Time Is of the Essence

by Quenda Behler Story

Contractors should treat a contract that contains the phrase "time is of the essence" as if it were a package from the Unabomber: Examine it with great care and suspicion, because it might blow up in your face.

In a contract with a "time is of the essence" clause, the completion date is so important to the customer's needs that if the contract is not completed on time, the work is practically worthless and the customer does not have to pay for it. "Time is of the essence" language means that the contractor's failure to finish on time is so damaging to the customer that the contractor might as well not have bothered starting.

For example, every year our company erects a display booth for a local florist. The booth is part of a state fair that only lasts a few days, so unless we complete our work on time, the booth has no value to the florist. Under these circumstances, a "time is of the essence" clause would ensure that the florist did not have to pay for a booth he could no longer use.

There is a difference, however, between a contract that contains completion dates and one that includes a "time is of the essence" clause. To say that the customer does not have to pay for a contract for which some or most of the work has been performed is unfair to the contractor. Even when the contractor does not finish on schedule, usually some value has been added to the customer's property. So as a rule, building contracts with completion dates — even those with penalty clauses for not meeting those dates — are not considered "time is of the essence" contracts. The customer still has to pay something for the work that has been completed.

Liquidated Damages

There are plenty of building projects, however, in which the completion date is particularly important to the customer. In a commercial job, for example, your client may have an advertising campaign planned around the new building or the improvements being made to the old building. Obviously, your client does not want its customers stepping over construction debris at the grand opening. Similarly, insurance companies that are paying to house burned-out or flooded-out customers at a local motel are concerned about when the remodeler will finish the repairs. And a homeowner who has sold the old house and is waiting for a new house to be finished will consider the completion date very critical.

Fortunately, most of these problems can be adequately addressed by a "liquidated damages" clause in the building contract. A liquidated damages clause says that the contractor will be assessed a penalty for each day the work remains unfinished beyond the specified completion date. The dollar amount of liquidated damages is usually agreed to in advance and stipulated in the contract.

This arrangement is fair to both the contractor and the client. It recognizes the inconvenience and financial loss to the customer, while at the same time acknowledging that the contractor's work has increased the property's value. The customer still pays for this increased value, offset by the actual damages caused by the delay.

No Cake and Eat It, Too

Some customers want contracts with both a liquidated damages clause and a "time is of the essence" clause. You have my permission to sneer at them. A liquidated damages clause, which spells out how much will be deducted from the contractor's fee if the work isn't completed on schedule, is the logical opposite of a "time is of the essence" clause, for which the remedy is no payment at all.

I know of lawsuits in which the courts ruled in favor of a liquidated damages clause, even though the contract language also included a "time is of the essence" clause. The reasoning is that where the parties have agreed to liquidated damages as an offset against the contract price, the contractor obviously had not intended to agree to forfeit all rights to payment if the work was not finished on schedule. In fact, "time is of the essence" clauses are looked at with suspicion by the courts, which are aware of the potential for abuse and for the unjust enrichment of certain customers. Typically, "time is of the essence" clauses are not enforced where there have been change orders, where the delay was actually caused by the customer, or where the customer has, for practical purposes, waived the finish date.

But be careful. In the absence of such mitigating circumstances, if you have knowingly and voluntarily signed a contract with specific language that says meeting the completion date is the essence of the contract, then you'd better finish on time. If you don't, then head for cover; your contract is about to explode. ■

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