



# Time is of the Essence

by Reina A. Calderon

Most builders have probably had the following discussion, or something like it, at some point in their negotiations with almost every prospective customer-owner.

**Owner:** How long do you think the construction of my house will take? Do you think we can close by September 1?

**Builder:** We will try to shoot for September 1, but you should know that just about anything can happen when you're constructing a building.

**Owner:** I don't want to be pushy, but it's really important that I'm into my house by then. I want enough time to move in before my kids start school, and besides, the lease on the place I'm living in ends August 31. This is really important to me - and anyway, isn't your job to see that my house is completed within my time frame?

## Time is of the Essence

If the owner in this scenario visits his lawyer soon after this discussion, chances are the lawyer will try to insert a "time is of the essence" provision in the construction contract. This type of provision typically says "Time is of the essence as to each and every performance hereunder," and means that the date or dates of performance in the contract are so important that they go to the heart of the bargain.

Such provisions are often inserted even when the timing is not so important. That's because the owner's lawyer is afraid that the "reasonable" time for performance, as allowed in typical contracts, may mean weeks or even months, depending on the circumstances. He wants to make the completion date stick - so he inserts a "time is of the essence" provision.

## The Risks of Untimely Performance

What happens to Builder if he doesn't perform by the completion date set in a "time is of the essence" contract? Builder risks two things. First, he risks damages for the delay in his performance. This is a risk that he takes even without a "time is of the essence" provision in the contract, if the delay was a material breach of the contract - that is, if the delay really did harm Owner and Builder's delay wasn't otherwise excused. See *Mazzotta v. Bornstein*, 133 At.677, 680; 104 Conn. 430, 437 (1926).

The second risk in particular to the "time is of the essence" contract: If the builder delays in performance, he may be unable to obtain his contract price. As one court has stated: "When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from that other party...[N]or does the phrase mean merely that time is a material matter, but that it is so material that exact compliance with the terms of

the contract in this respect is essential to the right to require counter performance." *Id.* Under a "time is of the essence" provision contract, a delay by the builder effectively gives the owner an "out". While the particularities of the situation may give the tardy builder some right of recovery against the owner - for instance, where the builder has built a house on the owner's land and has thus arguably benefited him - the right of recovery probably won't be under the contract, and the builder could very well get something less than the contract price for his efforts.

**This provision is a double-edged sword, however. The owner's delays will let the builder out of performing, just like the builder's delay will let the owner out of performing.**

## Time is of the Essence For Builders

the typical "time is of the essence" provision is a double-edged sword, however. the owner's delays will let the builder out of performing, just like the builder's delays will let the owner out of performing. So even though they are typically sought by the owner, "time is of the essence" provisions can work for the builder too - provided that he or his lawyer takes care to ensure that the contract gives him a reasonable time to complete the construction and contains provisions for extending the time of performance when there are extenuating circumstances. Depending upon the builder's situation, the time for the owner's performance may be just as important or even more important to the builder than his time of performance is to the owner - for instance, where the builder is relying on fixed closing dates to provide certainty to his operating finances - or needs the profit from the sale of one project to swing a deal on another project that has a short time fuse. The owner's delays in such situations can wreak even more havoc on the builder than the builder's delays can with respect to the prospective owner who must move into the house by a certain date. In these circumstances, it might be the builder who seeks the "time is of the essence" provision - hopefully with the knowledge of the ultimate downside if he is unable to keep up his end of the time bargain. ■

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