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LEGAL BLOG

OCTOBER 26, 2022

"TIME IS OF THE ESSENCE" – OR IS IT?

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It seems that almost every construction contract contains a clause proclaiming that "time is of the essence." But what exactly does that clause mean? And why is it important? Or is it?

The phrase "time is of the essence" means that timely performance is an essential obligation under a contract, and thus failure to perform in a timely manner amounts to a material breach of contract giving rise to the other party's right to exercise its remedies for breach. Under Ohio law, these remedies for material breach of contract may include being relieved from performance of one's contractual obligations, terminating the contract, and seeking damages for completion of the breaching party's obligations.

So why is it important to specify that time is "of the essence?" Because under Ohio law, unless a contract specifies this, the time of performance specified in a contract is generally ***not*** of the essence. Rather, a project schedule in a construction contract is a sort of guideline, and a party's failure to perform in accordance with the schedule does ***not*** deprive the other party of an essential element of the contractual bargain. Thus, unless a contract specifies that "time is of the essence," Ohio courts typically find that the failure to perform in strict accordance with a project schedule specified in a contract does ***not*** amount to a material breach and does not allow the other party to exercise remedies for breach.

THERE ARE EXCEPTIONS TO THIS, HOWEVER

Some Ohio courts have found that, even in the absence of a "time is of the essence" clause, an *unreasonable* delay still constitutes a material breach that entitles the other party to relief.

Additionally, even if a contract does not contain a "time is of the essence" clause, the nature of the contract or the circumstances under which it is negotiated might show that the parties *intended* for time to be of the essence. As such, even if a contract does not contain a "time is of the essence" clause, a party might still be entitled to relief if the other party fails to perform in accordance with a construction schedule. Unfortunately, Ohio courts have not yet provided guidance about what sorts of circumstances or what types of contracts might give rise to this inference that the parties intended for time to be of the essence.

WHAT DOES THIS ALL MEAN?

For owners, the best practice is to include a "time is of the essence" clause in your construction contracts. Having this clause in the contract will ensure that you can exercise all contractual remedies available for a material breach, which might include recovery of breach-related damages and termination of the contract.

For contractors and subcontractors, be aware that the absence of a "time is of the essence" clause does not necessarily provide relief from an owner's remedies for breach of contract. If a delay in performance is "unreasonable," or if other circumstances suggest that the parties intended for time to be of the essence, the owner (or prime contractor) might nonetheless be able to exercise its contractual right to terminate the contract or exercise its other remedies for a material breach of the contract.

Bottom line: Time might be of the essence even if a contract doesn't say so, but if you want to be certain, just say it.

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