

A contractor agreed to build a power plant for a public utility. A concrete company agreed with the contractor to lay the foundation for \$200,000. The concrete company supplied goods and services worth \$150,000, for which the contractor made progress payments aggregating \$100,000 as required by the subcontract. The concrete company then breached by unjustifiably refusing to perform further. The contractor reasonably spent \$120,000 to have the work completed by another foundation layer. The concrete company sues the contractor for the reasonable value of benefits conferred, and the contractor counterclaims for breach of contract.

Which of the following should be the court's decision?

- A. The concrete company recovers \$50,000, the benefit conferred on the contractor for which the concrete company has not been paid.
- B. The concrete company recovers \$30,000, the benefit the concrete company conferred on the contractor minus the \$20,000 in damages incurred by the contractor.
- C. The contractor recovers \$20,000, the excess over the contract price that was paid by the contractor for the performance it had bargained to receive from the concrete company.
- D. Neither party recovers anything, because the concrete company committed a material, unexcused breach and the contractor received a \$50,000 benefit from the concrete company for which the concrete company has not been paid.

## Explanation:

### Compensatory damages for breach of construction contracts

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

Breach of a **construction contract** allows the nonbreaching party to seek compensatory damages that will place that party in the same position as if the contract had been performed. When the **breaching party** is the **builder** (as seen here) and the breach occurs **during construction**, the nonbreaching party can generally recover the **cost of completion** over the contract price.\* But the builder can only recover the value of unpaid-for work performed before the breach if the nonbreaching party was unjustly enriched by that work.

Here, the concrete company breached the construction contract by refusing to complete the foundation as agreed. At that time, the contractor had already paid the company \$100,000. The contractor then spent \$120,000 to have the work completed by another foundation layer—bringing the contractor's total payment to \$220,000. Since the contract price was \$200,000, the contractor should recover the \$20,000 cost of completion over the contract price **(Choice D)**.

\*When the cost of completion over the contract price is clearly excessive compared to the loss in value caused by the breach (ie, involves undue economic waste), recovery is instead based on the value of the promised construction minus the value of the nonconforming construction.

**(Choices A & B)** Although the concrete company provided the contractor \$50,000 worth of goods and services for which it has not been paid, the contractor was not unjustly enriched—ie, did not receive a benefit that was not rightfully earned and would be unfair to keep. The reason is that the contractor still had to pay \$20,000 in excess of the contract

price, so any payment to the concrete company would just make the contractor's damages worse.

**Educational objective:**

When a builder breaches a construction contract during construction, the nonbreaching party can recover the cost of completion over the contract price.

**References**

Restatement (Second) of Contracts § 348 (Am. Law Inst. 1981) (explaining that the measure of damages for defective construction is the cost of completion unless it is clearly disproportionate to the loss in value).

Copyright © 2002 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.