

DEFINITION OF "MATERIAL BREACH"

For purposes of this Agreement, the term "material breach" shall mean:

A. A failure or refusal by one party to perform one or more promises of performance under this Agreement which renders the other party to be insecure in obtaining or receiving the benefit of the bargain under this Agreement in one of two manners: destruction of the essential object of the Agreement or which significantly deprives the other party of a benefit reasonably expected under the Agreement.

B. Factors to be considered in determining materiality of a breach shall include, but not be limited to, the following:

[1] Not being able to obtain a substantial benefit which could reasonably have been anticipated to have been the result of the breaching party's performance;

[2] Inadequacy of monetary damages to compensate the injured party for the lack of complete performance;

[3] The lack of progress toward or performance by the breaching party of the essential terms of the Agreement to the substantial harm of the injured party;

[4] The degree of wilfulness, negligence, or intentional conduct of the party failing to perform; and

[5] The uncertainty that the party failing to perform will perform the remainder of its obligations under this Agreement.

C. To be material, a breach must be substantial and must pertain to a material covenant of the Agreement. It shall not include a technical breach, further defined as a breach which occurs when the breaching party has not absolutely complied with the terms of the Agreement but the breach is harmless and would not constitute grounds for monetary damages, nor shall it include a minor breach of Agreement which, while not excused, does not rise to the level described in A., above.