



# NORTH AMERICAN CONSTRUCTION SUMMIT

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**Abandonment – What Contractors, Subcontractors and Consultants  
Should Know About When to Leave the Party**



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# Material Breach

## Overview

- Context
- What is a material breach?
- What are the determining factors of a material breach?
- What does the contract say about a material breach?





# Material Breach

## Overview

- What acts/omissions are significant enough to be a material breach?
- What acts/omissions do not rise to the level of material breach?
- Who has and what is the burden of proof material breach?
- What are the consequences of being wrong about a material breach?





# Material Breach

## Context

- Construction disputes typically generate significant legal crossfire in the form of countervailing claims pertaining to breach.
  - *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 426 (Cal. 1999) (“Most often a [construction] dispute will involve claims, counterclaims, charges and countercharges. Seldom will any one party be altogether in the right.”).
  - *Paul Hardeman, Inc. v. Arkansas Power & Light Co.*, 380 F. Supp. 298, 310 (E.D. Ark. 1974) (“[N]either party was totally without blame, and both had committed a substantial number of ‘breaches’ of their expressed and implied contractual undertaking.”).



# Material Breach

## Context

- Courts usually not thrilled about adjudicating construction cases.
- “This is one of those messy government [construction] contract dispute cases in which, during the performance of the contract, neither of the parties acquitted themselves with pure grace. Working through the detailed record of such a case causes one to understand better the ancient curse of a plague o’ both their houses. See William Shakespeare, *Romeo and Juliet*, act 3, sc. 1. Nevertheless, since the parties could not resolve their dispute, we must.”
  - *Decker & Co. v. West*, 76 F.3d 1573, 1575 (Fed. Cir. 1996).





# Material Breach

## What Is It?

- A valid finding of breach is a prerequisite to granting a breach of contract remedy; a *material* breach is a prerequisite to termination for cause.
  - *Miller v. Mills Const., Inc.*, 352 F.3d 1166, 1172–73 (8th Cir. 2003) (“A material breach of contract allows the aggrieved party to cancel the contract and recover damages for the breach...However, if the breach is not material, the aggrieved party may not cancel the contract but may recover damages for the nonmaterial breach.”).





# Material Breach

## What Is It?

- A material breach relates to and defeats the fundamental purpose of the contract.
  - *U.S. ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC*, No. 1:10-cv-512, 2011 WL 1627311, at \*3 (E.D. Va. Apr. 27, 2011).
- An unexcused breach that reasonably endangers future performance of contract obligations and goes to the heart of the contract.
  - *Gulick v. A. Robert Strawn & Assocs., Inc.*, 477 P.2d 489, 492 (Colo. App. 1970).





# Material Breach

## Self-Help

- During performance, each party must decide if a breach by the other party is sufficiently material to warrant termination.
  - Contract termination for cause is a “self help” remedy that is invoked by a party without prior judicial sanction.

7 Bruner & O’Connor Construction Law § 18:3.

*See also* Ballati and Cohen, *Termination for Cause or Convenience: What Happens if You are Wrong?*, 13 ACCLJ 4 (Winter 2019) (discussing the consequences of a wrongful termination decision).





# Material Breach

## Determining Factors

- Not all breaches are material.
- “[T]here is a range of reasonably expected adverse conditions in the performance of a construction contract within which there is no breach.”
  - *Bat Masonry Co., Inc. v. Pike-Paschen Joint Venture III*, 842 F. Supp. 174, 182 (D. Md. 1993).





# Material Breach

## Determining Factors

- Benefit deprived which was reasonably expected.
- Degree deprived party can be adequately compensated.
- Degree breaching party will suffer loss.
- Likelihood breaching party will cure.
- Degree breaching party acted with good faith and fair dealing.
- Not compensable by money damages.



Restatement (Second) of Contracts § 241;

Andersen, A New Look at Material Breach In the Law of Contracts, 21 U.C. Davis L. Rev. 1073, 1077 (Summer 1988);  
*Daystar Constr. Mgmt., Inc. v. Mitchell*, No. 04C-05-175-JRS, 2006 WL 2053649, at \*8 (Del. Super. Ct. July 12, 2006).



# Material Breach

## What Does the Contract Say?

- Determining material breach starts with the contract.
  - The materiality of contract time is critical to an evaluation of a contractor's failure to make progress. *R.R. Gregory Corp. v. Labar Enters. of Rochester, Inc.*, No. 1:06-cv-1037, 2007 WL 3376642, at \*6 (E.D. Va. Nov. 8, 2007).
- “Contracting parties can define what will constitute a material breach of their contract.”
  - *McGee Constr. Co. v. Neshobe Dev., Inc.*, 594 A.2d 415, 417–18 (Vt. 1991) (contractor “walked off the job,” ignoring contract provisions on claim procedure, grounds for claim).
  - “The intent is that the claims be resolved while the parties continue to perform under the contract, and that the mere existence of a claim not constitute sufficient grounds for walking off the job.”



# Material Breach

## What Does the Contract Say? Cont.

- To determine which party was the first to materially breach the contract, we must first determine what the contract required of the parties, a question of law.
  - *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211, 221 (Tenn. Ct. App. 2009).
- Is material breach defined? If so, how?
- Termination for cause vs. termination for convenience?
- Required notice and an opportunity to cure before a breach can be material?





# Material Breach

## What Does the Contract Say? Cont.

- Common termination clauses:
  - Define breaches material enough to warrant termination of the contract for cause (e.g., bankruptcy, insufficient workforce).
  - Prescribe remedies available to the nonbreaching party.
    - AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 14 (addressing termination and suspension of the contract).
  - Allow owner to terminate the contract without cause and without obligation to pay for the contractor's lost profits on unperformed work.
    - AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 14.4 (termination for convenience).



# Material Breach

## Nonpayment (Significant Enough)

- Key factor in assessing impact of breach on injured party's expectations: the extent to which that party can be compensated adequately in damages.
  - Farnsworth on Contracts § 8.12 (2d ed. 1998).
- The failure to pay an installment of the contract price in a construction contract is a substantial breach of the contract and gives the contractor the right to consider the contract at an end, to cease work, and to recover the value of the work already performed.
  - 13 Am.Jr.2d Building and Construction Contracts § 102 (1964).



# Material Breach

## Nonpayment (Significant Enough) Cont.

- Prime contractor failure to make a progress payment to subcontractor during construction project is likely a material breach.
  - *Rhea v. Marko Constr. Co.*, 652 S.W.2d 332, 333 (Tenn. 1983) (nonpayment caused sub to be distressed for lack of funds and unable to pay labor and suppliers, suppliers filed liens against the project).





# Material Breach

## Unjustified Abandonment (Significant Enough)

- Contractor ceasing all work on the project without cause and failing to return to the job site to complete the work constitutes a material breach of contract.
  - *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211, 226 (Tenn. Ct. App. 2009).





# Material Breach

## Defective Work

- Contractor defective work may or may not be a material breach.
- Developer terminating contract without giving notice to contractor of an alleged breach was a material breach.
  - *Madden Phillips Constr., Inc. v. GGAT Dev. Corp.*, 315 S.W.3d 800, 822–27 (Tenn. Ct. App. 2009).





# Material Breach

## Defective Work Cont.

- Contractor's material breach by failing to adhere to the contract's terms, and the substantial number of defects in the construction, excused owner from the requirement to give notice and an opportunity to cure.
  - *Forrest Constr. Co., LLC v. Laughlin*, 337 S.W.3d 211, 229 (Tenn. Ct. App. 2009).





# Material Breach

## Missing Deadlines (Not material)

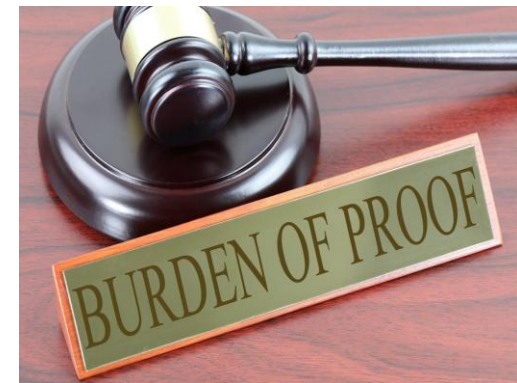
- Contractor not finishing work on time during a construction project may not be a material breach.
- For example: owner knows the project will not be completed before contractual deadline and allows contractor to continue working after contractual completion date and accepts or encourages contractor to complete.
  - *Shepard v. Perkins Builders*, 968 S.W.2d 832, 833 (Tenn. Ct. App. 1997) (“Under the terms of the written agreement and the actions of the parties in relation thereto, we conclude that time was not of the essence in this contract, and that failure to complete by the October 15 date was not a material breach.”).



# Material Breach

## Burden of Proof

- Terminating party has the burden of proving a default termination was justified.
- If that burden is satisfied, the terminateded party has the burden of showing that its excusable breach.
  - *CJP Contractors, Inc. v. U.S.*, 45 Fed. Cl. 343, 371 (1999)
- Standard in most jurisdictions is preponderance of the evidence.
  - *Mid American Constr., LLC v. Univ. of Akron*, No. 18AP-846, 2019 WL 4667581, at \*13 (Ohio Ct. App. Sept. 24, 2019).





# Material Breach

## Consequences of Being Wrong

- **Owner:**
  - An owner's wrong decision to terminate the contract discharges both the contractor and its performance bond surety from all performance obligations and exposes the owner to liability to the contractor for lost profits and other damages due to wrongful breach and even for extracontractual damages.
  - An owner's wrong decision not to terminate, whether reached in trepidation of the consequences of a wrongful termination or in confusion over the occurrence of a material breach, can leave the owner with a project untimely completed or of unsatisfactory quality or both.

7 Bruner & O'Connor Construction Law § 18:3.



# Material Breach

## Consequences of Being Wrong Cont.

- **Contractor**
  - A contractor's wrong decision to abandon the work results in liability to the owner for completion costs and other foreseeable damages resulting from delayed project completion, and frequently also results in loss of client relationships, intangible damage to reputation, and exposure to possible bad faith extracontractual damages.



7 Bruner & O'Connor Construction Law § 18:3.



# Material Breach

## Takeaways

- Preserve evidence:
  - Email, text, documents, and photographs.
- RTFC – know what the contract says.
- Consult legal counsel before terminating based on an alleged material breach.



# Preconditions to Abandonment or Termination



## Overview

- Preconditions before exit: notice, cure, meetings, certifications, and demobilization
- Tracking contractual timelines (timing for each precondition per contract or statute)
- Confirming authority to issue/receive default or termination notices



# Preconditions to Abandonment or Termination



## Notice and Cure Mechanics

- Content of default notice
  - Breach Particulars
  - Cure Period
  - Directive to “Decision Maker”
- Delivery mechanics
  - Method
  - Address
  - Required recipients (owner, CM, surety, architect)



# Preconditions to Abandonment or Termination



## Notice and Cure Mechanics

- **Strictly** follow contractual notice requirements: who, where, how. Any misstep can deem a notice insufficient.
- Include specific facts, contract references, cure period, and consequences of non-cure
- Attach evidence: daily reports, photos, correspondence, schedules, pay apps



# Preconditions to Abandonment or Termination



## Cure Period

- Typically set forth in contract. If not, then reasonable time period under the circumstances
- Confirm whether multiple defaults require separate or single cure notices and periods
- Monitor cure efforts: objective metrics, manpower logs, daily reports, sign-in sheets
- Address partial cure or temporary fixes
- Reserve rights during cure and avoid actions that could be construed as waiver



# Preconditions to Abandonment or Termination



## Architect/Engineer Certification

- Determine if architect/engineer must certify default or recommend termination
- Obtain require written certifications or decisions before terminating
- Calendar any decision/appeal windows under the contract (initial decision maker provisions)
- Coordinate with the design team on site conditions and safety risks
- Preserve neutrality concerns to avoid improper influence on certifier



# Preconditions to Abandonment or Termination



## Surety and Bond Considerations

- Provide notice to performance bond surety exactly as required.
- Invite surety participation during cure
- Preserve bond options: takeover, tender, or financing of principal
- Avoid prejudicing surety rights (payments, releases, over-advances without consent)



# Preconditions to Abandonment or Termination



## Subcontracting Chains

- Flow-down obligations.
- Coordinated notices to subs and suppliers.
- Site demobilization planning.
- Inventory and equipment recovery



# Preconditions to Abandonment or Termination



## Site Protection and Work Preservation

- Secure site: safety, fencing, and security arrangement.
- Inventory and protect in-place work, stored materials, and equipment.
- Document condition: photos, videos, surveys, material counts.
- Preserve warranties, design data, models, and submittals/closeout documents.
- Plan for demobilization and mobilization: transition schedule and logistics



# Preconditions to Abandonment or Termination



## Avoid Waiver

- Continued performance can occur BUT it must be under protest.
- Consistently reserve rights in payment applications, change orders, and correspondence.
- Carefully review everything and always use buzz terms
  - “without waiver of any rights and remedies”
  - “subject to a reservation of rights”
  - “without prejudice to any rights and remedies”



# Preconditions to Abandonment or Termination



## Authority to Abandon or Terminate

- AIA forms typically list the reasons you can terminate.
- Confirm what events constitute an event of default under your agreement and whether they are grounds for termination.
- Typical triggering events
  - Government shutdown of work
  - Non-payment
  - Failure to supply enough skilled workers
  - Violation of applicable laws, ordinances or regulations
  - “otherwise is guilty of substantial breach”

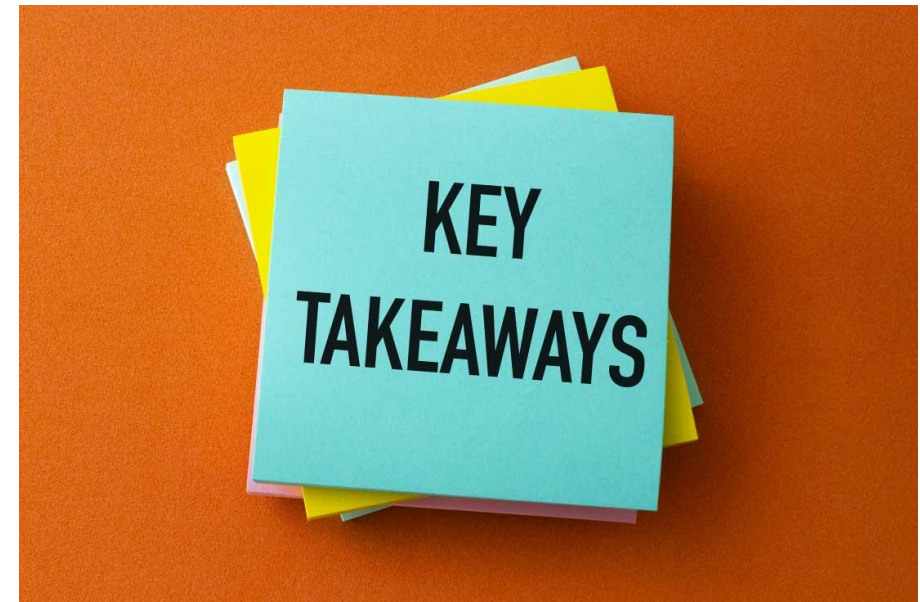


# Preconditions to Abandonment or Termination



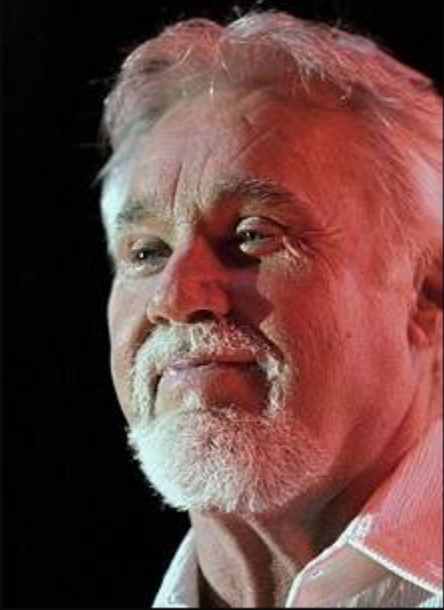
## Takeaways – Precondition Checklist

- Confirm breach by other party and no breach by you.
- Confirm all notice and certification requirements are satisfied and documented.
- Engage any initial decision maker or good-faith negotiation process promptly
- Ensure surety, subcontractors and all necessary parties are on notice of any default.
- Confirm site security/work preservation.
- Final risk review





# The Gambler: Finish the Job or Terminate? Contractor Decision-Making Under Pressure



You gotta know when to hold 'em, know when to  
fold 'em, know when to walk away, know when to  
run.

(Kenny Rogers)

izquotes.com



# Finish or Terminate?

## Private Healthcare Project

- \$185M hospital expansion (CM-at-Risk)
- 62% complete, 14 weeks behind baseline
- \$9.8M progress payments withheld
- 40+ unanswered RFIs, late redesigns
- Owner issues cure notices



# Finish or Terminate?

## Contractor Decision

What should the contractor do?

1. Continue and finish, pursue claims later
2. Issue suspension / owner breach notice
3. Terminate for owner default

Key tension: cash burn vs. abandonment risk



# Finish or Terminate?

## Public Infrastructure Project

- \$240M light rail extension
- 78% complete
- Behind original schedule, near revised
- Political pressure, media scrutiny
- Acceleration ordered without change orders



# Finish or Terminate?

## Contractor Decision

What is the least-risk option?

1. Absorb acceleration and finish
2. Reject acceleration, hold contract line
3. Escalate dispute / termination path

Key tension: reputation vs. contractual rights



# Finish or Terminate?

## Key Takeaways for Contractors

- Finishing is not always the safest option
- Abandonment risk drives behavior
- Documentation beats emotion
- Public and private jobs demand different risk lenses
- The record decides the outcome



THANK YOU