

HPPIB CONTRACT REVIEW SERIES

TIMELY PERFORMANCE AGREEMENT

Client Discussion Points

A "time is of the essence" provision can be construed to convert any schedule slippage past a stated time constraint into a material breach of the contract. Thus, any minor delay could be used by a Client as the basis for a claim for damages or as justification for termination of the agreement. The law only requires that Design Professional services be provided with reasonable promptness based on specific facts and circumstances. In addition, because professional liability insurance only provides coverage for claims resulting from the negligence of the Design Professional, claims for breach of contract may result in an uninsurable exposure.

SAMPLE UNACCEPTABLE AGREEMENT

Performance of Design Professional's services shall commence on a timely basis and shall continue until Design Professional satisfactory performs its Services and Owner duly accepts the Services as complete. Design Professional acknowledges that TIME IS OF THE ESSENCE of this Agreement. In this regard, Design Professional hereby accepts and confirms that the time allowed in the Project Schedule is a reasonable time period for completing its Services with Professional skill and care and as may be necessary to guarantee that the Services are performed in accordance with Project Schedule and within the Contract Time.

HPPIB suggests consideration of following alternative provisions:

SAMPLE ACCEPTABLE AGREEMENT: OPTION 1

Design Professional acknowledges the importance to Client of Client's Project Schedule and agrees to put forth reasonable efforts in performing the services with due diligence under this Agreement in a manner consistent with that schedule, as provided in the Project Schedule hereto. Client understands, however, that Design Professional's performance must be governed by sound professional practices. Should Design Professional discern that the schedule will not be met for any reason, Design Professional shall so notify Client as soon as practically possible.

SAMPLE ACCEPTABLE AGREEMENT: OPTION 2

Design Professional will complete the professional services described in the Project Schedule as expeditiously as is consistent with professional skill and care. However, it is expressly agreed that Design Professional shall not be held responsible for delays in performance occasioned by factors beyond Design Professional's reasonable control, including but not limited to delays because of strikes, lockouts, work slowdowns or stoppages, accidents of God, failure of any governmental or other regulatory authority to act in a timely manner, failure of Client to timely furnish information or approve or disapprove of Design Professional's services or work product, or delays caused by faulty performance by Client or contractors of any level. When such delays beyond Design Professional's reasonable control occur, Client agrees that Design Professional shall not be responsible for damages, nor shall Design Professional be deemed in default of this Agreement.

IMPORTANT NOTICE: This information is not legal advice. Legal advice may be only obtained from an attorney. Heffernan Professional Practice Insurance Brokers (HPPIB) risk management resources have been prepared solely for the purpose of sharing general information regarding insurance and practice management issues and are not intended to constitute legal advice or a determination on issues of coverage. HPPIB makes no representations about the accuracy, completeness, or relevance of this information.