing of formal claims by the contractor, if differences cannot be resolved in the field.

Usually either the job superintendent and resident engineer or project managers would solve the majority of problems by talking them out day to day as they arise. Oftentimes contractors and field engineers fail to negotiate and resolve disagreements promptly. Once the issue leaves the field it becomes difficult to negotiate. If it goes to litigation the process is very lengthy and expensive for both parties. As compared to other civil cases, construction contract disputes are notoriously lengthy and complicated. Because of the length of time and technical investigations involved, many judges try to postpone hearing construction contract disputes.

Normally contract documents require a contractor to alert the owner and/or the architect/engineer immediately or within a certain number of days. A contract normally requires that any claim or dispute, when it arises, must be submitted to the architect/engineer or the owners’ representative, as the first step in the claim resolution process.

A contractor must exhaust its administrative remedies before resorting to courts and must strictly adhere to any claim procedures mandated by law. For example, in addition to the claims and

dispute provisions outlined in a typical owner contract, some states require that a claim must first be filed by the contractor against the appropriate owner. If that owner subsequently rejects the claim within the prescribed time, the contractor has the right to take the matter to court.

Regardless of any contractual language regarding time for making claims, common sense and equitable principles dictate that once the contractor becomes aware of a claim or potential claim it must be communicated to the owner. For example if the owner's action in some way delays the contractor and the project, the owner must be advised of the situation in order for the owner to have an opportunity to correct and alleviate the problem. If the contractor does not notify the owner that it is being delayed at the time the delay is occurring, the contractor will have very little chance of recovering damages incurred as a result of such delay. After the project is complete without proper notice, the owner will argue, and rightfully so, that it cannot be held liable to the contractor for the delay of which it was never made aware and which it never had an opportunity to do address.

Lack of Proper Procedure Either Integrated in Contract Document or in Part

Most construction contract documents fail to clearly delineate the rights and responsibilities of the contracting parties on the project closeout phase. Too often, there is no clear abiding time limit set for the contracting parties. Such a contract would clearly state that "time is the essence of the contract". The time allotted for the contractor to complete the punch list items must also be stated in clear and easy-to-understood terms. If the contractor then fails to satisfy his obligation, the project can be closed out on the basis of contractor default. This is very crucial and important to invocation of "breach of contract". Under normal circumstances, once substantial completion is achieved and the project is accepted, the contractor's failure to complete remaining punch-list items may not be used as grounds for declaring the contractor in default, unless there is a time limit included in the contract.

Owners Lack of Insistence on Contractor Compliance

In some cases after substantial completion is achieved and the project has been accepted, the owners have been delinquent in communicating with the contractor. Owners assume that it is the contractor's responsibility to come back and pick up the punch-list. Although formal closeout procedures had not been done as time passes, the project is considered as complete. One should be aware that such projects, although operational, lack the crucial and final step of construction contract closeout. The owner, in case of public projects, would then have problems of legally transferring any unspent funds to other beneficial uses.

Contractors Negligence or Non-Responsiveness

After award of substantial completion certificate, oftentimes contractors lose interest in returning to the project site and pick up the punch-list. Usually they compare the retainage amount, which might be released on completion of the punch list, to the financial benefit they may get. If the retainage is not significant as compared to the cost the contractors will incur in delivering on the punch list, it is most likely that the contractor will not return to the project. The law states that the owner should not hold any payment in excess of the punch list estimate. In the landmark case, *State of Louisiana v. 430 So.2d 1376 (1983)*, the contractor Laconco, constructed a 60-man National Guard armory for the state. The architect certified that the building was substantially complete with the exception of punch list items valued at 3 percent of the contract price. The

building was occupied, but the state withheld 10 percent of the contract price until the punch list items were complete. Laconco sued and the court ruled that the state could withhold only a reasonable amount of money necessary to cover the completion of the punch list items. The state was ordered to release 7 percent of the contract price. In a case where the punch list is to be addressed by a subcontractor who had already left the site the problem would be much more difficult to resolve.

Beneficial Use of Part of the Project Before Total Completion of the Project

In cases of some public construction projects, such as water or waste water treatment plant, and construction or rehabilitation of roads and bridges, it may be necessary for the owner to begin to use completed portions of the new facilities well before total, or even substantial, project completion. Several serious problems can occur as a result of such utilization, for example:

- Maintenance issues often become a controversial issue between the contractor and the owner.
- Security of the site and on-site safety responsibility are no longer clear-cut issues during the beneficial use. Generally the owner must assume those risks. One of the principal risks involved in the above case is that each party will assume that the other is responsible for maintenance, security and safety, and neither party will perform. This can result in increasing the severity of the problem and increasing the volume and magnitude of disputes and claims.

Issuance of Substantial Completion Certificate for Partially Completed Projects

Upon reaching substantial completion, the contractor is entitled to the retainage minus deductions for punch-list items. Some architect/engineers try to issue notice of substantial completion certificates in order to put the partly finished part of the project into operation as soon as the plant is operable. This would not meet the legal criteria of substantial completion, and put the owner at risk of incurring liens to be filed on the property before the project is completed.

Once substantial completion has been reached, the contractor cannot be considered in breach of contract for failing to complete the project, and the owner may not terminate the contract for default. By achieving substantial completion, the contractor may be assumed to have honored its contractual commitment and cannot be assessed damages due to default – see Appeal of Wolf Construction Co., ENG BCA No. 3610 (June 29, 1984). In a conflicting opinion, the Veterans Administration Board of Contract Appeals ruled that a contractor might be terminated for default for failing to meet a deadline for completion of punch-list items – see Appeal of Demarco Corp. VABCA No. 1953 (June 22, 1984).

The execution of certificate of substantial completion releases the contractor from all responsibility and obligation for further execution of the work and it is important that the owner is fully aware of the significance of this document in terms of its added responsibility. On issuance of certificate of substantial completion the owner will waive its right of liquidated damage assessment.

Lack of Mutually Agreed Dispute Resolution Method

If provisions were not made for the method of resolving disputes in the contract document, it would be difficult to resolve differences as they arise. This would cause a serious problem by

having minor problems linger over the construction period, thus affecting the contractor-owner relationship significantly. If the parties to the project were unable to resolve their problems as early as possible it would create obstacles to closing out the project on time.

Owner-Contractor Relationships

Partnering literature categorizes the owner contractor relationships along a continuum including adversarial, guarded adversarial, informal partner and formal partner relationships. These categories reflect the level of cooperation and collaboration between owners and contractors. The adversarial approach represents an extreme position dominated by mistrust and self-interest. The guarded adversarial approach involves treating other parties as necessary but suspicious allies. Implicit in both adversarial and guarded adversarial approach is the assumption that mistrust is necessary for self-protection. The informal partnering approach involves parties working together cooperatively. Formal partnering takes cooperation one step further by creating a situation where parties work together as a team with common objectives and a commitment to collaborative problem solving.

Research has examined the relationship between different approaches to managing the owner-contractor relationship and project success, and found that partnered projects are more successful in controlling costs and resulted in better performance and customer satisfaction, than projects managed under more adversarial conditions (6).

Contractor Going out of Business

One of the contributing factors to delayed project closeout is contractors going out of business after substantial completion is achieved. This may be due to physical or financial difficulties. If provisions have not been made to accommodate such circumstances, it would be difficult to close out construction contracts.

Liens and Stop Orders

Mechanics' lien laws applicable to construction are designed to protect subcontractors, material suppliers and in some cases architect and engineers and other design professionals, who contribute to a work or improvement. In some states, it is possible to place a lien on public construction funds. New York State is among the four states that have such laws. When an unpaid claimant advises the agency of its claim in accordance with the notice requirement, then the agency has to stop further disbursement of funds to the contractor until such payment is made to the claimant.

3. Dispute Resolution Methods

Prior to the early 1980s, many public highway departments and agencies experienced far fewer construction contract claims than have been experienced today. In the early days of construction, most disputes were settled on the job site at an informal meeting between the resident engineer and the contractor on the basis of a handshake. Dissatisfaction with litigation and arbitration has resulted in attempts to find other means for quick resolution of contract dispute, commonly referred to as ‘alternative dispute resolution, or ADR.’ ADR techniques can be seen as extending along a continuum with non-binding negotiation or mediation on one end and litigation on the other.

Some methods are not binding and do not eliminate the right to go to litigation or arbitration, but their main aim is to settle the construction contract disputes between the contracting parties. If the alternative dispute resolution methods are included in the contract as a dispute resolution method, it would be a great help in resolving construction disputes as they arise and paving the way for smooth construction contract closeout. Some of the advantages of alternative dispute resolution methods are as follows (16):

- reduced time to disposition;
- less costly discovery;
- more effective case management;
- increased confidentiality;
- facilitation of early, direct communication and understanding among the parties of the essential issues on each side of the dispute;
- preservation of ongoing parties’ relation;
- saving in trial expense; and
- providing qualified neutral experts to hear complex cases.

Proper Closeout Procedure Integrated in Contract

In order to be able to claim any damage related to delay the contract document should include the phrase “ Time is the Essence of the Contract”, otherwise neither the start date nor the finish date could be considered. Moreover the length of time allotted for the contractor in order to pick up the punch-list should clearly be stated. There is also a need to clearly state the condition in case the contractor fails to meet the deadline, beyond which the construction contract would be terminated due to default of the contractor. The contractor has to agree to these conditions before signing the contract. This is a very important and necessary step. As discussed in the preceding section, unless such provision is made and the contractor signed the contract, it would be difficult to terminate the construction contract in default of the contractor for failure to pick up the punch list.

Owners Need to Prod the Contractor on the Closeout Procedure

A construction contract that remains open for a considerable time period constitutes a burden for the public agency, and hinders efficient resource utilization and reallocation. This burden is not equally borne by the contractor. The owner must therefore make every effort to encourage the contractor to pick up the remaining punch-list items and complete the project. The owner has to

discuss with the contractor the problems that hinder it from finishing the remaining work, and the owner has to cooperate with the contractor to achieve the closeout procedure efficiently and effectively. The notion that, it is the contractor's sole, or primary obligation to come back and finish the job would hurt the public owner more than the contractor. This needs to be clearly understood and a sense of partnership needs to be developed so that closeout of the project is perceived as a common objective.

Beneficial Use

Sometimes there would be a need to put the completed part of the project into operation immediately after substantial completion is achieved. Care needs to be taken when part of the project is put in operation. The owner needs to assume the complete responsibility for maintenance and operation of the facility. The owner should also assume the responsibility to have in effect all the necessary insurance for protection against any losses not directly attributable to contractor negligence. When there is a need to put the finished part of the project under beneficial occupancy, the owner needs to assume full responsibility and transfer that part to its operation and maintenance division.

Award of Certificate of Substantial Completion

The architect/engineer must take care not to award a substantial completion certificate for a project which is not fully completed. Notwithstanding that might be a need to put a project, or part of a project, in operation as soon as it is operable, a certificate of substantial completion should not be awarded for an unfinished project. The architect/engineer, in consultation with the contractor, should seek other methods to accelerate completion of the project. As discussed in an earlier section, the award of certificate of substantial completion for a partially completed project would constitute a risk to the owner. The contractor could refuse to do any further work on the project and the owner would be in a position where it could not breach the contract by default of the contractor. Therefore, care has to be taken to define the proper procedures for determination and award of substantial completion, which must then be strictly followed.

Improvement of Owner-Contractor Relationships

As an alternative to litigation, ADR has proven to be successful. But ADR comes in to play after the dispute has already arisen. One critical key to successful projects is establishing a relationship among the parties driven to resolve issues before they become disputes. One such relationship is a synergistic partnership built on trust and long term goals (3).

Partnering was first applied in the private sector. In the public sector, managers in the US Army Corps of Engineers recognized partnering as a tool to anticipate and resolve claims (8).

Recent construction industry publications have established the significance of the owner-contractor relationship for successful project completion. If either party is suspicious of the motive and action of the other, successful project completion may be jeopardized (2).

The fundamental principles of partnering commitment, trust, respect, communication and equality are designed to include proper consideration of all the interests of all parties at every level (1, 17). The building of trust among the interested parties to the contract helps avoid problems with the project that, in recent times, more often than not have led to litigation (Mosley et al,

1991). Therefore, if owner-contractor relationship is based on a partnering rather than an adversarial approach, it has been shown that the project would be more successful.

Contractor Going out of Business

Sometimes a contractor may face physical or financial difficulties that render it incapable of continuing in business. As discussed earlier this would create problems in closing out a construction contract. When contract documents are drafted, this possibility should be considered and necessary legal terms and conditions should be clearly stated, which enable the owner to terminate the contract in default of the contractor.

Liens and Stop Orders

In New York State lien laws can be applied to public property. The lien rights are based on the contract document. A lien is only an additional remedy for securing payment of labor and material furnished to the project. To protect public funds from stop notice or “freeze orders” every time payment is made to the contractor, the owner should insist on corresponding waiver of lien rights. Progress payments should result in partial lien waivers and final payment should result in a full waiver and release. Along with lien waivers, the owner should insist on an affidavit from the contractor swearing that all subcontractors and suppliers who furnished labor and material for the work covered by the owner’s payment have been paid in full.

4. NYSDOT Local Project Closeout Procedure



Chapter 17
Local Project Close-Outs

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Chapter 17 Local Project Close-Outs

17.1 INTRODUCTION

This chapter discusses the requirements for closing-out Locally Administered Federal-aid Projects. It is directed primarily to the sponsors of Federal-aid projects. The close-out process involves the sponsors, Regional Local Project Liaisons (RLPLs), and various NYSDOT Main Office Bureaus.

17.2 BACKGROUND

NYSDOT formally commits funding to a locally administered Federal-aid project through the execution of a State-Local Agreement between NYSDOT and the sponsor for each project. The Agreement is used to establish project cost and process and to confirm how funding is distributed. The purpose of this chapter is to describe how this Agreement is to be closed-out upon completion of the project. It should be recognized that subsequent to the final payment and close-out of the project, an audit by NYSDOT, the Office of the State Comptroller, the Federal Highway Administration, and/or the Office of the Inspector General may occur and may identify disallowances. Amounts paid to the sponsor by NYSDOT that are disallowed by such audit are subject to recovery by NYSDOT from the sponsor or, at the option of the State, will be offset or reduced against current or future claims on other projects.

17.3 SPONSOR RESPONSIBILITIES

- The Responsible Local Official will perform the final inspection and confirm that the terms of the construction contract are satisfied. The sponsor will determine that no additional payments are to be made to contractors, consultants, or others.
- For projects with consultant contracts greater than \$300,000.00, the sponsor ensures that an audit is performed. (Guidance for such audits is provided in the AASHTO Consultant Audit Guide which can be found at the following website:
www.transportation.org/download/audacctguide.pdf.)
- Upon completion of applicable audits, the sponsor notifies the RLPL in writing that the project is complete and indicates an estimate of the final reimbursement request.
- The sponsor requests the RLPL to make a site visit and to assist in completion of the Final Acceptance form. (See Attachment 1, NYS 1446-LA.)

17.4 REGIONAL RESPONSIBILITIES

- The RLPL requests Main Office to suppress the Project Identification Numbers (PINs) for all phases of the project.
- The RLPL obtains a Final Cost Report from the Main Office to determine the accumulated charges to each PIN.



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- The RLPL verifies that the payments received by the sponsor are consistent with the approved Sponsor Payment Requests.
- The RLPL confirms that the State-Local Agreement provides sufficient Federal, State, and Marchiselli funding to cover the total charges, including the estimate of the reimbursement request.
- If the funding in the State-Local Agreement is not sufficient, a Supplemental Agreement will be processed to allow for reimbursement of eligible expenditures consistent with the terms of the involved funding program. If funding is sufficient, the RLPL will notify the sponsor and will call for submission of the final Sponsor Payment Request.
- Based on notification that final reimbursement payments have been made by NYSDOT, the RLPL will notify the sponsor in writing that the State-Local Agreement is effectively closed.

17.5 SPONSOR SUBMISSION TO REGION

- When the sponsor and the RLPL are satisfied that the project is complete and that the State-Local Agreement is adequate, the sponsor is required to submit the following documentation:
 - A final Sponsor Payment Request (FIN 424). (See Chapter 5 and the corresponding appendices.)
 - A Final Acceptance form (NYS 1446-LA) indicating completion of all project related contracts including construction, engineering services, utility agreements, railroad agreements, and right-of-way (ROW) transactions.
 - An acknowledgment of the date of completion of the most recent Federal Single Audit Report and, for projects with consultant contracts greater than \$300,000, the date of completion of the Consultant Audit Report.
 - For bridge projects, as-built plans and a load rating report as well as a copy of the formal request for a bridge inspection. For highway projects involving NYSDOT facilities, as-built plans.
 - A final Disadvantaged Business Enterprise (DBE) Utilization Report AAP-19 and a final Prime Contractor Payment Report AAP-21. These reports are applicable to every project, but required for those with construction costs greater than \$1,000,000. (See Chapter 13).
 - A final Equal Employment Opportunity (EEO) Utilization Report AAP-33d. This report is applicable to all projects (See Chapter 13).



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- If it is determined that there is an outstanding issue such as a ROW claim or a consultant dispute, that is expected to be resolved quickly, the sponsor should temporarily withhold close-out, proceed with resolution of the issue, and keep the RLPL informed of progress.
- If it is determined that there is an outstanding issue that may not be resolved for an extended period of time, the sponsor may acknowledge that the particular phase is not complete and may request close-out of the completed phases only. In such case, the sponsor should a) note in the transmittal letter which phase remains incomplete, b) identify the outstanding issue in the Final Acceptance form, and c) indicate in the Sponsor Payment Request for the incomplete phase that reimbursement is for a progress payment rather than a final payment.

17.6 INTERNAL NYSDOT SUBMISSIONS

The following is a brief description of the internal actions the RLPL takes to finalize the close-out process and is for informational purposes only:

- After the RLPL approves the final reimbursement request, it will be transferred to the Main Office. A cover memo will confirm that the Region concurs that the project is complete and consistent with the cost and process as described by the State-Local Agreement.
- For bridge projects, the RLPL will transfer the as-built plans and the load rating report to the Regional Structures Unit. For highway projects involving NYSDOT facilities, the RLPL will transfer as-built plans to the Regional Record Plans Unit.
- If it has been determined that there are outstanding issues, the RLPL would a) note which phase remains incomplete in the transmittal memo to Main Office, b) prepare a limited supplemental State-Local Agreement for the uncompleted phase, and c) indicate the plan for resolution in the Final Acceptance form.

17.7 CONTACT INFORMATION

- Questions about this chapter should be directed to the Regional Local Project Liaison.



Chapter 17 Local Project Close-Outs

GUIDELINES FOR COMPLETING FORM NYS 1446-LA

The following guidelines are provided to ensure uniform completion of form NYS 1446-LA:

- Item 4. Check completed phases only. Note incomplete phases in Remarks section (Item 15).
- Items 7. and 8. List all prime contractors and consultants involved with the phases checked.
- Item 10. The date of the acceptance of the construction contract in the field.
- Item 11. This is the RLPL or his/her designee.
- Item 12. The date of the site visit by the RLPL, which may or may not coincide with the date of the sponsor's final inspection.
- Item 13. This will be signed by the individual authorized by the Responsible Local Official to perform the final inspection and who is in direct charge of the project. This cannot be delegated to a consultant or other third party.
- Item 14. This will be signed by the NYSDOT Regional Local Project Liaison.
- Item 15. This section shall include a summary of any work not completed at the time of the site visit distinguishing work that:
 - a. will be completed subsequently, but is not eligible for reimbursement or
 - b. will be completed subsequently and is eligible for reimbursement .

5. Draft Contract Administration Letters (3)

Letter # 1
To be sent transmitting the first agreement.

[NYSDOT LETTERHEAD]

Date

Re: Project Name
 (Project Number)
 (Contract Number)

Dear Contractor:

Pursuant to Article 10 of the above referenced contract with the New York State Department of Transportation (“NYSDOT”), the enclosed final agreement has been issued.

It is requested that you comply with the requirements contained in the final agreement within thirty (30) days of the date of the acceptance of the work by NYSDOT which date is referenced in the enclosed final agreement.

Your failure to comply with the requirements set forth in the final agreement within two (2) years of the date of acceptance referenced therein shall constitute a waiver of your right to any remaining payment under the above referenced contract.

Sincerely,

[NYSDOT]

Letter # 2
[NYSDOT LETTERHEAD]
To be sent a year after the date of acceptance.

Date

Re: Project Name
 (Project Number)
 (Contract Number)

Dear Contractor:

Pursuant to Article 10 of the above referenced contract with the New York State Department of Transportation (“NYSDOT”), acceptance of the work on the above referenced project occurred on [date].

It has been previously requested that you comply with the requirements contained in the final agreement within thirty (30) days of the date of acceptance of work by NYSDOT and you have failed to do so.

Please be advised that your failure to comply with the requirements set forth in the final agreement within two (2) years of the date of acceptance, shall constitute a waiver of your right to any remaining payment under the above referenced contract.

Sincerely,

[NYSDOT]

Letter # 3
[NYSDOT LETTERHEAD]
To be sent 2 years and 30 days after the date of acceptance.

Date

Re: Project Name
(Project Number)
(Contract Number)

Dear Contractor:

Pursuant to Article 10 of the above referenced contract with the New York State Department of Transportation (“NYSDOT”), acceptance of the work on the above referenced project occurred on [date].

It has been previously requested that you comply with the requirements contained in the final agreement within thirty (30) days of the date of acceptance of work by NYSDOT and you have failed to do so.

Please be advised that by your failure to comply with the requirements set forth in the final agreement for more than two (2) years of the date of acceptance, you have waived your right to receive the final retainage amount or any other remaining payment under the above referenced contract. Should there be any questions, please immediately contact the undersigned.

Sincerely,

[NYSDOT]

