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Dealing with "Time is of the Essence"

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In this (or any other) time of social and/or business disruption, delays, or shutdowns, focus frequently goes to the scheduling clauses contained in design and construction professional service agreements. One common phrase frequently used in such agreements is "time is of the essence." In ordinary times, the phrase garners little attention. In times of disruption, delay, and shutdown, it becomes the focal point of anxiety and finger wagging. Is the clause more than an anvil of psychological pressure? Yes, it is. Accordingly, it is important to understand it and to respond to it accordingly.

The objective of a "time is of the essence" clause is to transform what might be flexible schedule dates and milestones into material contract obligations with ramifications. Absent such a clause, the Uniform Commercial Code and many applicable state codes would make deadlines effectively flexible by providing that a missed deadline may be overcome by the payment of corresponding damages or other compensation. For example, California Civil Code Section 1492 provides:

> Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime. (Emphasis added.)

The challenge is that such damages for a schedule issue are often hard to establish and take drawn out litigation to do so. Accordingly, such issues are often resolved by either liquidated damages clauses or back charges.

The point of a "time is of the essence" clause is to transform time and schedule into a "material" term of the agreement and therefore a basis for immediate claims and even termination. That is a significant difference. While an understandable priority, such an approach is also draconian.

To overcome such concerns, but also to address the admitted importance of schedule and other contract issues, Design professionals (and in fact all participants in the design and construction

process should consider "right to cure" clauses in their agreements. Under such a clause, before a contract may be terminated generally or for a specific issue, the other party must provide written notice of the alleged breach with a corresponding opportunity for the other party to make right on the issue. Such a clause might provide,

"Prior to terminating this Agreement for breach or non-performance, a Party must provide seven days written notice to the other Party of such breach or non-performance and provide such Party an opportunity to correct such breach or non-performance within that seven day period."

Such a clause may be silent on damages or alternatively provide,

"*If the Party corrects the breach or non-performance within such time period, this Agreement may not be terminated for the issue identified and there shall be no damages for such issue*" or "*If the Party corrects the breach or non-performance within such time period, this Agreement may not be terminated for the issue identified, but actual damages incurred as a result of the issue may still be recovered*."

Obviously, the former approach is typically preferable to most design and construction professionals.

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