CONSTRUCTION BUSINESS OWNER

When Can a Contractor Stop Work?

Friday, November 7, 2025 | Chad V. Theriot

Walking off the job in an economic down cycle

Terminations always come with high stakes that could make or break a firm's future. One case that stands out to me is Kiewit-Turner v. Department of Veterans Affairs (Civilian Board of Contract Appeals [CBCA] 3450) from December 2014, where I helped secure a win for my client, Kiewit-Turner. This joint venture contractor was allowed to stop work on an approximately $2 billion Veterans Affairs hospital project due to the government's material breach — specifically, underfunding massive design changes that ballooned costs and timelines. The decision not only halted performance but also opened the door for the recovery of equitable adjustments, underscoring how critical it is for contractors to recognize when an owner's actions cross the line from routine friction to fundamental disruption.

The case challenged the Federal Acquisition Regulation mandate that a contractor must always "continue work" under protest, even amid legitimate disputes. While this was a federal government contract case, the principles — rooted in common law doctrines of contract performance and remedies — apply broadly to all commercial construction contracts, from private developments to public-private partnerships. In an industry where projects often span years and involve intricate supply chains, these rules govern

whether a contractor can pause without risking default termination, liquidated damages or reputational harm.

Landmark Decision: Affirming That a Material Breach Must Go to a Contract's 'Essence'

The Kiewit-Turner case affirmed that when a party — here, an owner — commits a breach that goes to the contract's essence (such as chronic funding shortfalls for scope-altering changes), it may excuse the nonbreaching contractor from further performance. This was a landmark decision that revived a perennial discussion among contractors on complex, large-scale projects: At what point can a contractor contractually and legally stop working without inviting catastrophe? The ruling emphasized that not every delay or dispute qualifies; the breach must deprive the other party of the contract's core benefits, making cure impracticable or futile.

Fast-forward a decade from the Kiewit-Turner decision. Has the legal landscape evolved? The short answer is yes, but incrementally, with courts and boards applying these doctrines more rigorously in light of supply chain volatility, labor shortages and economic pressures. Recent rulings continue to cite Kiewit-Turner as a touchstone, but they've expanded its application to emerging issues such as payment withholding and safety-driven work stoppages.

Material Breach Doctrine: Applied With Caution

A review of cases citing Kiewit-Turner reveals that courts and boards still uphold the material breach doctrine, but they apply it cautiously, weighing factors such as the breach's impact on project timelines, costs and overall feasibility. This scrutiny is especially relevant for construction executives navigating fixed-price contracts where change orders can erode margins.

For instance, in Adventus Techs. v. Dept. of Agriculture (CBCA 7283, 2023), the CBCA found that the government's failure to provide essential janitorial services — despite the

contractor's labor challenges — constituted a material breach justifying the contractor's default termination. The board explicitly noted that this lapse went "to the essence of the contract," echoing Kiewit-Turner's standard by focusing on how the omission undermined the project's core operational integrity. This case echoes the Kiewit-Turner breach standard, often upholding the owner's decision to terminate when the contractor fails to deliver the "essence" of its obligations. But the doctrine cuts both ways.

A more recent private-sector example illustrates Kiewit-Turner's growing relevance beyond federal work. In the September Utah appellate decision of Globe Contracting LLC v. Hour et al., 2025 Utah Ct. App. 98, the court ruled that an owner's unjustified withholding of three progress payments — totaling more than $1.2 million — amounted to a material breach, entitling the contractor to suspend work and seek damages. The ruling clarified statutory limits on payment withholding under Utah's prompt payment laws, reinforcing that such tactics can trigger contractor remedies if they jeopardize cash flow and project continuity. For construction executives, this serves as a stark reminder that payment games can backfire, exposing owners to counterclaims and interest penalties.

Duty of Good Faith & Fair Dealing: Cooperation Without Malice

The implied duty of good faith and fair dealing was a cornerstone in Kiewit-Turner, requiring parties not to impede the other's performance through unreasonable actions. Crucially, this doctrine doesn't demand proof of bad faith — mere hindrance suffices. Recent cases build on this, applying it to safety protocols and geopolitical disruptions. In Griz One Firefighting v. Dept. of Agriculture (CBCA 6358, 6567, 2022), the contractor alleged a breach from government-mandated suspensions during accident investigations at wildfire sites. The CBCA rejected the claim, finding the agency's actions reasonable for ensuring safety and professionalism — a balanced application that protects owners from frivolous challenges while holding them accountable for overreach.

Likewise, in First Kuwaiti Trading v. Dept. of State (CBCA 3506, 6167, 2018), the CBCA denied the government's summary judgment motion on delay claims stemming from excessive "duck and cover" alarms during embassy construction in Baghdad. Disputed facts about whether these security measures unreasonably hindered progress led the board to invoke the Metcalf Construction Co. v. United States (2014) and related Kiewit-Turner good faith standard, rejecting the sovereign acts defense.

Like the decision in Kiewit-Turner, which highlighted how external factors, such as funding shortfalls and design deficiencies, can lead to a material breach of a construction contract, ultimately justifying the contractor's right to stop work, a recent decision from the United States Supreme Court underscored that cooperation serves as the baseline for government contracts and that a finding of breach under the implied duty of good faith and fair dealing does not require malice or conscious wrongdoing. In other words, mere bad faith, including arbitrary or unreasonable actions, suffices. In Kousisis v. United States, 605 U.S. ____ (2025) (decided May 22, 2025), a painting contractor was convicted of wire fraud after making material misrepresentations to secure a state contract by falsely certifying the use of a disadvantaged business supplier, even though the work was performed competently and without economic harm to the government. While a criminal matter focused on the bidding phase, it reinforces how the covenant of good faith and fair dealing underline both solicitation and performance.

While no case after 10 years directly replicates Kiewit-Turner's scenario of an owner issuing multiple changes and refusing payment under a purported fixed-price regime, the principle endures and should still serve as guidance. Put simply, material breaches discharge duties if they deprive expected benefits.

This Issue Is More Critical Now Amid Economic Headwinds

The stakes have never been higher, as construction grapples with a perfect storm of macroeconomic pressures. The material breach and good faith doctrines aren't abstract legal niceties — they're survival tools for executives steering firms through uncertainty.

Dodge Construction Network reported that U.S. total construction starts declined 10% in July, with nonresidential sectors such as manufacturing and institutional buildings hit hardest. Meanwhile, the American Institute of Architects (AIA)/Deltek Architecture Billings Index scored a dismal 47.2 in August. Further, the AIA's July Consensus Construction Forecast projects just a 1.7% uptick in nonresidential building spending this year, with manufacturing output declining amid trade tensions. Compounding this are tariffs on imported steel and aluminum, now projected to drive material price hikes of 10% to 12% toward the end of the year, per industry analysts, alongside supply chain snarls from geopolitical flashpoints.

High interest rates — hovering near 5% for commercial loans — have delayed project financing, while potential stagflation risks from persistent inflation could squeeze owner budgets further. Cash-strapped developers and agencies may resort to delaying payments, disputing change orders or imposing unilateral "safety" halts, forcing contractors into Hobson's choices: absorb losses or risk breach claims.

Owners, too, face peril. Terminating a contractor invites the "capital punishment" of construction and brings with it protracted litigation, as the fallout — damaged reputation, eroded bonding capacity and mandatory disclosures of defaults on future bids — can cripple a firm's pipeline of logged work.

Practical Strategies for Executives: Mitigating Risks in Volatile Times

To navigate this, construction leaders must embed proactive safeguards into not only their contracts but also their operations. Beyond the basics — meticulous daily logs, certified mail for notices of dispute — consider these executive-level tactics:

- *Contract drafting upgrades* — Incorporate escalation clauses for material cost surges tied to tariffs and define “essence” breaches with objective metrics (e.g., payment delays exceeding 30 days trigger suspension rights). Reference Kiewit-Turner precedents in the boilerplate to deter aggressive owner tactics.
- *Early intervention protocols* — Form cross-functional teams (legal, finance, operations) to monitor red flags such as payment lags or excessive requests for information. Seek formal assurances via certified letters and engage neutral mediators before disputes harden — reducing escalation costs by up to 40%, per industry benchmarks.
- *Bonding and insurance alignment* — Review surety policies for coverage of suspension-related losses and negotiate endorsements for economic force majeure events such as interest rate spikes.

My advice? Document everything, seek assurances early and consult counsel before walking off a job or terminating a contractor. In this volatile market — where a single breach can cascade into multimillion-dollar judgments — understanding these risks isn’t optional; it’s the difference between resilience and ruin. By leveraging Kiewit-Turner’s enduring lessons alongside fresh precedents, construction executives can fortify their positions, turning potential pitfalls into competitive edges.

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