

# LOVE IT OR LEAVE IT?

**When is a contractor entitled to walk off the job? This two-part article explores the many issues involved.**

**By Gerald I. Katz**

**O**n the question of *abandonment* of a construction project, by far the majority rule among contractors is to *never* abandon a job. However, this approach involves a number of risks:

- Contractors may merely get into further trouble. For example, the owner may fall further behind in making progress payments.

- Contractors who fail to walk when entitled may, at the end of the job, be accused of failing to limit their damages or of implicitly forgiving the other party's breach.

- By deciding beforehand never to abandon a project, contractors miss provoking early confrontations which can dispose of a particular problem so the remainder of the project proceeds smoothly.

A second traditional approach to the question of abandonment is a willingness (almost eagerness, often for reasons of principle) to risk abandoning the job when not really in a position to do so. There are also risks associated with this approach:

- Contractors' reputations among owners, bonding companies and general contractors will suffer if they are viewed as being prone to walk off a job.

- Contractors may be accused of



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## Part I

unjustifiably abandoning the work and exposed to lawsuits for the costs incurred to complete the job. In such cases, the contractor brought in to finish the job tends to "gold plate" it at the expense of the original contractor.

- By provoking a confrontation where none was perhaps necessary, abandonment-prone contractors are not in a good position to win that confrontation.

- The greatest risk is that an improper abandonment will be found a material breach of the contract, thus justifying termination of the contract by the other party.

To chart a safe course, contractors should obtain a careful analysis of the problem both from a business and legal perspective. In particular, don't walk off a job merely because an attorney concludes, often in the passion of the moment, that abandonment is legally justified. Decisions should always reflect sound business judgment, even if contrary to an attorney's advice.

No single factor determines the right to abandon. Every contract and project creates some of its own special rules and conditions, and always involves questions of judgment about which people may differ. However, some general questions do give helpful guidance:

Do you have a *factual* basis to support a claim that there has been a *material breach* of your contract?

Do you have a *legal* basis to support a claim that there has been a *material breach* of your contract?

Does your contract or your course of conduct reveal anything that can undermine the factual and legal basis of your claim? For example, your contract may limit your right to walk off the job, or require certain things before you abandon, such as give notice.

Do you have good evidence and proof?

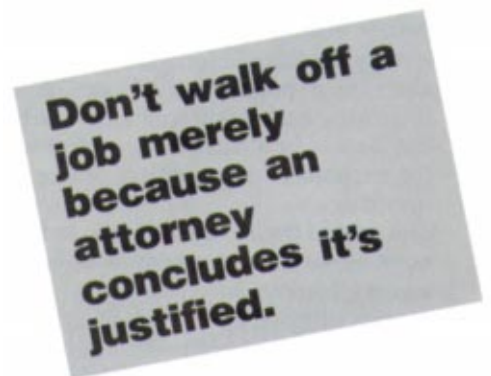
Have you given proper notice of all problems and kept good records?

If you abandon, what is your exposure to legal action?

An illustration of these issues comes from the case of the Vermont Marble Company, hired as a subcontractor to do the stonework facing on the Dirksen Senate Office Building in Washington.

About a month after the commencement date for the subcontractor's work had passed, the Vermont Marble's attorney advised the prime contractor there had been unreasonable delays in making the site ready for commencement of the stonework. The company stated it would perform the stonework if the delay was not the fault of the prime contractor; but if the delay was the responsibility of the prime contractor, Vermont Marble intended to rescind the contract.

The company then asked for documentation from the prime contractor as to the causes of and responsibility for delays. Additionally, Vermont Marble advised the prime contractor it intended to mitigate its damages by removing workers from the site whose services were not then required.



**Don't walk off a job merely because an attorney concludes it's justified.**

When the prime contractor failed to provide the documentation and assurances requested by Vermont Marble, the company filed suit seeking a judicial determination of its right to abandon the job. One week later, Ver-

mont Marble withdrew its forces from mitigate its damages and not abandonment of the project. However, a few weeks later Vermont Marble advised the prime contractor it considered the sub-

was entitled to abandon the project. At trial, the court concluded Ver-

ed its contract and, therefore, was unjustified in abandoning a project. The

argument that merely because a provision of the contract stated "time is of donment. Instead, the court concluded a negotiated paragraph dealing with delays and requiring Vermont Marble to proceed under protest overcame the company's argument that any delays gave the right to abandon the project.

The court ruled that in view of the paragraph providing for the sub to work under protest, even unreasonable

delays would not be material breaches of the subcontract. Instead, a material breach would arise only if the prime contractor refused to pay a properly presented claim. Since Vermont Marble had never even presented a claim, its rights had not been breached and, instead, it had breached its subcontract by an improper abandonment.

In summary, the factual basis for abandonment was present, but the legal and contractual basis was not adequate. Vermont Marble's insistence that contractually "time was of the essence" did not overcome the force of a special remedies clause that also appeared in the contract.

**To never abandon a job . . . involves a number of risks.**

Understanding the basic legal concept is critical in weighing the risk of abandonment. *Material breach* of the contract discharges the duty to perform, and is the fundamental legal basis for abandonment. Such a breach is defined legally as a failure to perform by one party, such that the other party does not receive substantially what it bargained for.

Of course, when a material breach occurs the contractor does not have to abandon. There is always the option to perform on the contract and sue for damages later. The choice, however, can be difficult because, among other things, you run the risks of (1) allowing the other side to gain an upper hand, or of (2) acting too soon.

For example, a painting subcontractor was once ordered to apply a third coat of paint where the specifications required only two. The company requested a written change order or assurances of reimbursement for extra

work. But the order to proceed was reiterated without the written assurance.

At that, the subcontractor walked off the job without notice before completing the second coat. Later, a court said it would have been more prudent for the subcontractor to stay on and complete the job according to the original contract documents, but nevertheless allowed the painting subcontractor to collect damages equal to unpaid work prior to abandonment. However, the court disallowed the painting subcontractor's claim for lost profit because the company abandoned rather than completed the original terms.

But in another court, the painting subcontractor might have risked total rejection of its claim because it failed to complete the original terms. Some judges might have felt the subcontractor owed the general contractor more, especially since the contractor was not in arrears.

An immaterial or unsubstantial breach does not justify abandonment. Two of the many factors that affect



*Contractors who never abandon a project when entitled may be accused of implicitly forgiving the other party. But others too eager to walk off the job may open themselves to lawsuits.*

materiality are *time of breach* and *willfulness*. Breaches that occur at the outset of a project, or that are willful, are more likely to be regarded as material.

Other acts that may justify abandonment include:

- Obstructive acts by engineer or architect.
- Failure to prevent third-party obstructions.
- Failure to resolve or remove third-party obstructions.
- Failure to assure proper performance in the future.
- Failure to issue changes.
- Failure to pay progress requisition.

Courts often regard progress payments as essential to a contractor's duty to perform. Therefore, delay in payment can be a substantial or material breach.

**If a pattern of delay has been established, contractors can correct previous acquiescence to untimeliness by giving notice that timely compliance is hereafter necessary.**

giving notice that timely compliance is hereafter necessary. Hence, it is possible sometimes, to postpone the decision to abandon and reserve the right for later use.

Such new notice is often given force by the courts if it is reasonable. Courts will not allow a party to ambush another party by off-and-on-again insistence of certain terms without notice.

Where an express contractual condition exists that makes timely periodic payment "of the essence," courts will be especially likely to regard delay in payment as material.

But even in the absence of a "time of the essence" clause, payment must be made within a *reasonable time* or it will cross the line of material breach.

If a pattern of delay has been established, contractors can correct previous acquiescence to untimeliness by