3)

======== Start of Answer 3 (1119 words) ========

1. Is Dirt likely to prevail in its suit?
Dirt is suing the builder for terminating the contract.

Governing Law
Contracts are either governed by the common law or the UCC. The UCC applies to the sale of goods. Here, the contract is a service contract for a building. Thus, the common law governs this transaction.

Formation of a contract
A contract is formed when there is a valid offer which expresses a parties intent to make an offer. There must also be acceptance which is the mutual assent of the parties expression of an intent to be bound. Furthermore, there must be consideration which is a bargained for exchange. Here, the parties are not in disagreement of the formation of the contract, so it is assumed they have entered into a valid contract because they facts state "valid written contract."

Defenses
there are multiple defenses which may lead to a contract being unenforceable. Fraud, duress, illegality, incapacity, and the statute of frauds are all valid defenses to a contract. Here, the contract was written, so the SOF does not apply. There does not seem to be any duress, fraud, illegality, or incapacity that would seem to suggest that the formation was invalid. Thus, the contract is enforceable.

Terms
The terms of a contract are binding and control the parties to the extent that they are valid. Here, the contract is for performance. The terms indicate that the Builder would like the project completed around September 1st and wants site work to commence on June 1. Noticeably, there is no time of the essence clause. A time is of the essence clause is used when a party must have work completed by a certain day. If a party does not complete it by that day then it is void and the breaching party is not able to recovery damages. If there is no time is of the essence clause then the parties must compete the task within a reasonable time. Here, the contract says "on or before september 1" and "on or before june 1," this indicates that the Builder would like Dirt to start earlier if not later than that date, but they did not include language indicating that time was of the essence. Thus, as long as party performs within a reasonable time of either of those dates, then it is fine.

Unilateral
A unilateral contract is one that must be accepted by performance. Once performance begins, the offering party can not cancel the contract. Here, performance is not the only way to accept the contract. Thus, it is not a unilateral

contract.

Bilateral
Bilateral contracts are the most common type of contract. Acceptance can be made by either performance or a mutual assent of an intent to be bound through a writing or verbal indication. Here, the parties have a valid written contract so it is bilateral.

Restraint on work
Restraints on work are okay if they are limited in the geographic scope and duration. Here, the contract included a statement which says "Dirt agrees to have all of it's equipment available as needed to perform this contract and shall refrain from undertaking all other jobs fort he duration of the contract." This seems to be reasonable in duration because it is only for three months. However, it is an absolute restrain on one parties right to obtain other jobs. Thus, it will probably be too restrictive and deemed invalid, at least this one part of the contract.

Termination/performance
a contact can be terminated if it is no longer able to be completed due to impracticality, anticipatory repudiation, and frustration of purpose.

Anticipatory repudiation
anticipatory repudiation is where one party anticipates not being able to perform the contract and tells the other party that they will breach the contract. If the non-breaching party feels that the other party may breach, they are allowed to ask for assurance from the anticipated-breaching party. However, they cannot just have a gut feeling that the other party plans on breaching and thus terminate the contract. there must be a real anticipation of a breach.

Here, the state temporarily banned use of all diesel-powered equipment on May 30th. Dirt told builder that he could perform the work with his gas-powered equipment with an increase in cost of 500k. The builder did not agree to the price. If the builder did agree, it would have to be in writing because it is for a modification over 5k. However, the builder refused. Dirt still had a duty to perform although it would be a lot more expensive, but the equipment was readily available and 500k seems excessive. On June 8, the builder contracted with another company.

The issue then becomes whether a week is enough time to anticipate that Dirt would not perform. It seems unlikely that a week or two of work would constitute builder anticpating repudiation on Dirt's behalf. The contract did not contain a time is of the essence clause. Furthermore, the ban on diesal is only because a high pressure weather sustem settled over the state. This high pressure system was one of the reasons for the ban and the ban would probably be lifted in due time to allow for dirt to perform the work with their diesal. Builder would argue that Dirt had a duty to perform the work regardless of what type of fuel was used. The court would probably agree with this notion. However, one week of waiting to begin work would not likely constitute an anticipaitory repudiation. therefore, the

builder did not have the right to terminate the contract when he did. the builder should have allowed for more time to terminate the contract, at least enough time to make the delay unreasonable. with a 3 month contract, a month would probably constitute unreasonable delay.

Remedies
Dirt would likely prevail on the breach of contract because builder terminated the contract prematurely. DIrt would be able to recover the amount of the contract.

2. Is builder likely to prevail in its countersuit?
Builder has countersued Dirt for the 300k difference between the original contract price and what it paid the new contractor. If the builder would have properly waited to terminate the contract, he would be able to recover the difference.

Builder would argue that Dirt should have performed the contract regardless of the availability of the preferred type of fuel needed. They both contracted for a job and it is the duty of Dirt to complete the job regardless of the obstacles that stand in its way. Because builder had to pay an additional 300k, dirt will be liable for that price because it is unfair to make the builder pay for dirts failure.

Question #3 Final Word Count = 1119

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END OF EXAM