

A construction firm in a signed writing contracted with a doctor for an agreed price to build a medical office according to specifications provided by the doctor, and to start work on December 1. The construction firm agreed to provide all materials for the job in addition to all of the labor required.

The doctor, without legal excuse, repudiated the contract one week before the construction firm was to start work. Notwithstanding the doctor's repudiation, however, the construction firm subsequently purchased for \$50,000 materials that could only be used in building the doctor's medical office, and promptly notified the doctor that it intended to hold him to the contract.

If allowed to perform, the construction firm would have made a profit of \$30,000 on the job.

If the doctor refuses to retract his repudiation, and the construction firm sues him for damages, what is the maximum that the construction firm is entitled to recover?

- A. \$30,000, the construction firm's expectancy damages.
- B. \$50,000, on a restitutionary theory.
- C. \$50,000, the construction firm's reliance damages, plus \$30,000, its expectancy damages.
- D. Nothing, because the construction firm failed to mitigate its damages.

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

Breach of a **construction contract** (eg, by repudiation) entitles the nonbreaching party to compensatory damages that will place that party in the same position as performance under the contract. When the **breaching party** is the **owner** and the breach occurs **before or during construction**, the builder can recover its **lost profits** (ie, expectation/expectancy damages) *plus* any **reasonably incurred costs**. Costs incurred *after* a breach are not reasonable and therefore cannot be recovered.

Here, the doctor repudiated the construction contract before construction began. As a result, the construction firm is entitled to recover its lost profits of \$30,000 as expectancy damages. But the construction firm cannot recover the \$50,000 it spent on materials *after* the breach since those costs were unreasonable.

(Choice B) A party may recover restitutionary damages for the reasonable value of a benefit conferred on another if that benefit was not rightfully earned and would be unfair to keep. But here, the construction firm did *not* confer a benefit on the doctor by incurring \$50,000 in expenses post-breach.

(Choice C) When a party's expectation damages cannot be measured reliably, reliance damages can be awarded to place that party in the same position as if no contract had been entered. Reliance damages are awarded *in lieu of* expectation damages, so an award of reliance damages *plus* expectation damages is always inappropriate.

(Choice D) The construction firm's failure to mitigate its damages by incurring costs after the breach will not stop it from recovering lost profits on the construction contract.

Educational objective:

When the owner breaches a construction contract before or during construction, the builder can recover its lost profits (ie, expectation damages) plus any reasonably incurred costs. Post-breach costs are not recoverable.

References

Restatement (Second) of Contracts § 347 (Am. Law Inst. 1981) (explaining expectation damages).

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