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## Substantial completion of a renovation project: A milestone that everyone should agree on



**C. Jaye Berger**  
The Law Offices of  
C. Jaye Berger

Substantial completion of a project is the date every client on a renovation project is anxiously waiting for. They may have been working with the contractor and design professionals for months, perhaps even years, and this shows the end is drawing near. But what needs to happen to reach that milestone officially and get past it to achieve final completion? One of the first things to do is review the contract and see what it says about “substantial completion.” The general principle is that this is the point in time when the client can move into the space, but it is not 100% complete. There are still punch list items to be completed, but the critical elements are done. However, it is a technical term that calls for input from the client’s team of design professionals. Usually, the contract requires the architect or designer to say in writing that the project is substantially complete. It is a very important milestone that everyone on the project must agree on.

When substantial agreement occurs, it means that all the inspections have taken place and been passed. This means that the contractor will be asking for some of the retainage back. Retainage is money, usually 10% of the contract sum, which has been held back from each payment to ensure that the work is completed in a satisfactory and timely fashion. That money is deducted

from each payment and accumulates. This is why I advise my clients to obtain signed waivers of mechanic’s liens with each payment made along the way, so that everyone is on the same page about what has been held back and what is owed. There is still contract work that must be completed, as well as a punch list work and possibly some work pursuant to change orders.

Retainage can be a large sum of money. The contractor is usually anxious to receive that money. From the client’s perspective, you want to be cautious not to return too much money if there is still a lot of work left to be done. “How can that be? You may ask. This can occur when errors in judgment about project management come to the surface. A good example is when a client or his design professional gives in to a contractor’s demands for advance payments. One client said his contractor pleaded for extra money around Christmas time so that he could pay a subcontractor. There was some representation that if the client did that, he would receive a “discount” in the future, which was not put in writing.

It is never a good idea to over pay a contractor. Payment should always be in relation to the amount of work that has been done. Also, the whole idea of a contractor needing more money like this late in the project is indicative of a problem. If he has been getting paid all along and has been paying his subcontractors and suppliers, why should he need advance payments? So something is wrong. Usually the thing that is wrong is that he has been using his payments from your project to fund other projects and he is “behind.” His subcontractors

are waiting for the client to pay the contractor the retainage money, so that they can be paid.

The other thing that often occurs is that the project is not sufficiently funded. Instead of having plenty of money “on account” to pay for work that may need to be re-done by others, the project is down to bare bones. This brings us to analyzing the punchlist. If you consider that a punchlist is supposed to be “smaller” items left to be completed, what can occur is that major items of work still need to be done, but are listed on the punch list. It is not chipped paint, but big items, such as work on the HVAC system or the elevator does not work properly. The punch list may need to be revised. You have to look at these issues from the point of view of what it would cost if you had to hire another contractor to perform this work. The answer should be that the work needed would only be a small fraction of what is being held in retainage plus the balance of the contract, but often that is sadly not the case.

Clients often first come to me when they have a renovation project that seems to be going on forever and should have ended months ago and they have the problems discussed above. The contractor believes he is entitled to a lot of money, when he owes a lot to subcontractors and is behind in completing the work.

In such situations, I have to review the contract to see what the contract completion date is. On a recent project I was consulted on, the contractor was months behind schedule and was trying to claim it was the fault of the client.

He had a number of unsigned change orders that he insisted he should be paid for and he owed a lot of money to subcontractors, even though he had been paid hundreds of thousands of dollars by the client. That issue might have been avoided or mitigated if the client had consulted with legal counsel before the project was commenced and asked for waivers of lien with each payment. It keeps everyone “honest” and “on the same page.” On top of this, the client owed the building money for being “late” under the Alteration Agreement.

Sometimes I hear about contractors going on vacation right after the project has commenced. That is usually not a good way to start things off. However, more and more I hear about clients who also go on extended vacations and leave their projects in the hands of contractors and hope that when they return, it will magically be completed just the way they wanted it. Again, that is not a good idea.

Even the best contractors require supervision. Also, anyone embarking on a renovation project should have an experienced construction attorney review the proposed contracts and consult on what is planned. Construction projects are very complicated and are constantly changing. Anyone undertaking such a project should have an experienced construction attorney on their team throughout, as well as an owner’s representative or a construction manager for more substantial projects.

**C. Jaye Berger, Esq., is the principal of The Law Offices of C. Jaye Berger, New York, N.Y.**