

A Day Late and *Two Million Dollars* Short

(How intermediate delay leads to major consequences.)

By Rick Reed

"Time is of the essence." Is this just ancient, benign legalese? It means being late, even by a day, is considered a *material breach of contract*.

The Texas Supreme Court shed light a few years ago on just how critical this phrase can be. The case involved a pipeline contractor who got caught in the rain. The contract made "time of the essence," and it also said:

> *"Sufficient forces and equipment . . . [must] be furnished at all times to adequately perform work with ample margin for emergencies and unexpected events, to carry on the work at a sufficient rate of progress to ensure completion within the time specified in the Contract."*

For extra emphasis it also said the contractor had to achieve *"100 percent completion of the pipeline system no later than April 30, 1997."*

So, what happens if a contractor falls a little behind schedule during the job. Assume the contractor takes the position that the delay should be minor and proposes to extend the schedule rather than accelerating to stay on schedule? Could the contractor be in trouble for admitting it is in material breach? Read on.

In the midst of negotiating a time extension for the rain delays, the Owner's engineer declared the contractor in default for failure to timely perform -- and terminated the contract. The Court found all time limits were "of the essence," and that the contractor had agreed *any failure to stay on schedule would be a material breach of its contract*. The jury also found the owner in breach because it wrongfully terminated the contractor -- but this was irrelevant because the contractor was the *first* to breach the contract. The Supreme Court reminds us:

> *"It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance."*

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The jury actually awarded *more* in damages to the contractor than it awarded the owner, but the Supreme Court disregarded this and made the contractor pay the owner over $2,000,000 to complete the project with another contractor. Since the contractor's rain delay immediately resulted in a material breach of the contract, the owner was excused from having to comply with contractual conditions to terminating, and was free to terminate the contractor!

So, if you see a clause making "time of the essence," particularly one that makes time of the essence for "all time limits in the schedule," remember that any instance of falling behind schedule could put you in material breach of the contract, and expose you to immediate termination, even though the contract otherwise makes termination improper.

(Extra tips: A "time of the essence clause" is a two-edged sword – Owners and Contractors need to be cautious about falling into immediate material breach of their contractual obligations. Also, when dealing with a public owner, use a well framed question to seek clarification of this issue.)

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