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===== Start of Answer 3 (1039 words) =====

1. The issue is whether Dirt is likely to prevail in its suit against Builder for terminating the contract.

A. Anticipatory Repudiation

A party has a right to terminate a contract when there has been a material breach of the contract and the non-breaching party has given the breaching party notice of the breach and a reasonable opportunity to cure. In order for anticipatory repudiation of a contract to be proper, the party seeking anticipatory repudiation must first seek adequate assurances from the party owing performance and must give that party a reasonable amount of time to provide such assurances. In the event that party does not give adequate assurances, the other party has the right to anticipatory repudiation and may repudiate the contract and find a substitute for performance.

Here, Builder and Dirt signed a valid written contract on May 1 under which Dirt agreed to perform all of Builder's site preparation work for \$1.5 million. The contract specified Dirt would begin work on or before June 1st and finish on or before September 1st. On May 29th, an unusual high pressure weather system settled over the work area and caused the state to ban the use of diesel-powered equipment on May 30th. Dirt had planned to use diesel-powered equipment to complete the project. On June 2nd, Dirt informed Builder of the ban and informed Builder that it did not know when the ban would be lifted. When Builder asked that Dirt use its old gas-powered equipment, Dirt responded that using its old equipment would add \$500,000 to its costs and asked Builder to pay for the increase in price. Builder refused and informed by Dirt by email on June 4th that the contract was "terminated," thus attempting to anticipatorily repudiate the contract. Builder's action was improper because he or she failed to first request further assurances from Dirt before terminating the contract.

Therefore, Builder improperly terminated the contract, but may be able to defend itself if Dirt materially breached the contract, as discussed below.

B. Builder's Defenses

Whether Time was of the Essence

When evaluating the materiality of a breach when performance is late, courts will consider whether time is of the essence to the agreement. The performing party must be aware that time is of the essence and that a timely performance is essential.

Here, the contract specified the exact time frame for beginning and finishing the performance. This shows that Dirt was aware time was an important component

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of the contract. Although the facts do not indicate whether Builder informed Dirt that it could not begin other work until the site preparation was completed, it can be assumed that Dirt was aware other work would be delayed considering that the preparation had to be finished before other construction could begin. Accordingly, Builder may be able to assert in defense that Dirt materially breached the contract by delaying performance and refusing to incur the expense of using its old equipment. The court will also look at whether it was reasonable for Dirt to refuse to use its old equipment, as discussed below good faith as one of Dirt's defenses.

C. Damages

Expectation damages are given to put the parties in the position he or she would be in had the contract been performed. When evaluating the damages incurred by Dirt for Builder's improper termination of the contract, courts will look to Dirt's lost profits on the contract as well as any damages Dirt incurred from loss of business.

Here, the contract specified that Dirt "shall refrain from undertaking all other jobs for the duration of the contract" so it's very possible that Dirt could assert a loss of business claim if Dirt had to turn down any jobs due to its contract with Builder. The facts specify that it would have cost Dirt \$1.3 million to complete the project, so Dirt would have received \$200,000 in profits.

Conclusion

Dirt is likely to prevail in its suit against Builder for terminating the contract, but any recovery will be off set by the expense Builder incurred in finding substitute performance.

2. The issue is whether Builder is likely to prevail in its countersuit against Dirt for the difference in price between the original contract price and what it paid the new contractor.

A. Material Breach

The rules for a material breach are set forth above.

Builder will argue that he or she properly terminated the contract because of a material breach and Dirt is thus responsible for the extra expense Builder incurred in finding substitute performance.

It seems likely that the court will find that time was of the essence to the contract and late performance was a material breach, but that Builder still improperly terminated the contract without seeking adequate assurances. Accordingly, the court will off set Builder's damages by Dirt's damages.

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B. Dirt's Defenses

Impossibility

A party's inability to perform will be excused when there is objective impossibility. Objective impossibility occurs when it is objectively impossible to complete the work. For example, when the property at issue has been destroyed or the work to be performed has been declared illegal. Subjective impossibility occurs when a factor makes it substantially harder for a party to complete the work, such as making performance significantly more expensive. Objective impossibility will completely excuse a breaching party's failure to perform, but subjective impossibility will not.

Here, Dirt's inability to perform is not objectively impossible because Dirt could still perform, although it would have had to pay \$500,000, therefore losing all of its potential profit and an additional \$300,000. Courts will evaluate the foreseeability of the state's ban on diesel equipment when evaluating Dirt's breach of contract.

Good Faith

Parties facing subjective impossibility may request the other party to pay extra in good faith. Courts will consider whether the harm was reasonably foreseeable.

Here, Dirt will argue that it was not reasonably foreseeable that the state would ban the use of diesel-powered equipment and because its performance would be \$500,000 more expensive, Builder should have agreed to cover the cost.

C. Damages

Because Dirt incurred \$200,000 in lost profits and Builder had to pay \$300,000 more to incur substitute performance, Dirt will have to pay Builder \$100,000 for its damages. This is

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