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Why Material Breaches of Contract are so Important on a Construction Project

INSIGHTSARTICLE

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When a project “goes south” and deteriorates, contractors sometimes threaten to stop work. But stopping work is a serious response that can lead to other compound problems such as schedule delays, lost profits and broken relationships. When a project starts to have issues, the legal right to stop work depends on whether the breach of contract is considered material or minor.

Any failure to perform is a breach of contract; but not all breaches are material. A material breach is one that is substantial. It permits the non-breaching party to suspend performance and ultimately terminate the contract. A minor breach, on the other hand, does not allow for suspension or termination of the work or payment. Regardless

of whether the breach is material or minor, the non-breaching party can still recover its losses. The difference is in the ability to suspend or terminate the contract after a breach, and only a material breach permits a remedy that drastic.

Whether a breach is material depends on the facts and specific circumstances. Usually, the larger the extent to which the party failed to perform, the more likely it is a material breach.

For example, if a painting subcontractor satisfactorily completes 95% of its work, but on one small wall the painter failed to prep and only applied one coat, which was non-compliant with the specifications in the contract, then there is a breach. This would be considered a minor breach of contract because the painter substantially performed the work. In this example, the contractor cannot immediately terminate the subcontractor but may still be able to recover losses incurred from the one non-compliant wall.

On the other hand, if the painting subcontractor was found to be non-compliant on 60% of the work performed on the walls, then this would be considered a material breach. In such circumstances, the contractor may be permitted to immediately terminate the contract and remove the subcontractor from the job.

It is important to note that some construction contracts specifically identify or define certain events as a material breach. Courts have held that the contract definitions are fully enforceable and may define the types of events that are material breaches.

Whenever a party has failed to perform, it is best to seek advice from legal counsel. These situations often evolve quickly, and early decisions may have lasting legal consequences on the dispute. The contract and facts surrounding the event will also have a significant impact on the matter. It is best to consult with your attorney early and often when problems are encountered during a construction project.

Saxton & Stump's construction law attorneys are available to discuss how to appropriately handle breach of contract claims, suspension of work disputes, payment bond claims and can provide advice on structuring contracts to minimize risk.

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