

A builder contracted in writing to construct a small greenhouse on a homeowner's property for \$20,000, payable upon completion. After the builder spent \$9,000 framing the greenhouse and an additional \$1,000 for materials not yet incorporated into the greenhouse, the homeowner wrongfully ordered the builder to stop work.

The builder then resold the unused materials that he had already purchased for the greenhouse to another contractor for \$1,000. At the time the homeowner stopped the work, it would have cost the builder an additional \$5,000 to complete the project. The partially built greenhouse increased the value of the homeowner's property by \$3,000.

In a suit by the builder against the homeowner, how much is the builder likely to recover?

- A. \$3,000, the increase in the value of the homeowner's property.
- B. \$10,000, the total cost expended by the builder at the time of the breach.
- C. \$14,000, the total cost expended by the builder (\$10,000) plus the builder's expected profit (\$5,000), minus the loss avoided by the resale of the unused materials (\$1,000).
- D. \$15,000, the contract price (\$20,000) minus the costs saved by the breach (\$5,000).

Explanation:

Compensatory damages for breach of construction contracts

	Before construction starts	During construction	After construction completed
Breach by builder (owner paid)	Owner entitled to cost of completion	Owner entitled to: cost of completion/correction if no undue economic waste OR value of promised construction <i>minus</i> nonconforming construction	N/A
Breach by owner (did not pay)	Builder entitled to: lost profits <i>plus</i> costs incurred OR contract price <i>minus</i> cost of completion		Builder entitled to contract price

Contract damages are meant to compensate the nonbreaching party by putting the party in the same position as if the contract had been performed. For example, if an **owner breaches** a construction contract **during construction**, the **builder can recover** any **costs incurred** up to that point **plus the profits** it would have earned. However, any costs the builder avoided (eg, by mitigation) will be subtracted from the total damages award.

Here, the builder had incurred \$10,000 in costs (\$9,000 completed frame + \$1,000 in additional materials) at the time of breach. The builder lost an expected profit of \$5,000 (\$20,000 contract price – \$10,000 costs – \$5,000 cost to complete the greenhouse). But he was able to mitigate some of those costs by selling the additional materials for \$1,000. Therefore, the builder is likely to recover \$14,000, the total cost he expended (\$10,000) plus his expected profit (\$5,000), minus the loss avoided by the resale of the unused materials (\$1,000) **(Choices B & D)**.

(Choice A) The builder is entitled to seek restitution for the value of the benefit conferred on the homeowner (ie, the \$3,000 increase in property value) *in lieu of* the standard measure of damages. But the builder is unlikely to seek restitution since he can recover \$14,000 under the contract instead.

Educational objective:

When an owner breaches a construction contract during construction, the builder is entitled to lost profits plus costs incurred. But any costs avoided (eg, by mitigation) will be subtracted from the total damages award.

References

Restatement (Second) of Contracts § 344 (Am. Law Inst. 1981) (purposes of remedies).

Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981) (measure of damages in general).

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