

Fear and Loathing of the Punch List

Organization and Preparation Can Help Avoid Costly Disputes

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Anyone who has undertaken the construction or renovation of his or her commercial space has encountered a document called the punch list.

This is simply a list of items that the contractor and the owner create toward the end of a project. It lists items which the contractor and owner agree still need to be completed. They are usually small items which are mostly 'fit and finish' issues. In an ideal world, the list would be prepared jointly by the parties and, as each item was completed, it would get crossed off the list.

We do not live in an ideal world, however.

In our world, the punch list lives a tenacious life. By the end of the project it has many individuals' scribbles on it, is illegible, and more often than not, torn and stained by coffee. Should the parties' relationship break down, the owner will look to the punch list as a basis for refusing to pay the contractor the remaining balance due on the contract. Similarly, the contractor will look to the punch list as proof that he addressed the owner's concerns and is entitled to payment.

Although the punch list should clearly indicate the items that the parties agreed needed to be addressed and which ones were

in fact addressed, it seldom does. Even in instances when the punch list has the items crossed off in a neat and organized fashion, disputes arise as to whether both parties agreed that the item should have been crossed off.

To restore the value and purpose of the punch list, a computer can be of immense value. For example, if an owner has 10 issues he/she wants the contractor to address, a simple punch list can be prepared listing items 1 through 10 and having a signature line for both the owner and contractor. Once the parties agree to the items of the punch list, it is executed by both parties, and each party receives a copy. Even if nothing else is accomplished using the punch list, at a minimum, this document memorializes what issues the parties agreed need to be addressed.

As each issue is addressed a new punch list should be prepared, indicating the date and manner an issue was addressed. This updated punch list should then be executed by both parties, each receiving a copy. This process should be repeated until all the issues are addressed. Should the parties have a dispute in the future, their relationship will be unambiguously documented. Should the dispute need to be liti-

gated, this will allow the disputed issues to be clear cut and well defined, making litigation more streamlined and less expensive.

Once the punch list is created, another document called a hold-back agreement should also be prepared. In most instances, a final payment is due to the contractor at the end of the project. From the final payment the project owner will 'hold back' a certain portion of the funds due the contractor until the items referenced on the punch list are completed. An amount equal to 150% of what it would cost the project owner to hire another contractor to complete the punch list items is the typical way to determine the amount of funds to be held back.

The hold-back agreement should state the amount of funds being held back, as well as what conditions need to be met before funds are released. It is good practice for the project owner and contractor to agree to the amount of funds to be released as each punch list item is addressed.

Even if all parties are committed to resolving the punch list items in an amicable way, reasonable people can disagree. Should this occur, the parties will need a vehicle in which their dispute can be resolved. It is in no one's interest to have the hold-back funds

held in perpetuity. While a formal lawsuit could be initiated, the cost and time associated with it may be undesirable. In this instance, arbitration maybe an attractive alternative. The parties can apply to have their dispute arbitrated by the Commonwealth's Office of Consumer Affairs and Business Regulation, hire a private mediator, or contact their local bar association. Some contracts actually require that the parties arbitrate any disputes.

At the arbitration, the parties will be able to offer evidence and cross examine the opposing side and any of their witnesses. Although some evidentiary rules apply, they are much less stringent than if the matter is being tried in court. At the end of the arbitration, the arbitrator will enter a decision, which is binding upon both parties. In most cases, the parties will waive their right to appeal the arbitrator's decision prior to the arbitration.

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