

# The Perilous Parachute

## Walking Off the "Project from Hell"

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Here's the dilemma: you've been working on an especially cantankerous construction project (or any services contract for that matter). You've been misled on the site conditions. You've had design changes galore, your critical path has been re-routed twenty times. You haven't been paid your estimates, or have been seriously shortchanged. And you're facing a protracted contract term with serious liquidated damages, an overhead that won't quit, and the looming possibility you may be terminated. Should you file a claim or a demand letter and keep working? Or do you walk off?

It doesn't take an Oliver Wendell Holmes to figure out that either route could have unwelcome circumstances. If the contractor cuts his losses, then abandons the work--and its claim that the owner was in breach is later proven wrong--the contractor and its surety may be liable to the owner for much, or all, of the damages arising from that breach.<sup>1</sup> On the other hand, a contractor that continues to perform despite owner actions that would otherwise justify its abandoning or terminating the contract, could be deemed to have "waived" its right to claim a "material" or "total" breach. That could foreclose several avenues of relief, including the right to walk if conditions on the project get even worse, as well as a major defense to a later termination by the owner or general contractor.<sup>2</sup>

A review of the court decisions on this topic will confirm it's as much a game of rolling dice as it sounds. Nonetheless, a contracting party's strategies when faced with one of these "projects from hell" should be given careful thought, because the move you make will unquestionably be pivotal in any forthcoming dispute procedures and/or litigation.

### Perils and Possibilities of Pulling Off: Balancing the Risks

The premise is simple: when a party breaches its contractual promise, the remedy will most likely turn on whether the breach is "material." If it is, the textbook solution is that "the aggrieved party may cancel the Contract."<sup>3</sup> That's the text book; in real life using a breach as an excuse to walk is far more problematic. In those situations, you must not only garner a finding of "materiality" but also a ruling that the breach has gone "to the root of the Contract" or to the "essence of the bargain."<sup>4</sup> And even that is not always the case. In short, predicting what a court will think is "material" or what "goes to the root" may be as vague a barometer as the standard the U.S. Supreme Court chose to determine pornography: "you'll know it when you see it". What *is* certain is that in virtually every

potential walk-off situation the Court has regarded these issues as extremely fact-intensive, inevitably depending upon the context and circumstances in which the breach has occurred. Meaning you may have to wait for months or years to learn if you were right. So, what are the pros and cons of walking?

*Pros:* Walking off could cut the losses, bring the owner to the bargaining table, as well as preserve a rebuttal to another loaded charge in the minefield: an owner's allegation that continued work on the project constitutes a waiver. *Compare Cities Service v. Helex, Inc.*<sup>5</sup> (contractor must terminate to preserve claim for total breach) with *Peter Kiewit Sons' Co. v. Summit Const. Co* (continued performance, not a waiver).<sup>6</sup>

Indefinite suspensions can constitute "total breach";<sup>7</sup> so can compelling a contractor to continue to dredge impenetrable material undepicted in the Owner's borings.<sup>8</sup> Requiring a contractor to perform work at an inadequately prepared and maintained site has been considered a material breach.<sup>9</sup> So has improper and untimely delivery of materials by a contractor to its steel erector leading to a collapse.<sup>10</sup> Even such performance-specific issues as directives requiring re-stocking and re-sorting previously segregated rip-rap rock<sup>11</sup> have qualified. On the other hand, projects where there have been systematic, endless changes, or a massive change, laced with project-wide implications, have been *rejected* as "material".<sup>12</sup> Even projects where there has been a chronic failure to pay have been rejected as justifiable walkoff excuses.<sup>13</sup>

Still, there is more likelihood that a Court will rule that a breach will justify a walk-off when the Owner or general contractor has failed to live up to what are universally perceived as "basic" contractual obligations, such as failing to issue time extensions<sup>14</sup> and, to a much greater degree, failing to pay promptly, or at all. The courts will support a claim of material breach even where the contractor has given a relatively sub-standard performance<sup>15</sup> if there has been deliberate or willful withholding of estimate payments by the Owner that may have influenced that performance.<sup>16</sup>

In any event, deliberate withholding of progress payments will expose an owner or general contractor to liability for lost profits and other damages due to wrongful breach, if the walkoff is excused.<sup>17</sup> In fact, in rare cases, it may even result in a jury award of punitive damages in favor of the contractor.<sup>18</sup>

*Cons:* Even though these types of "root cause" breaches can pave the way to a justified walk-off you can't always count on it. For example, most contracts have a provision requiring continued performance despite the existence of disputes or protested work, a provision that is frequently cited by courts to discourage walkoffs. Since a "contractor's" mistaken election to abandon the work raises a potential liability to the owner for completion costs and other foreseeable damages that could result from a delayed project completion, it certainly should give pause before walking off.<sup>19</sup> It may also expose the contractor to a litany of collateral consequences, such as loss of client relationships, damage to reputation, possible designation as an irresponsible contractor,<sup>20</sup> and lots of damages, liquidated or otherwise.

And a contractor that walks also could be compromising an otherwise tenable position before courts that view a self-imposed walk off to be premature,<sup>21</sup> wasteful<sup>22</sup> or “cheeky”, or all three, and invoke legal obstacles based on preliminary or premature breach.<sup>23</sup> Perhaps the most insidious and frustrating of these is the prospect of dealing with decisions that have found “trump cards” for the owner or general contractor by labelling a “walk off” in pure legal terms, as an anticipatory breach, or a “first breach”. When walkoffs are categorized in those terms, courts have endorsed them (not always correctly) as owner or general contractor excuses for their failure to issue timely change orders<sup>24</sup>, engage in expeditious dispute resolution,<sup>25</sup>, properly pay estimates or retainage, or promptly address and honor change order requests<sup>26</sup>.

Indeed, in some instances, where the owner or general contractor is in position to characterize his contractor’s performance as sub-standard, courts have held that that owner or general contractor’s *perception* that his contractor or subcontractor is facing financial difficulties justifies withholding progress payments, and can insulate itself from a claim of breach.<sup>27</sup>

### Tales of Turmoil

These kinds of dilemma have been played out in several “sets” of cases decided in a cross section of jurisdictions. Each pair of these cases arose from a single overall construction project, all of them with similarly contrasting results that turned on whether the Court believed the breach was so material as to make the walk-off justifiable, or whether the walk-off was less sensible than staying the course.

(1) “Big Dig Projects that ‘Caved’”: Two recent decisions in the Federal Court in Boston focus on the influence payment withholdings could have in determining a walk-off dispute. There, a fencing firm, Cyclone, vendor on two of the “Big Dig” projects, went belly-up, a condition each court considered amounted to a walk-off. Yet the two courts ended up with split--albeit somewhat inconsistent--rulings, one of which was particularly tough on an unpaid and financially cornered contractor.

In *U.S. Steel v. M. DeMatteo Const. Co.*,<sup>28</sup> the U.S. Court of Appeals upheld the trial court's ruling that US Steel was not entitled to a red cent because its debtor and assignor, Cyclone, had “abandoned” the project when it filed for bankruptcy and could not make a showing of “complete and strict performance”.<sup>29</sup> So the Court found that Cyclone (or its assignee, US Steel), was not even entitled to the credit that the contract expressly provided for termination situations, nor would it permit recovery on a *quantum meruit* basis. As a result, Cyclone received the worst punishment a contractor could be dealt: first, suffering bankruptcy and second, no credit or offset for the work it had actually performed.

However, the Judge in *USS Corp. v. Modern Continental Construction Co.*-- involving the same subcontractor and the same project-- ruled that he *would* enforce the credit provision giving US Steel opportunity to earn reimbursement for the work Cyclone had performed and contractor.<sup>30</sup> In *Modern Continental*, the Court spotlighted the fact that Modern, not Cyclone, may very well have committed the material breach by not

promptly paying Cyclone, a circumstance that the Court conceded could constitute "an uncured, material breach...excus[ing] the other party from further performance..."

(2) From P&G Paper Mill to P&G 'Papier Maché': Another pair of decisions that arose out of a single project, this one a "design-build" project in Missouri, underscore the importance of setting a strategy for recovery on that "project from hell". There, the contractor that *stayed on the project* recovered virtually all amounts he sought. The contractor that *walked* lost completely on one of his claims and could recover only a partial amount on the other.

In *O'Brien & Gere Technical Services Co. v. FruCon/Fluor Daniel, J.V.*<sup>31</sup> a joint venture, Fru-Con/Fluor, the program manager for the owner, hired O'Brien (OBG) to design and build six buildings for Procter & Gamble's paper manufacturing complex in Cape Girardeau, Missouri for a lump sum of \$15.3 million. After six months into the job, and faced with a landslide of changes that Fru Con and the Owner had directed, OBG demanded written change orders before it would proceed. The Joint Venture reminded them of the "continuing work" provisions of the contract and threatened default. The threat kept OBG on board. Still, the agreed payments were not made and the milestone dates were never achieved. Ultimately, the JV withheld progress payments and then terminated OBG.

O'Brien, which had already been paid \$6 million more than the original \$15.3 million contract, sued on a *quantum meruit* basis for an additional \$5.5 million. The trial court ruled that the parties had "abandoned" the Contract even though OBG had never physically walked off, because the abundance of changes had "transformed...the [original] nature of the task..." The "most crucial evidence" of abandonment, it said, was the "breakdown" of the change process. The Court summed up this frequently encountered dilemma:

[A]pparently because it had already committed resources to the project and needed whatever cash it could get, OBG remained on the job. Likewise, apparently because it faced looming completion deadlines, the Joint Venture kept on the job a subcontractor it believed had underbid the contract and inflated CORs. In other words, the parties altogether abandoned the subcontract's flawed process for pricing and paying changes, resorting to whatever expedient they could conceive to see the project through.<sup>32</sup>

The Court ruled in O'Brien's favor on a *quantum meruit* basis even though the Court found that O'Brien had overstated changed work by as much as \$1.6 million.

Query what would have happened if it had walked off. Well, the answer came in another lawsuit on the same project, this one between a subcontractor, Corrigan Bros, and Fru-Con. Corrigan quit working, after these same massive design changes had also impacted their work on both its contracts for pipe fabrication at the Papermaking facility with a relatively small portion of the work remaining, and at a second sister "Balance" facility at the site, where Corrigan was not able to start the work until the completion date had come and gone on the original contract.<sup>33</sup> The Court ruled that Corrigan, forfeited his claim by walking, even though Corrigan had been underpaid by \$350,000 on a Contract of about \$5 Million. The Court of Appeals upheld both trial court decisions. It said:

We agree with the trial court in finding that Corrigan, not the Joint Venture, breached the Papermaking contract when it walked off the job because the Joint Venture would not accept Corrigan's proposed rates.<sup>34</sup>

But on the "Balance" facility this extensive delay led the court to believe there had been an abandonment allowing Corrigan to recover *quantum meruit* damages. The walkoff on this part of the project occurred with only a small part of the work performed, while on the Papermaking facility contract, Corrigan walked with ten percent of the work remaining, leading the trial court to reject recovery despite the same massive changes that had plagued Corrigan on the Balance facility and O'Brien on *its* project with Fru-Con. See *Sunhouse Construction Co. v. Amwest Surety Ins. Co.*<sup>35</sup> (where court reached similar outcome after considering small amount of work remaining on this "design-build" project).

Even though these type of circumstances could pave the way to a justified walk-off you can't always count on it. Most contracts have a provision requiring continued performance despite the existence of disputes or protested work, a provision that is upheld or injected by the Courts in virtually every case in which this issue is raised. Since a "contractor's" mistaken election to abandon the work raises potential liability for completion costs and other foreseeable damages that could result from a delayed project completion, it certainly should give pause before walking off.<sup>36</sup> It may also expose the contractor to a litany of collateral consequences, such as loss of client relationships, damage to reputation, possible designation as an irresponsible contractor.<sup>37</sup>

(3) Helium Extraction Program that Fizzled: "Walking off" does not always backfire. There are times, sometimes critical times, when it can work to the contractor's advantage.<sup>38</sup> Moreover, despite the ominous ramifications of "walking off", *not* walking could definitely haunt a contractor later: by continuing performance in the face of a material breach, your adversary--and the Court--might declare that you waived your right to claim total breach or rescission, both of which give you important restitutional rights as opposed to more limiting contractual remedies.<sup>39</sup> Also the waiver (i.e., not walking) may preclude you from defenses that you might have posed to an owner's eventual determination to terminate performance.<sup>40</sup> Besides, most government contracts contain a provision requiring contractor to proceed regardless of a pending dispute and some courts have held that these provisions constitute "an advance waiver of any right to rescind...and make a breach of contract action the [contractor's] exclusive remedy." <sup>41</sup>

Our third pair of cases dramatically illustrate this proposition. The cases arise out of the Federal Government's ill-fated helium conservation project in the 'sixties and 'seventies involving a number of big-cap contractors including Northern Helix and Cities Service <sup>42</sup> The "Design-Build-operate" program called for four of these contractors to construct helium extraction facilities and then to produce helium, a by-product of natural gas for annual payments over a 20-plus year term. When the Department attempted to terminate the program, legal skirmishes ensued, and the contractors asked the court to enjoin the termination, which it did in March, 1971. However, the contractor/producers continued to produce until after EPA compliance was attained, after which the Secretary shut the system down.

The "skirmishes" lasted for a long time themselves and resulted in two contrasting outcomes. In 1970 Northern Helix one of the four companies chosen to perform this work went to trial and, after three trials and ten years of litigation recovered \$33 million from the

Department of Interior. The Court of Claims shot down the Government's contention that Northern had waived its claim by continuing performance, concluding that its decision to go on was the result of a "reasonably commercial judgment" in view of their commitment of resources to this project, their inability to mitigate the damages and the objectives of the program, which was to preserve what had been considered a depleting national resource.

Shortly thereafter, Cities Service sued on several counts, including "total breach" for which it claimed entitlement to the revenue for the entire 22-year period of its contract. Why not? After all, the year before Northern Helex, in its initial trial, had overcome a Government motion to knock out its case because it had continued performance after it learned that it was not being paid leading to an initial \$94 million judgment<sup>43</sup> (an award that was cut to \$33 million<sup>44</sup>, because the Trial Judge had deviated from the measurement criteria the Court had established in 1975).<sup>45</sup> However, in *Cities Service*, the same Court (with a somewhat different composition of Judges) threw out the claim for "total breach" because, it found that the plaintiff had "elected" to continue performance, thereby keeping the contract "alive", giving the Government a chance to formally terminate it and to pay the more limited amounts contractually required for termination.<sup>46</sup> The difference between this case and *Northern Helex* was that in this case there was "much more than mere continuance of performance". Cities Service had actually initiated a suit during the course of performance to compel the Government to continue the program, which they did successfully, keeping the program alive for several years. The Court stated that Cities "[could not] blink away the fact that...[they] deliberately sought and enjoyed the advantages of a legally-enforced continuation of the contracts for over a year".<sup>47</sup>

This doctrine of "estoppel by continued performance" has remained firm in Federal contract disputes where the U.S. Court of Claims is involved, but it has not been consistently adhered to by other courts. Continued performance has been held to present no barrier to a recovery for misrepresentation,<sup>48</sup> for "partial breach"<sup>49</sup> or for recovery of *quantum meruit* so long as there is no claim for rescission after claimant has partially performed work.<sup>50</sup>

Moreover, even under this litany of cases before the United States Court of Claims, protecting the opportunity to make a "total breach" claim clearly remains a possible avenue of relief, provided the contractor has furnished *explicit reservations* of material breach, explanations for its continued performance, prompt suit, and a lack of prejudice to the Government resulting from the continued performance. See *Cities Service, OBrien*.<sup>51</sup> And it will not undermine a "total breach" claim if there are, as in *Northern Helex*, compelling economic, social or national security reasons to continue the performance.<sup>52</sup>

### Epilogue

Surely, continuing performance is arguably the most secure alternative. Adoption of this more conservative approach by a contractor in response to an owner or general contractor's imposition of substantial changes or persistent withholding of payment can be predicted to elicit a more understanding response from whichever the adjudicating panel may be.

That's what a few residential home buyers in Georgia learned in another recent decision in Georgia, *Young v. Park, Builders*.<sup>53</sup> In that case home purchasers were able to keep alive a claim for warranty damages and for rescission against their builder because they went through with the closing even after they learned of an encroachment that threatened to

materially devalue their property's marketability, information that sellers knew but didn't disclose. The seller said that purchasers had waived their causes by going through with the closing, Purchasers countered that they wanted to preserve their loan commitment and that is why they stuck it out. While the trial court ruled purchasers had waived their claim by going through with the closing, the Court of Appeals reversed. That Court held that the prospect of encroachment was real and as long as the purchasers *believed* they had to close to protect their loan, as victims, continuing with the closing was reasonable, regardless of whether, in fact, their loan would have been at risk or not, an approach that compares closely to the Court of Claims' adoption of the "reasonable commercial judgment" test used in the *Northern Helix* opinion(citing Uniform Commercial Code §§1-207; 2-703; 2-704).

While continuing performance *could* lead to a defense of waiver, the waiver is of a remedy, not a cause of action, whereas "walking off" could be construed as a unilateral abandonment in itself, i.e., a fundamental breach or "first breach" that could nullify the contractor's claim against the owner for either total *or* partial breach.

"Walking off" can have implications even in "role-reversal" situations, situations where it is the owner or a higher tier contractor, such as the general contractor, that does the "walking". In another recent case, *Moreland Corp. v. United States*<sup>54</sup>, the contractor, a design-builder on a Design-Build-Own-and-Leaseback arrangement recovered \$17 million from the Veterans' Administration Department after the VA effectively did the "walking" when it "cancelled" its 15-year leaseback from Moreland of the Las Vegas hospital facility halfway through the term. The Court determined that the VA could not terminate for default because that would require proof equivalent to a constructive eviction. Since the Court found that the structural deficiencies asserted- -many not until five years after completion of the work- -did not impair building integrity or continued occupancy, it held there was no constructive eviction.<sup>55</sup>

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<sup>1</sup> *e.g., Drew Brown, Ltd. v. Joseph Rugo, Inc.*, 436 F.2d 632 (1<sup>st</sup> Cir. 1971).

<sup>2</sup> *Zulla Steel, Inc. v. A & M Gregos, Inc.*, 415 A.2d 1183 (N.J. App. Div. 1980).

<sup>3</sup> Calamari & Perillo, Contracts §11-18(a).

<sup>4</sup> *Siegfried Const., Inc. v. Gulf Ins. Co.*, 203 F.3d 822 (4th Cir. 2000) cert. denied 530 US 1275 (2000).

<sup>5</sup> 543 F.2d 1306 (Ct. Cl. 1976).

<sup>6</sup> 422 F.2d 242 (8th Cir. 1969).

<sup>7</sup> *Guerini Stone Co. v. P.J. Carlin Const. Co.*, 248 U.S. 334 (1919).

<sup>8</sup> *U.S. v. Atlantic Dredging Co.*, 253 U.S. 1 (1920).

<sup>9</sup> *J.A. Jones Construction Co. v. Lehrer McGovern Bovis Inc.*, 891 F.3d 1009 (D. Nev. 2004).

<sup>10</sup> *Miller v. Mills Construction*, 352 F.3d 1166 (8th Cir. 2003).

<sup>11</sup> *Becho Inc. v. U.S.*, 47 Fed. Cl. 595 (2000).

<sup>12</sup> *e.g., PCL v. U.S.*, 47 Fed. Cl. 345 (2000).

- <sup>13</sup> *e.g.*, *U.S. Steel v. M. DeMatteo Const. Co.*, 315 F.3d 43 (1st Cir. 2002).
- <sup>14</sup> *M.A. Butters & Assoc. v. City of Lancaster*, 2005 WL 1926546 (Cal App. 2 Dist. 2005).
- <sup>15</sup> *U.S. f/b/o Taylor & Polk Const. Co., Inc. v. Mill Valley Const., Inc.*, 29 F.3d 154 (4th Cir. 1994).
- <sup>16</sup> *U.S. f/b/o Evergreen Pipeline Const. Co., Inc. v. Merritt Meridian Const. Corp.*, 95 F.3d 153, 167 (2d Cir. 1996); *U.S. f/b/o Taylor & Polk Const., Inc. v. Mill Valley Const., Inc.* 29 F.3d 154 (4th Cir. 1994).
- <sup>17</sup> *e.g. U.S. ex. rel. Virginia Beach Mechanical Services, Inc. v. SAMCO Const. Co.* 39 F. Supp.2d 661 (E.D.V.A. 1999), *Carolina Cas. Co. v. Ragan Mechanical Contractors, Inc.*, 262 GA. App. 6 (2003) cert. denied (2003).
- <sup>18</sup> *Cuddy Mountain Concrete, Inc. v. Citadel Const., Inc.* 121 Idaho 220 (Ct. App. 1992).
- <sup>19</sup> *Cates Construction, Inc. v. Talbot Partners* 980 P.2d 407 (Cal. App. 1999); *Fru-con/Fluor Daniel v. Corrigan Bros., Inc.* 154 S.W. 3d 330 (Mo Ct. App. 2004).
- <sup>20</sup> *Miami-Dade County v. Church & Tower, Inc* , 715 So. 2d 1084 (Fla. 3d DCA 1998).
- <sup>21</sup> *Metric Systems Corp. v. McDonnell Douglas Corp.*, 850 F.Supp. 1568, 1583-86 (N.D.Fla.1994).
- <sup>22</sup> *Kennedy v. U.S.*, 164 Ct.Cl. 507 (Ct. Cl. 1964)(contractor that refused to proceed until work secured, deemed an anticipatory breach).
- <sup>23</sup> *e.g.*, *U.S. Steel v. M. DeMatteo Const. Co.*, 315 F.3d 43 (1st Cir. 2002)(walk off, declared when subcontractor filed for bankruptcy, constituted anticipatory repudiation that could not be cured by proof of chronically unpaid progress estimates); *Corrigan Bros., Inc.*, 154 S.W.3d at 330; *but c.f. O'Brien & Gere Technical Services, Inc. v. Fru-con/Fluor Daniel, JV*, 380 F.3d 447 (8th Cir. 2004)(despite late delivery and significant overcharging, it was construction manager, not contractor that remained on site, that caused abandonment by ordering abundance of changes).
- <sup>24</sup> *Marshall Const. Ltd. v. Coastal Sheet Metal*, 569 So.2d 845, 848 (Fla. 1st DCA 1990).
- <sup>25</sup> *Stoekert v. U.S.*, 391 F.2d 639,645 (Ct. Cl. 1968).
- <sup>26</sup> *Metric Systems Corp.*, 850 F.Supp. at 1583-86; *Oak Ridge Const. Co. v. Tolley*, 504 A.2d 1343 (Pa. Super. Ct. 1985).
- <sup>27</sup> *T. Ferguson Const., Inc. v. Sealaska Corp.* 820 P.2d 1058 (Alaska 1991); *US v. Buffalo Coal Mining Co.*, 343 F.2d 561 (9th Cir. 1965).
- <sup>28</sup> *U.S. Steel v. M. DeMatteo Const. Co.*, 315 F.3d 43 (1st Cir. 2002).
- <sup>29</sup> *Id.* at 47-48, 54.
- <sup>30</sup> *USS Corp. v. Modern Continental Construction Co.*, 2002 WL 1949223 (D. Mass. August 5, 2002)(citing *Andre v. Maguire*, 305 Mass. 515 (1940)).
- <sup>31</sup> *O'Brien & Gere v. FruCon/Fluor Daniel, J.V*, 380 F.3d 447 (8th Cir. 2004).
- <sup>32</sup> *Id.* at 456.
- <sup>33</sup> *Sunhouse Construction Co. v. Amwest Surety Ins. Co.*, 841 So. 2d 496 (Fla. 3d DCA 2003)( aggrieved electrical subcontractor's successful recovery of \$250,000 at trial court, reversed because he walked off with less than ten percent of the project remaining, that the appellate court described as an abandonment).
- <sup>34</sup> *Id.* at 336

<sup>35</sup> *Sunhouse Const. Co. v. Amwest Surety Ins. Co.*, 841 So.2d 496 (Fla. 3d DCA 2003).

<sup>36</sup> *Cates Construction, Inc. v. Talbot Partners* 980 P.2d 407 (Cal. App. 1999); *Fru-con/Fluor Daniel v. Corrigan Bros., Inc.* 154 S.W. 3d 330 (Mo Ct App Ed 2004).

<sup>37</sup> *Miami-Dade County v. Church & Tower, Inc.* 715 So.2d 1084 (Fla. 3d DCA 1998)

<sup>38</sup> *U.S. v. Atlantic Dredging Co.*, 253 U.S. 1, 40 S.Ct. 423 (1920)(contractor that walked with 350,000 c.y. of dredging remaining, could recover because government knew from unpublished tests that equipment and plant it approved for dredging incapable of dredging materials); *Miller v. Mills Construction Inc.*, 352 F.3d 1166 (8th cir. 2003)(subcontractor that walked entitled to recover from contractor for consequences of inadequate design) *U.S. f/u/o N. Maltese & Sons, Inc. v. Juno Const. Corp.*, 759 F.2d 253 (2d Cir.1985)(structural steel subcontractor that walked off when denied payments by prime contractor that had wrongfully concluded that sub's steel was defective, entitled to recover full subcontract price); *Citizens Nat'l Bank of Orlando v. Vitt*, 367 F.2d 541 (5th Cir. 1966); *Tennessee Asphalt Co.* 631SW 2d at 443(failure to make progress payments a justified basis for walking off).

<sup>39</sup> e.g., *Cities Service Helex, Inc. v. U.S.*, 543 F.2d 1306 (Ct.Cl. 1976); *Barron Bancshares, Inc. v. U.S.*, 366 F.3d 1360 (Fed.Cir. 2004)(Government waived claim for material misrepresentations made by thrift institutions).

<sup>40</sup> *Precision Pine & Timber Co.v. U.S.*, 62 Fed. Cl. 635 (2004) (by continuing harvesting timber on contracts temporarily suspended when government failed to meet Endangered Species Act requirements, contractor waived defense to the owner's subsequent termination; *Becho v. U.S.*, 47 Fed. Cl. 595 (2000) (contractor waived one prong of cardinal change claim, by performing disputed work).

<sup>41</sup> *B.C. Richter Contracting Co. v. Continental Cas. Co.*, 41 Cal. Rpr. 98 (Calif. D.C.A. 1964)(one subcontractor on project not entitled to claim quantum meruit damages, because its subvcontract had "continuing performance" clause that amounted to "advance waiver"; second subcontract did not contain clause, but subcontractor waived claim anyway by electing to continue performance); *but see Barton Properties, Inc. v. Superior Gunitite Co.*, 2006 WL 541025 (Cal.App. 2 Dist. March 7, 2006) (where general contractor materially breaches Contract so as to delay sub, sub is not foreclosed from rescinding even with "continuing performance Clause.")

<sup>42</sup> *Cities Service Helex, Inc.*, 543 F.2d 1306.

<sup>43</sup> *Northern Helex Co. v. U. S.*, 455 F.2d 546, 550 (Ct. Cl. 1972)(Northern Helex initially recovered \$94 million before the Trial Court Commissioner, 20 Cont. Cas. Fed. 89,085 (1974)).

<sup>44</sup> *Northern Helex Co. v. U.S.*, 634 F.2d 557 (Ct. Cl. 1980)).

<sup>45</sup> *Northern Helex Co. v. U.S.*, 524 F.2d 707 (Ct. Cl. 1975) *cert. denied* 429 U.S. 866 (1976).

<sup>46</sup> *Cities Service Helex*, 543 F.2d at 1319.

<sup>47</sup> *Id.* at 1318

<sup>48</sup> *U.S. v. Atlantic Dredging Co.*, 253 U.S. 1, 40 S.Ct. 423 (1920).

<sup>49</sup> *Blair v. U.S.*, 147 F.2d 840 (8th cir. 1941).

<sup>50</sup> *Wunderlich Contracting Co. v. U.S. ex. rel. Reischel & Cottrell*, 240 F.2d 201 (10th Cir.1957); *cf.*, *B.C. Richter Contracting Co. v. Continental Casualty Co.*, 230 Cal. App. 2d 491 (3d DCA 1964)(contractor could recover reasonable value of extra work, not just unpaid remainder of contract).

<sup>51</sup> *Cities Service*, 543 F.2d at 1316, *Northern Helex*, 455 F. 2d at 552 ("guiding principle" is whether contractor exercised "reasonable commercial judgment" in continuing to manufacture and deliver); *See Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242 (8th Cir. 1969), *O'Brien & Gere v. FruCon/Fluor Daniel, J.V.*, 380 F.3d 447, 456 (8th Cir. 2004)(Court rejected "continued performance"

defense, in light of the “reality” that parties had been forced to effectively “abandon” the contract structure maintaining a working relationship “outside the parameters of the contract, so much so that they could not even agree to disagree.”).

<sup>52</sup> *Northern Helix Co.*, 455 F.2d at 551 (contractor justified to claim total breach after continuing performance, since, unlike other helium producers in program, it had not been called upon to develop marketing or storage facilities for the gas);

<sup>53</sup> 626 S.E.2d 240 (Ga.Ct.App., 2006)

<sup>54</sup> *Moreland Corp. v. U.S.*, 76 Fed.Cl. 268, 284 (2007).

<sup>55</sup> Interestingly, even if they had *not* found a legal basis for eviction, the *Moreland* Court observed, the contractor would have prevailed because, in the Court’s eyes, the VA had breached the covenant of good faith and fair dealing when the VA contracting officer had been proven to have previously refused to issue a change order simply in order to get leverage on other claims. *Id.* at 290-93.