Between the Lines
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Insights From a Career Claims Professional
AMES & GOUGH

# Time is of the Essence

On its face, this language sounds simple enough; someone wants their project done in a timely manner, right? Well, that may be the case, but that isn't all that is at stake when you see a contract with Time is of the Essence in the language in the contract.

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As seen in many contracts these days, a Time is of the Essence clause has legal meaning and potentially severe consequences. Generally, failure to perform tasks outlined in the contract in the time frames spelled out may be a breach of the contract, but it may not be a material breach depending on the circumstances. The failure to meet such deadlines when a Time is of the Essence clause is included may result in a material breach of the contract and allows for immediate termination of a contract. Essentially, the insertion of this clause waives your rights to perform a contract in a reasonable amount of time in accordance with the standard of care. The standard contracts allow for time limits established in the contract to be waived for reasonable cause.

More importantly, the damages that may be asserted with a breach of a Time is of the Essence clause can be far more significant. So, what happens when you breach such a clause? The answer varies from jurisdiction to jurisdiction, but the risk of greater damages is potentially increased regardless. The risks cannot be clearly quantified, but here are some examples of specific situations that may be familiar to help illustrate the potential for disputes that could arise in performing a design contract that contains such a clause:

The contract contemplates a date when the design will be complete. You are working in a jurisdiction you have been working in for years, and permit drawings are generally approved within 60-90 days. While you are in the design process, the governmental entity responsible for that review has a complete change in personnel, and the process takes six months. You agreed to the dates in the contract based on history.

1. An entity over which you have no control caused the delay without the provision, arguing that the time limit should be waived, as there was reasonable cause. With the provision, it's anybody's guess what a court will decide.
2. During contract administration, you generally have a certain amount of time to review shop drawings and submittals. There is supposed to be a submittal schedule, which the contractor may not provide. If the submittals come in out of the expected order, or worse all at once on a Friday after construction has begun, is it reasonable to expect that you will be able to comply with the contract? Your arguments are much stronger in the absence of a Time is of the Essence clause.
3. The contract anticipates a construction completion date. You are not the contractor and don't have any control over how the contractor executes the contract. What are the ramifications for you, the design professional, if the project is not completed on time?

There are no easy answers to these questions, but you should be aware of the potential liability consequences when you see this language in a proposed contract.

Perhaps most importantly, there are potential coverage questions associated when Time is of the Essence language is included in contracts. Most professional liability policies exclude coverage for express warranties or guarantees, and there is an argument that can be made that the language, which the Court will construe, is a material provision and is also a guarantee. Additionally, the contractual liability exclusion allows design professionals to enter into contracts if they don't create liability in the absence of the contract. When there is no written contract, your liability is tied to the common law and the standard of care.

It is one of the most difficult tight ropes that design professional walk; the carriers understand the importance of written contracts and urge you to obtain them, but don't want any terms and conditions that increase your common law liability exposure. In this world full of lawyers and contracts, balancing that can be a difficult feat.

While exceeding the common law exposure is not likely to result in a complete declination of coverage, receiving an onerous Reservation of Rights letter before the facts are developed is anxiety producing and a difficult way to begin a claim.

Understanding the terms that may give rise to such a letter, like a Time is of the Essence clause, is helpful in understanding and managing your risk.

*Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.*

**About the Author: Lauren Rhodes Martin** is a risk management and claims specialist focusing on the firm's architect and engineer accounts. In her role, Lauren, who is based in the Ames & Gough Washington, DC office, works directly with the firm's partners and client executives on all aspects of design firm clients' risk management, including contract reviews, claims advocacy, loss prevention training and advice. Prior to joining Ames & Gough, Lauren had a distinguished career of nearly 35 years at CNA, where she held positions of increasing responsibility in claims and client management, culminating with her appointment in 2018 as A/E Platinum Accounts Director. For more than three decades she was directly responsible for handling architect and engineer errors and omissions (E&O) claims.

For additional information, please call the Ames & Gough office nearest you:

**Washington, D.C.**
8300 Greensboro Drive
Suite 980
McLean, Virginia 22102
**Phone: (703) 827-2277**
**Fax: (703) 827-2279**

**Boston**
859 Willard Street
Suite 320
Quincy, Massachusetts 02169
**Phone: (617) 328-6555**
**Fax: (617) 328-6888**

**Florida**
111 North Orange Ave
Suite 800
Orlando, Florida 32801
**Phone: (202) 680-4507**
**Fax: (703) 827-2279**

**Philadelphia**
1781 Hunters Circle
West Chester
Pennsylvania 19380
**Phone: (610) 547-0663**
**Fax: (703) 827 2279**

**www.amesgough.com**