

Does Anyone Know What Time It Is?

Time is a crucial element that all professionals, particularly design professionals, must manage effectively. Few professions are as bound by strict schedules as architecture and engineering (A/E) firms. Frequently, clients of A/E firms demand and expect their projects to be completed as quickly as possible. Many clients mistakenly believe that A/E firms somehow have control over time—control over the project completion dates. Reality is otherwise, but A/E firms can do a poor job of educating their clients about their inability to control project completion in a timely manner. We have all witnessed project schedules go awry for various reasons. While it may be easy to identify a specific cause, multiple factors often contribute to a delay, making it difficult to pinpoint responsibility.

From the very start of a potential project, time is a significant concern. As owners begin conceptualizing a project, they immediately consider the timelines involved. Owners may face delays in securing funding, selecting a project team, or adhering to deadlines set by others that are non-negotiable. The A/E firm must also contemplate time at the outset of their involvement. Is the proposed schedule realistic? Can they mobilize their staff as required by the schedule. What potential threats could hinder the timeline, such as labor shortages, supply chain issues, permitting problems, or public resistance? Some of these issues are not in the control of the A/E, but the Client may still find reason to put blame on the design firm.

Too often, in claims made against A/E firms, we hear design professionals admit they were concerned about unrealistic client expectations regarding schedules and completion dates. However, project files reveal no documentation of such concerns made to the client by the A/E. This is a critical error that shouldn't happen. Effective communication is the key to successful project management in A/E firms. Documented communication from the A/E to their clients can be critical in defending the A/E in claims. If a schedule is too optimistic for the A/E, it is imperative these concerns are communicated to the client and documented. The client is free to ignore your concerns, but at least you have documented them. No one likes surprises, particularly clients with expectations their project will be completed on time. So, word of caution: don't let your client be surprised with bad news.

While the A/E may have little control over time, any delays can lead to legal repercussions for the design firm. If a project is delayed, owner's attorneys often cast a wide net, which means the A/E could find themselves spending valuable time and resources trying to extricate themselves from the situation. This underscores the importance of effective project management, particularly communication, and the potential risks of delays.

Let's take a closer look at some common contractual issues related to time that can help the A/E protect itself:

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- Avoid any guarantees regarding time. We know warranties and guarantees are not covered by your PL policy. It's too easy to guarantee you will meet the schedules set forth by the Owner without appreciating the financial risk you expose the firm to when you do. Perhaps the Owner is a long-standing client you have a good relationship with. Your favorite competitor has been trying to get work from your client. The Project is an 'easy' one, you think, even though your competitor is probably better suited for this particular project. It will be another simple, easy project for this good client. So, you agree to a simple agreement by your client wherein you guarantee you will provide deliverables on a certain date, obtain permits by a certain date, and so on. Language you might normally push back on, but for the fact this is a good client, a simple project, and you want to keep the customer satisfied. All is good until it's not. An uninsurable claim develops.
- A time is of the essence clause is not your friend, they can be your worst enemy and should be stricken. The clause raises the element of time to front and center. In a legal context, "time is of the essence" means that timely performance of contractual obligations is crucial, transforming flexible schedules into material obligations, potentially leading to immediate claims or termination if deadlines are missed. So, whenever you come across such a clause you must do your very best to strike the clause.
- Liquidated damages – Liquidated damages are sometimes seen by A/E firms in contracts. Not covered by PL insurance, these types of damages are normally seen by contractors and are a risk they often assume. Experience tells us that the design firm can successfully push back on such clauses. If they cannot eradicate the clauses, perhaps the A/E can agree to risk a small liquidated sum, capped by a maximum number the firm can 'live with.' While still not insurable, the risk can be made tolerable to some firms.
- Force majeure – Force majeure clauses leave an 'out' for the A/E if the A/E is delayed for reasons outside of its control. If written properly, the clauses do not require addressing every possible delay potential. As an example, when COVID struck, many firms scrambled to specifically add COVID-19 to their Force Majeure clauses. That wasn't really necessary if the clauses were drafted appropriately, to begin with. A sample Force Majeure clause might look like the following:

"If an event or circumstance beyond the Consultant's reasonable control occurs, including without limitation an act of God, fire, flood, hurricane, wind event, storm, weather disturbance, earthquake, pandemic, disease, epidemic, or other viral or bacterial outbreak, government-ordered shutdown,

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quarantine or shelter-in-place order, an act or omission of a third party, war, riot, terrorism or threat of terrorism, civil unrest, labor problems (including lockouts, strikes and slowdowns) of a third-party, inability to obtain power, internet connectivity or services interruptions, scarcity of ingredients or supplies, or court injunction or order, new laws or governmental regulations or other causes that are beyond the reasonable control of the Consultant, whether similar or dissimilar to any of the foregoing, that cause the Consultant delay or additional expense ("Force Majeure Event"), then the Consultant is entitled to an equitable adjustment in the contract price or time for performance, or both. If any Force Majeure Event renders the Consultant's performance impossible or impracticable, the Consultant has the right to terminate performance under this Agreement consistent with any termination requirements that might exist in this Agreement. If a Force Majeure Event lasts more than thirty (30) days, upon written notice either party may terminate this Agreement without liability to the other for such termination. Upon occurrence of a Force Majeure Event, the Consultant will notify the Client within a reasonable time that a Force Majeure Event has occurred and its anticipated impact on the Consultant's performance, including its expected duration. The Consultant will use reasonable good-faith efforts to mitigate the impact of any Force Majeure Event on the Consultant's ability to perform under this Agreement."

- Waiver of Consequential Damages—The financial damages caused by a delay in project completion can be enormous. In fact, such damages can often exceed the construction value of the project itself. Consider the well-known case of Perini Corp. v Greate Bay Hotel & Casino, Inc. While it happened over 40 years ago, it is still illustrative of what can go wrong on a project. You are encouraged to do an internet search for the case, and it will immediately pop up. It illustrates why a waiver of the consequential damages clause is so valuable to the A/E firm.

"Notwithstanding any other provision of this Agreement, and to the fullest extent permitted by law, neither the Client nor the Consultant, their respective officers, directors, partners, employees, contractors or subconsultants shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages of any kind or nature whatsoever arising out of or connected in any way to the Project or to this Agreement. This mutual waiver of consequential damages shall include, but is not limited to, delay, loss of use, loss of profits, loss of business, loss of income, loss of reputation or any other consequential damages of any kind or nature whatsoever that either party may have incurred from any cause of action including negligence, strict liability, breach of contract and breach of strict or implied warranty. Both the client and the Consultant shall require similar waivers of consequential damages protecting all

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the entities or persons named herein in all contracts and subcontracts with others involved in this project.”

There are numerous methods to help reduce your risk of time-related claims. We strongly encourage you to discuss the issue with your legal counsel and insurance agent. They can provide immense help in helping you craft appropriate contract language or guiding you through a difficult project time related issue.