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# THE CONSTRUCTION INDUSTRY BIDDING CASES: APPLICATION OF TRADITIONAL CONTRACT, PROMISSORY ESTOPPEL, AND OTHER THEORIES TO THE RELATIONS BETWEEN GENERAL CONTRACTORS AND SUBCONTRACTORS

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## INTRODUCTION

The construction industry bidding cases involving disputes between general contractors and subcontractors<sup>1</sup> have proved especially troublesome for the courts. Resolution of the issues confronted in these cases often strained the principles of contract law. The early decisions were largely unresponsive to the financial realities and needs of that industry, leaving it clouded with uncertainty and instability.<sup>2</sup> Those opinions rejected the notion that either traditional contract theory or promissory estoppel applied at the early stage of the bidding procedure in the usual case. That is, there was no binding contractual relationship when a subcontractor had submitted a bid and the general contractor had used that bid in computing and submitting its prime or overall bid for a project.<sup>3</sup> Thus, neither the general contractor nor the subcontractor was legally bound until the bidding procedure culminated in the owner's or developer's selec-

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1. The term "subcontractors" when used throughout this paper will include materialmen, i.e. those who supply materials for the project, possibly including the labor necessary for the construction or installation of such materials.

2. See *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933). See also note 67 *infra*.

3. We refer to this point as the "early stage of the bidding process." This is the point when the subcontractor has prepared and submitted a bid to the general contractor, the general contractor has used that bid as a component of the prime bid, and the awarding authority has not yet taken any action on the prime bid.

tion of the general contractor to do the work on the overall project *and* in award of the job by the general contractor to the subcontractor. The subcontractor could withdraw at any time before it had been awarded the work by the general contractor, which meant that a general contractor might be placed in the financially-precarious position of having based its bid on the overall project on a subcontractor's bid that was later withdrawn.<sup>4</sup> On the other hand, until the work was awarded to a subcontractor, the general contractor was free to engage in the practice of bid shopping<sup>5</sup> or to encourage bid chopping.<sup>6</sup>

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4. When the general contractor's bid is accepted and a subcontractor for some reason refuses to perform the work on a sub-bid used by the general contractor in the accepted prime bid, the general contractor must find someone else to perform, invariably at a higher price, and sue the reneging subcontractor for the difference. There is this added expense upon the general contractor plus the cost of litigating the claim against the original subcontractor whose bid was used, and many times these costs cannot be passed on to the owner or awarding authority. See *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772 (7th Cir. 1976); *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *F.B. Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176 (Mass. 1978) (*Braucher, J.*); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971); *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943).

5. Bid shopping is the general contractor's use of the low bid already received by him to induce other subcontractors into submitting even lower bids. *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971). Although both bid shopping and bid chopping practices are condemned as unethical by construction industry associations and legislative bodies, these practices are quite common in the industry. See *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 725 n.5, 456 P.2d 975, 980 n.5, 79 Cal. Rptr. 319, 324 n.5 (1969); Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 U.C.L.A. L. REV. 389, 398 (1970) [hereinafter cited as *Bid Shopping and Peddling*] ("Ethics in the construction industry are, it would appear, situational at best."); Note, *The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel*, 10 WM. & MARY L. REV. 212, 216 (1968) [hereinafter cited as *"Firm Offer" Problem*].

On the day to day practical side of bid shopping one small scale subcontractor stated in a telephone interview with one of the authors: "In the outside world money talks, so if someone can get a better deal they will take it. I can understand that. I've never had a written contract in my life. Everything is by handshake and a man's word." *But see Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 15 Cal. App. 3d 95, 110, 92 Cal. Rptr. 799, 808 (1971) (bid shopping not against public policy when done by a general contractor awarded a contract for the construction of a freeway).

6. The general contractor, having been awarded the prime contract, may pressure the subcontractor whose bid was used for a particular portion of the work in computing the overall bid on the prime contract to reduce the amount of the bid. "Bid chopping" . . . is the practice of subcontractors voluntarily reducing their own bids or trying to get under the low bid in order to get the subcontract from the general contractor." *Constructors Supply Co. v. Bostrom Metal Works, Inc.*, 291 Minn. at 121, 190 N.W.2d at 76. This practice by the subcontractors has also been described as "bid peddling." See *Bid Shopping and Peddling* note 5 *supra*.

Later decisions recognized that a reliance analysis based upon the contract theory of promissory estoppel fit the factual setting at the early stage of many construction industry bidding cases.<sup>7</sup> That is, the use of the subcontractor's bid by the general contractor in computing and submitting the bid on the prime contract was viewed to be reasonable detrimental reliance by the general contractor which prohibited the subcontractor from withdrawing its bid. This theory was refined by both case law and the Restatement (Second) of Contracts. These developments afforded protection to the general contractor, although not to the subcontractor.

Recently, an important decision by the Supreme Judicial Court of Massachusetts has proposed two methods by which traditional contract theory may be applicable at the early stage of the bidding procedure in many, if not all, construction industry bidding cases.<sup>8</sup> First, a conditional bilateral contract, binding upon both the general contractor and subcontractor, might be formed at the time the subcontractor submits its bid. Second, the subcontractor's bid might be viewed as akin to an offer for a unilateral contract so that the general contractor's use of the subcontractor's bid constitutes the commencement of performance, prohibiting the subcontractor from withdrawing its bid. The first of these theories protects the subcontractor in a manner virtually unknown in this line of cases. The second theory is a new development at odds with earlier decisions.

In order to fully understand and analyze the methods available to the courts and legislative bodies for dealing with the practices of bid shopping, bid peddling, and bid withdrawing in the relationship between general contractors and subcontractors, one must be aware of the sequence of events in the construction industry bidding process and must appreciate the importance of those events. Secondly, one must be cognizant of the reasons why general contractors and subcontractors ought to be bound at the early stage of the process. Next, one must know the historical development of the application to the construction industry bidding cases of contract theories such as traditional contract theory (including unilateral contract) and promissory estoppel. Finally, one should consider the applica-

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7. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958) (Traynor, J.) (reliance on paving subcontractor's bid made the bid irrevocable); *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943). See also note 37 *infra*.

8. *Loranger Construction Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176 (Mass. 1978) (Jury could conclude that defendant's offer was intended to induce plaintiff's promise or action thereby warranting a conclusion that there was a "typical bargain" supported by consideration, rendering resort to doctrine of promissory estoppel unnecessary).

tion of the reasoning of the Massachusetts case and other theories that might be utilized to hold the general contractors and subcontractors to legally enforceable agreements at the early stage of the bidding process. This article will attempt to accomplish these goals.

### THE BIDDING PROCEDURE

The construction industry bidding process is complicated and lacks uniformity; however, some broad generalizations can be made which provide a description of the basic procedure. On even fairly small construction projects where competitive bidding is employed, at least two sets of bids are ordinarily taken. One set of bids is submitted to the landowner or project developer by the general or prime contractors interested in undertaking the job. Usually, such bids include the cost estimates for the entire project, but a project could be divided into a number of large segments each to be awarded to a separate contractor. The other set of bids is submitted by the subcontractors and materialmen to the general contractors. Because general contractors do not actually perform the work, but instead coordinate and supervise its progress, subcontractors and materialmen (such as electrical, plumbing, carpentry, painting, landscaping, and so on) bid for the purpose of securing the specialty work on the project. Of course, the subcontractors and materialmen might seek competitive bids from suppliers of goods and services, and such bids would constitute a third set of bids. The process could be subdivided even further.

#### *General Contractor Bids*

The focus of this article will be the bidding at the second level (between general contractors and subcontractors) and at lower levels. Bidding between the owner or the developer and the general contractors, however, must be examined in some detail to understand the process at the second level and to consider how the procedure might be changed to avoid the problems that arise so often under that system. The process is generally initiated when an owner or developer, having decided to go forward with a project, invites or solicits bids. Bids are solicited in government projects by a public announcement.<sup>9</sup> In

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9. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 774 (7th Cir. 1976) (awarding authority publicly invited submission of sealed bids); *M.F. Kemper Constr. Co. v. City of L.A.*, 37 Cal. 2d 696, 699, 235 P.2d 7, 9 (1951) (awarding authority published a notice inviting bids for the construction project); *Wil-Fred's, Inc. v. Metropolitan Sanitary Dist.*, 57 Ill. App. 3d 16, 17, 372 N.E.2d 946, 948 (1978) (awarding authority published advertisement in-

non-public projects, owners and developers use whatever vehicles of communication are desired, including advertisements in general or trade newspapers and magazines,<sup>10</sup> individual invitations to known contractors,<sup>11</sup> or informal means.<sup>12</sup> Blueprints and specifications for the project must be made available for examination by the subcontractors in order for them to prepare their bids.<sup>13</sup> The common practice is to require written, sealed bids which must arrive on or before a specified time.<sup>14</sup> The sealed bids are then opened and read (sometimes at an open meeting),<sup>15</sup> and the owner or developer reviews the bids and in-

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viting bids for project). OR. REV. STAT. § 279.025(1) (1975), Advertisement for bids provides:

An advertisement for bids, stating the date after which bids may not be received, the date that disqualification or prequalification statements must be filed under subsection (1) of ORS 279.037 or subsection (1) of ORS 279.039, the character of the work to be done or the material or things to be purchased, the office where the specifications for the work may be seen, and the person designated for receipt of bids and notices shall be published in at least one newspaper of general circulation in the area where the contract is to be performed. If the contract is for a public improvement with an estimated cost in excess of \$50,000, the name of the person designated for receipt of the bids and the notices shall be published in at least one trade newspaper of general state-wide circulation. The board may, by rule, require publications in one or more additional publications.

See 16 PA. CONS. STAT. § 8322 (1956) (advertisement for bids required).

10. Janke Constr. Co. v. Vulcan Materials Co. 527 F.2d 772, 775-6 (subcontractor responded to advertisement in *The Dodge Reports*, a national trade journal); Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 369 A.2d 1017, 1021 (1977) (subcontractor learned through a trade journal which general contractors had bid on project); OR. REV. STAT. § 279.025(1) (1975) (advertisement for bid published in at least one trade newspaper if estimated cost in excess of \$50,000).

11. S.N. Nielsen Co. v. National Heat & Power Co., 32 Ill. App. 3d 941, 337 N.E.2d 387 (1975) (plaintiff invited to bid as general contractor); Tatch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 731, 418 P.2d 187, 188 (1966) (subcontractor offered bid in response to invitation); Clover Park School Dist. No. 400 v. Consolidated Dairy Prods. Co., 15 Wash. App. 429, 550 P.2d 47 (1976) (invitations to bid sent to dairies).

12. Informal means of communicating that the awarding authority is seeking bids include word-of-mouth or indirect communication within the industry.

13. Wil-Fred's Inc. v. Metropolitan Sanitary Dist., 57 Ill. App. 3d 16, 372 N.E.2d 946, (1978) (advertisement announcing bids would be accepted specified the work to be performed).

14. Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971) (sealed bids scheduled to be opened at specified time); MINN. STAT. § 16.07(2) (1977) (all bids shall be sealed when received); OKLA. STAT. tit. 61, § 103 (1975) (contract to be awarded to the lowest responsible bidder, by free and open competitive bidding after solicitation for sealed bids); *id.* at § 109 (bids received after time for opening or more than 96 hours before the time for opening excluding Saturday, Sunday and Holidays, shall be returned unopened).

15. R.J. Taggart, Inc. v. Douglas County, 31 Or. App. 1137, 1145, 572 P.2d 1050, 1054 (1977) (Johnson, J., dissenting) (statute requires public contract bids to be opened publicly); OR. REV. STAT. § 279.027(c) (1975) ("All bids

investigates the bidders. Just as in an auction with reserve,<sup>16</sup> the owner or the developer on a private project need not ordinarily accept the lowest bid, nor any of the bids.<sup>17</sup> In many government contract settings, however, the job must be awarded to the "lowest responsible bidder."<sup>18</sup>

Because there is a time lag between the submission of bids

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made to the public contracting agency pursuant to ORS 279.015 and 279.025 shall be: . . . (c) opened publicly by the public contracting agency at the time designated in the advertisement."); see MINN. STAT. § 16.07(2) (1977) (all bids shall be opened in public).

16. In an auction with reserve the auctioneer may withdraw the goods at any time before acceptance of a bid because the bids constitute offers to be considered by the auctioneer. According to the RESTATEMENT (SECOND):

- (1) At an auction, unless a contrary intention is manifested,
  - (a) the auctioneer invites offers from successive bidders which he may accept or reject;

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(c) whether or not the auction is without reserve, a bidder may withdraw his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

- (2) Unless a contrary intention is manifested, bids at an auction embody terms made known by advertisement, posting or other publication of which bidders are or should be aware, as modified by any announcement made by the auctioneer when the goods are put up.

RESTATEMENT (SECOND) OF CONTRACTS § 27 (Tent. Drafts Nos. 1-7, 1973). The Uniform Commercial Code contains a similar provision, U.C.C. § 2-328 (1976 version).

17. At the point that the bids are opened they are merely offers which the owner or developer may or may not accept. There is no requirement on a private project that they enter into a contract merely because bids have been received, opened, and considered. This is, as noted, analogous to the auction with reserve. See also "Firm Offer" Problem, *supra* note 5, at 212 n.5. ("The general [contractor] does not always use the lowest bid. Other criteria, such as the subcontractor's reputation for reliability enter into the decision. The same considerations affect the letting party's choice of a general contractor to perform the project.").

18. This qualification allows the awarding authority some discretion and flexibility. See Keyes, *Consideration Reconsidered—The Problem of the Withdrawn Bid*, 10 STAN. L. REV. 441, 444 n. 8 (1958) [hereinafter cited as Keyes] ("A 'responsible bidder' is a bidder who possesses the financial, technical and managerial abilities necessary to perform the contract and in the case of government contracts is otherwise eligible under applicable laws and regulations. Obviously, some discretion rests with the buyer in this area."); 10 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATION, § 29.73, at 419 (3d ed. 1966) (to "lowest" or "lowest responsible" bidder). OR. REV. STAT. § 279.029(1) (1975) provides:

After the bids are opened as required by ORS 270.027, and after a determination is made that a contract is to be awarded, the public contracting agency shall award the contract to the lowest responsible bidder. "Lowest responsible bidder" means the lowest bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disqualified by the public contracting agency under ORS 279.937.

See also 53 PA. CONS. STAT. § 65802 (1957) (contracts let to lowest responsible bidder); OKLA. STAT. tit. 61, § 103 (1975) (competitive bidding requires contract to be awarded to the lowest responsible bidder).

and the award of the project to the successful general contractor, the owner or developer would prefer that the bids be irrevocable for a period of time. This situation allows him to open the bids and to consider and complete any final details (possibly including arrangements for financing). Without this condition, the process might be further complicated and interrupted by the revocation of bids by general contractors.<sup>19</sup> Therefore, a number of devices have been utilized for the purpose of making the bids of the general contractors irrevocable for a period of time. In government bidding situations, the governmental units involved usually have had the foresight to adopt legislation in the form of ordinances or statutes requiring that bids remain irrevocable for a specified time.<sup>20</sup> In the purely private setting, however, owners and developers have no such ordinances or statutes. Thus, there must be some contractual basis established to make the bids irrevocable. The most widely used device in the private sector (as well as in government bidding) is the bid bond.<sup>21</sup>

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19. *Crenshaw County Hosp. Bd. v. St. Paul Fire & Marine Ins. Co.*, 411 F.2d 213 (5th Cir. 1969) (general contractor requested that offer be rejected because of inadvertent clerical mistake, judgment on bid bond for \$10,000 in favor of awarding authority); *M.F. Kemper Constr. Co. v. City of L. A.*, 37 Cal. 2d 696, 235 P.2d 7 (1951) (general contractor sought to cancel bid on public construction work and obtain discharge of bid bond—rescission allowed for substantial material mistake not caused by neglect of duty by plaintiff where city had knowledge of mistake before it attempted to accept bid).

20. *Crenshaw County Hosp. Bd. v. St. Paul Fire and Marine Ins. Co.*, 411 F.2d 213 (5th Cir. 1969) (hospital board bid invitation restricted withdrawal of bids for thirty days after having been opened); *M.F. Kemper Constr. Co. v. City of L.A.*, 37 Cal. 2d 696, 235 P.2d 7 (1951) (city charter provides that no bid shall be withdrawn for three months after having been opened); *R.J. Taggart, Inc. v. Douglas County*, 31 Or. App. 1137, 1142, 572 P.2d 1050, 1053 (“Oregon State Highway Department Standard Specifications appear to require that bids may not be withdrawn in the 30 days after all bids have been opened.”); 10 E. McQUILLIN, *supra* note 18, at § 29.67, pp. 405-06 (withdrawal of bid).

21. *R.J. Taggart, Inc. v. Douglas County*, 31 Or. App. 1137, 1139, 572 P.2d 1050, 1052. Accompanying the bid was a bid bond which provided:

“NOW, THEREFORE, if the [Defendant] shall accept the bid of the [Plaintiff] and the [Plaintiff] shall enter into a Contract with the [Defendant] in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the [Plaintiff] to enter such Contract and give such bond or bonds, if the [Plaintiff] shall pay to the [Defendant] the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the [Defendant] may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

*Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943) (written bid agreement requiring bid bond); OR. REV. STAT. § 279.027(3) (1975) provides:



Owners and developers require that, along with the sealed bids, the general contractors bidding on a project must submit bonds which are ordinarily obtained from surety companies. Under the terms of a bid bond, a contractor posts a bond—usually ten percent of its bid<sup>22</sup>—and guarantees that its bid will not be withdrawn for a specified period of time—frequently 30, 60, or 90 days from the date the bids are opened.<sup>23</sup> The bond is forfeited in the event the bid is withdrawn during that time or the contractor refuses to abide by the timely award and proceed with performance on the project.<sup>24</sup>

Option contracts and blacklisting are other devices used to

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A surety bond, cashier's check, or certified check of the bidder shall be attached to all bids as bid security unless the contract for which the bid is submitted has been exempted from this requirement pursuant to ORS 279.033. Such security shall not exceed 10 percent of the amount bid for the contract.

Pennsylvania also requires a bid bond. 16 PA. CONS. STAT. § 5518 (1956) (amended in part, 1979). See Keyes, *supra* note 18, at 456, where the author notes, "It has been suggested that the 'easiest solution' to the irrevocable bid problem would be to require bid bonds to be conditioned upon the bidder's holding the bid open for acceptance within the specified period for opening." The bid bond which is to insure the holding of the bid open is distinguishable from the performance bond which is used to insure performance by the party awarded the contract. See also C.H. Leavell & Co. v. Grafe & Assocs., 90 Idaho 502, 414 P.2d 873 (1966) (dispute concerned which party would secure and pay for performance bond).

22. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958) (general contractor required to provide a bidder's bond of ten per cent of his total bid); M.F. Kemper Constr. Co. v. City of L.A., 37 Cal. 2d 696, 235 P.2d 7 (1951) (City charter requires each bid must be accompanied by a certified check or surety bond for an amount not less than ten per cent of the sum of the bid "as a guarantee that the bidder will enter into the proposed contract if it is awarded to him"); Wil-Fred's Inc. v. Metropolitan Sanitary Dist., 57 Ill. App. 3d 16, 372 N.E.2d 946 (1978) (\$100,000 deposit required on bid of \$882,600); OKLA. STAT. tit. 61, § 107 (1975) (5 per cent bid bond required); OR. REV. STAT. § 279.027(3) (1975) (surety bond not to exceed 10 per cent required); 16 PA. CONS. STAT. § 1802(f) (1956) (bid bond not less than 10 per cent).

23. Failure to specify a time period in the bid bond during which the bid will remain irrevocable may lead a court to conclude that there is nothing in the bid bond to bind a subcontractor. Thus, even though a bid bond is provided the bid may be withdrawn before acceptance if the bid is not otherwise made irrevocable. R.J. Taggart, Inc. v. Douglas County, 31 Or. App. 1137, 572 P.2d 1050 (1977).

24. M.F. Kemper Constr. Co. v. City of L.A., 37 Cal. 2d 696 n.1, 235 P.2d 7, 9 n.1 (1951) (city cross-claimed for forfeiture of bond under city charter which provides, "If the successful bidder fails to enter into the contract awarded him . . . within ten days after the award, then the sum posted in cash or by certified check or guaranteed by the bid bond is forfeited to the city."); R.J. Taggart, Inc. v. Douglas County, 31 Or. 1137, 572 P.2d 1050 (1977) (contractor appeals order requiring forfeiture of bid bond); CAL. GOV'T CODE, § 14331 (West 1963) (if successful bidder fails to execute the contract, bidder's security forfeited to the state); ILL. REV. STAT. ch. 24, § 9-2-105 (1977) (forfeiture of bid for failure to execute contract); OR. REV. STAT. 279.031 (1975) (bidder who has contract awarded and fails promptly and properly to execute the contract shall forfeit the bid security).

induce general contractors not to withdraw bids and to abide by the awarding of the bid. An option contract is created if the owner or the developer pays even nominal consideration for the promise of each general contractor to hold its bid open for a specified time.<sup>25</sup> Blacklisting is the informal identifying of a general contractor as disapproved or as one to be boycotted due to the contractor's propensity to withdraw its bids on projects.<sup>26</sup>

As noted above with respect to public contracting, many governmental units have adopted extensive legislative schemes to govern the competitive bidding process.<sup>27</sup> These enactments often include so-called "naming" statutes which require general contractors to identify the subcontractors that are to perform work on the project, the nature of the work, and the price or cost of such work.<sup>28</sup>

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25. See Keyes, *supra* note 18, at 455, "One possible way to make irrevocable all bids received, in the case of a private solicitation for bids, is to pay for each bid. In effect, all bids would become option contracts." See also RESTATEMENT (SECOND) OF CONTRACTS § 24A (Tent. Draft Nos. 1-7, 1973).

26. See Keyes, *supra* note 18, at 445-446:

In private contracts there is the nonlegal sanction of refusing to do further business with any contractor who attempts to withdraw his bid after opening. In government bidding procedures, in addition to incurring possible liability in damages to the Government and the wrath of the contractor's bonding company, the contractor (bidder) may be placed upon a list of firms and individuals who are ineligible to bid on government contracts. . . .

In any case, neither of these sanctions is entirely satisfactory. A buyer may never have another occasion to solicit from the bidding vendor who has refused to perform. This could be the case where a buyer stipulates against withdrawal of his solicitation for bids from contractors for the construction of a home in which he intends to live for the duration of his life. When a low bidder withdraws prior to acceptance because he has more profitable business elsewhere, the buyer can hardly be expected to be happy with the status of the law which permits the withdrawal but allows him to smile to himself, saying, "Wait until I build another house—I'll not solicit from that bidder again." The use of such a nonlegal sanction really appears to admit that a bidder can withdraw for lack of consideration, and, in seeking a solution outside of contract law, it does not produce satisfactory results.

27. There is wide disparity of statutory regulation from state to state. Some states, such as California, heavily regulate construction bidding procedures with extensive legislative schemes while other states have virtually no provisions on the subject. See notes 9, 14-15, 20-24 *supra*, and note 28 *infra*.

28. *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969) (naming statute does not change contract principles but does confer the right on listed subcontractors to perform unless statutory grounds for valid substitution exist); *Mitchell v. Siqueiros*, 99 Idaho 396, 582 P.2d 1074 (1978) (naming statute does not confer legal contractual status on the subcontractor so named); CAL. GOV'T CODE § 4104 (West 1966) (amended 1971) (bid shall set forth the name and location of place of business of each subcontractor who will perform work or labor in an amount in excess of one-half of one per cent of the prime contractor's total bid); IDAHO CODE 67-2310 (1973) (the general contractor shall be re-

### Subcontractor Bids

The other setting in which bids are solicited, submitted, and considered on a construction project involves the relationship between general contractors and subcontractors. Just as the owner or developer solicits bids for the overall project, general contractors (if they choose to use competitive bidding at all) solicit bids from subcontractors and materialmen for specialty work. A very significant fact is that the bidding process at this level is far less organized and sophisticated than the bidding procedure between the owner or developer and the general contractors. As in the setting at the first level, the process at this second level must include announcing that bids are invited, making available the specifications for the job, and setting a deadline for the submission of bids. This deadline is commonly set only hours before the bid on the prime contract is due. As a result, subcontractors frequently finalize their bids in the early morning hours under intense pressures, submitting them at the eleventh hour (by telephone or private messenger).<sup>29</sup> The subcontractors tend to withhold submission of their bids until the last possible moment in hopes of obtaining information about

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quired to include in his bid the name and address of any subcontractor who shall work under the general contractor); *See* note 32 *infra*.

29. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 774, 776 (7th Cir. 1976) (price quotations received by telephone, the twenty-four period preceding the price bid deadline is one of great activity); *Robert Gordon v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941) (defendant received telephone calls requesting price quotations and confirmation in writing); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 411, 333 P.2d 757, 758 (1958) (it was customary in the area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids); *Constructors Supply Co. v. Bostrum Sheet Metal Works, Inc.*, 291 Minn. 113, 116, 190 N.W.2d 71, 73 (1971) (Much telephoning and hurried activity takes place between prime contractors and subcontractors in an effort to prepare bids before the prime deadline); *Keyes*, *supra* note 18, at 461 (a large portion of bid solicitation is often done by telephone).

*See also* *M.F. Kemper Constr. Co. v. City of L.A.*, 37 Cal. 2d 696, 699, 235 P.2d 7, 9 (1951):

Respondent company learned of the invitation for bids on August 17 and immediately began to prepare its proposal. Over a thousand different items were involved in the estimates. The actual computations were performed by three men, each of whom calculated the costs of different parts of the work, and in order to complete their estimates, they all worked until 2:00 o'clock on the morning of the day the bids were to be opened. Their final effort required the addition and transposition of the figures arrived at by each man for his portion of the work from his "work sheet" to a "final accumulation sheet" from which the total amount of the bid was taken. One item estimated on a work sheet in the amount of \$301,769 was inadvertently omitted from the final accumulation sheet and was overlooked in computing the total amount of the bid. The error was caused by the fact that the men were exhausted after working long hours under pressure.

their competitor's bids, thus preventing bid shopping and bid peddling at this stage of the process.<sup>30</sup> These bids are offers and are revocable, as a general rule,<sup>31</sup> for there are ordinarily no ordinances or statutes requiring them to be kept open (even where a "naming" statute has been adopted),<sup>32</sup> no bid bonds are

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30. *Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 15 Cal. App. 3d 95, 97, 92 Cal. Rptr. 799, 801 (1971).

31. *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736, 739 (D.C. Cir. 1963) (mere use of the bid not an acceptance in law which gave rise to a contract); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 345 (2d Cir. 1932) (Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late); *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413, 333 P.2d 757, 759, (1958) (defendant contended that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated acceptance to defendant, but the court found an implied subsidiary promise not to revoke the offer); *E.A. Coronis Assoc. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246, 249 (1966) (prior to enactment of the U.C.C. § 2-205 (1962 version), an offer not supported by consideration could be revoked at any time prior to acceptance); *Clover Park School Dist. No. 400 v. Consolidated Dairy Prods. Co.*, 15 Wash. App. 429, 550 P.2d 47 (1976) (a bid is no more than an offer to contract); *Keyes*, *supra* note 18, at 444 ("It is almost a universal rule of contract law that an offer may be modified or withdrawn at any time up to the moment of acceptance but not afterwards."). See also RESTATEMENT (SECOND) OF CONTRACTS § 35(1)(c) (1932).

32. Most cases deciding the issue have held that the requirement of naming the subcontractor whose bid was used does not change the general law of contracts requiring acceptance of an offer. In *Klose v. Sequoia Union High School Dist.*, 118 Cal. App. 2d 636, 640-1, 258 P.2d 515, 517-18 (1953) it was stated that:

Petitioner's arguments are necessarily predicated upon the concept that a subcontractor, whose name is submitted with the bid of the general contractor, in some undefined way, secures some legal rights when the general contractor's bid is accepted by the awarding authority. In the absence of statute that is not the law. A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor. No contractual relationship is created between the subcontractor and the general contractor even though the bid is used as part of the general overall bid by the general contractor and accepted by the awarding authority. . . .

In order to uphold petitioner's interpretation of [the naming statute] we would have to hold that the Legislature intended by that amendment to change the general law of contracts, and to confer on subcontractors the irrevocable right to perform the contract as soon as the awarding authority accepted the general contractor's bid except where the subcontractor refuses to execute a contract. We can find no such expressed or implied intent in the sections. They appear in the chapter of the public works law dealing with "Subletting and Subcontracting" which are regulatory provisions. None of those sections is aimed at conferring rights on the subcontractors, but are all aimed at protecting the public and the awarding authority.

In agreement, the Idaho Supreme Court in *Mitchell v. Siqueiros*, 99 Idaho 396, 401, 582 P.2d 1074, 1079 (1978) declared that:

The purpose of [the naming statute] was 'to invite effective competition, prevent fraud, and to secure subcontractors who were capable of satisfactorily performing the work and furnishing supplies at the lowest

required,<sup>33</sup> and no consideration is paid in order to form option contracts to hold the bids open. Recently, the usual bidding process in one area of the country was described as follows:

According to the normal bidding practices in the construction industry in the area, a contemplated project is generally listed or advertised in trade magazines and in the "Dodge Reports," a daily construction news service which lists proposed construction activity for various areas of the country. A subscriber to the "Dodge Reports" for a particular area may inspect the plans for a project in any Dodge plan room located in that area. An interested materials supplier checks the plans and specifications to determine if he can supply any of the required materials. He then submits a quotation by telephone, mail, or both, to the contractors interested in bidding on the project. It is in this manner that contractors usually obtain quotations from competing suppliers and subcontractors. These quotations are then used by the contractors to estimate their own costs in preparing their bids. Normally, the twenty-four hour period preceding the prime bid deadline is one of great activity, with the subcontractors and suppliers making the rounds of the contractors who are still preparing their bids. By this time the first quotations have generally become known and the quoted prices are often revised downward at the last minute, with the prime contractors revising their bids accordingly.

The contractor usually purchases the materials from the supplier upon whose prices he relied in preparing his bid; however, a contract to purchase the materials is not entered into until after the contractor has been awarded the contract and the project engineers have approved the materials, if such approval is needed. The supplier then prepares the shop drawings for the project after the successful bidder signs a letter of intent to purchase the materials.<sup>34</sup>

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overall cost' (citation omitted). Although the [naming] statute requires public works contractors to state their specialty subcontractors, we hold that the act did not mean to confer legal contractual status on the subcontractor so named. The purpose of [the statute] was not to modify long existing contract principles.

However, the California Supreme Court changed its policy after the legislature modified the statute relied upon in *Klose*. In *Southern Cal. Acoustics Co. v. Holder*, 71 Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969), Chief Justice Traynor, citing *Klose*, stated that "in the absence of an agreement to the contrary, listing of the subcontractor in the prime bid is not an implied acceptance of the subcontractor's bid by the general contractor." *Id.* at 978. The court also noted the subsequent amendments made to the statute included a change of purpose, and stated that "[s]ince the purpose of the statute is to protect both the public and subcontractors from the evils of the proscribed unfair bid peddling and bid shopping . . . , we hold that it confers the rights on the listed subcontractor to perform the subcontract unless statutory grounds for a valid substitution exist." *Id.* at 981. See note 28 *supra*.

33. *But see* *Northwestern Eng'r v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943) (bidder's bond required of subcontractor).

34. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 775-76 (7th Cir. 1976).

This description reflects practices throughout the country.<sup>35</sup>

35. See, e.g., *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958):

Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between fifty and seventy-five subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one per cent or more of the construction work, and he had also to provide a bidder's bond of ten per cent of his total bid of \$317,385 as a guarantee that he would enter the contract if awarded the work.

*Id.* at 411-2, 333 P.2d at 758; *S. N. Nielsen Co. v. National Heat and Power Co.*, 32 Ill. App. 3d 941, 337 N.E.2d 387 (1975):

The facts which gave rise to this action may be summarized as follows: In July of 1969 Nielsen was invited to bid as a general contractor on the second construction phase of the Budd Company plant. Sets of drawings and specifications were provided by Giffels and Rossetti, the architect. Thereafter, Nielsen contacted a number of subcontractors as well as material and labor suppliers. Bids from approximately 25 mechanical subcontractors were solicited including National. National had previously submitted bids to Nielsen, but they were never accepted. National accepted the invitation to bid, and copies of the drawings and specifications dealing with the mechanical work were provided. On several occasions National contacted the architect to clarify questions regarding the mechanical phase of the project.

On August 4th National contacted Nielsen by telephone and submitted an oral bid of \$494,000. Later that day Nielsen submitted its final bid on the Budd Company project. The following day Budd informed Nielsen that it had been awarded the general contract. Nielsen in turn informed National that it would be the mechanical subcontractor. On August 18th National reconfirmed its bid by letter. That same day Nielsen submitted to the architect the names of all proposed subcontractors including National.

*Id.* at 942, 337 N.E.2d at 388; *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977):

From the evidence adduced, it is manifest that the usual method of operation in the construction industry was followed in the construction of the Western Heights Middle School. The letting party, the Board of Education, advertised for bids for the construction of the School. Blake was one of the general contractors who responded. Supreme, a manufacturer of ready mixed concrete, learned through a trade journal what general contractors had bid on the job. After examining the specifications relating to concrete for the project, Supreme, as a subcontractor, wrote the interested general contractors with reference to supplying the concrete required.

*Id.* at 534, 369 A.2d 1021; *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971):

It was brought out at trial that subcontractors and contractors customarily negotiate on the telephone in submitting their bids. The subcontractors itemize their various costs by computing them from the plans and specifications of the project, and when they come up with final figures, they submit them as bids to the prime contractors who use these bids in arriving at their own bids. At times a subcontractor himself has subcontracted various items of the project on which he wishes

## CONCERN ABOUT THE SUBCONTRACTOR BIDDING CASES

In our jurisprudence, there is an abiding concern about enforcement of mutual promises, entered into by an offer and an acceptance, supported by consideration rising therefore to the level of a "bilateral contract."<sup>36</sup> Similarly, under the contract doctrine of promissory estoppel, where a promise induces a party to reasonably rely to his substantial detriment, the promise is enforceable in the courts.<sup>37</sup> Tradition and our sense of justice demand that a party be bound by such promises. If either the general contractor or subcontractor can be found to have

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to bid, and he must receive bids from his subcontractors before he can submit a complete figure to the prime contractors. This whole process usually culminates on the day that the prime bids are due on the project. Much telephoning and hurried activity takes place between the prime contractors and subcontractors in an effort to prepare bids before the prime bid deadline. It was also brought out at trial that subcontractors customarily agree to be bound by the bids they submit to prime contractors and that prime contractors act in reliance on these bids when they submit their own bids to the owner.

*Id.* at 115-6, 190 N.W.2d at 73. Keyes, *supra* note 18, at 453 provides:

Persons who bid or even quote a price for private work generally consider themselves bound if the bid or quote is accepted. According to a study of private bidding practices of general contractors and subcontractors, a majority of subcontractors felt bound to perform after receipt of notice from the general (bidder) that he had been awarded the job. Some do not feel so bound, however, and some who considered themselves morally obliged in the past will probably change their views under certain conditions, e.g., a personal or general business decline. Be that as it may, usage may be argued on the side of a buyer who has been soliciting "firm bids" for years.

*Bid Shopping and Peddling*, *supra* note 5, at 390 provides:

Typically, the general contractor will receive estimates from several subcontractors on a particular item of work. The general [contractor] will then usually "take," but not contractually "accept," the lowest of these estimates and use it in preparing its bid on the overall contract. From this point until a formal acceptance of the subcontractor's offer, the absence of contractual liability has assumed great significance.

36. See generally Horowitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85 (1919).

37. *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772 (7th Cir. 1976) (complaint set forth claim upon which relief could be granted under theory of promissory estoppel); *F.B. Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964) (bid by electrical contractor at a price not so low as to put general contractor on notice that mistake had been made was binding under principle of promissory estoppel); *Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971) (whether general contractor is entitled to rely upon the bid of a proposed subcontractor must be decided on the basis of the facts involved in the particular case); *S.N. Nielsen Co. v. National Heat and Power Co.*, 32 Ill. App. 3d 941, 337 N.E.2d 387 (1975) (promissory estoppel applies to cases involving bids on construction project but reliance by general contractor in this case not reasonable as a matter of law); *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966) (doctrine of promissory estoppel could apply to require subcontractor to perform in accordance with its bid).

committed itself to the other party by way of a legally recognizable promise at the early stage of the bidding process, the breach of such a promise will cause sufficient concern to warrant judicial enforcement of the promise.

Apart from the ordinary concern in the law for promise enforcement, however, there are other special concerns arising from disputes between general contractors and subcontractors that warrant mention. As in almost all other settings where judicial remedies are sought upon contract theory,<sup>38</sup> however, the significance of such concerns will be of no consequence to the issue of whether a legal action is available unless an enforceable promise is found.

### *The Promise*

A significant number of disputes arise between general contractors and subcontractors due to the view that, until the formal award of the job to the subcontractor at the end of the bidding process, neither party is bound to the other.<sup>39</sup> Many general contractors engage in bid shopping or encourage bid chopping and bid peddling after the award of the prime contract, because these practices allow them to increase their profit margins. Of course, a general contractor who has been awarded the prime contract occupies a position having substantial influence and leverage over subcontractors, for this general contractor possesses the real power to hire subcontractors to perform work on the project. In contrast, many subcontractors withdraw their bids after the general contractors have relied upon them in computing the bids on the prime contracts. The informal, last-minute bidding process contributes to mistakes by subcontractors in computing or preparing their bids.<sup>40</sup> Subcontractors guilty of

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38. We are referring here to the basic traditional contract and the theory of promissory estoppel, excluding from this reference quasi-contracts. Quasi-contracts arise not from an agreement of the parties but from some relation between them; quasi-contracts are obligations which spring from voluntary and lawful acts of the parties in absence of any agreement.

39. *The "Firm Offer" Problem*, *supra* note 5, at 212:

Bidding in the construction industry has long been the source of many problems for contractors, lawyers, and judges. Until recently these problems had received little public attention because of a reluctance among contractors to litigate their differences. However, since 1958 the litigation involving construction bids has dramatically increased and courts and attorneys have with increasing frequency been faced with the difficulties of reconciling the law with modern business practices.

40. *F.B. Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964) (electrical subcontractor found he had made serious error in bidding before principal bids were opened); *M.F. Kemper Constr. Co. v. City of L.A.*, 37 Cal. 2d 696, 235 P.2d 7 (1951) (item on bid inadvertently omitted caused by the fact that the men working on the bid were exhausted after working long hours under pressure); *Wil-Fred's Inc., v. Metropolitan Sanitary Dist.*,



making such errors tend to renege on their bids in order to attempt to avoid financial losses. A subcontractor may bid on a number of contracts but have the capability of actually performing only one or two such contracts at a time. Thus, such a subcontractor would have to renege on a bid if it had already reached its capacity to perform.<sup>41</sup> Other difficulties unique to a subcontractor (labor, equipment or financial) may lead a subcontractor to renege on its bid.

### *Shopping, Chopping, and Peddling Bids*

The consequences of bid shopping and encouragement of bid chopping and bid peddling by general contractors and of withdrawal of bids by subcontractors can be quite severe to the owner or developer of a project, the general contractors and subcontractors, and the public. The practice of bid chopping and peddling by general contractors has been criticized by one court as follows: "When successful this practice places a profit squeeze on subcontractors, impairing their incentive and ability to perform to their best, and possibly precipitating bankruptcy in a weak subcontracting firm."<sup>42</sup> The legislature of the State of California is on record as condemning bid shopping and bid peddling.

The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees and other evils.<sup>43</sup>

Withdrawal of a bid by a subcontractor can cause delays in completion of the construction project and can cause severe financial hardship to the affected general contractor. Of course, where a public project is involved, the public will suffer to some extent as well. Therefore, the important concerns regarding the relationship between general contractors and subcontractors in construction industry bidding cases must be considered.

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57 Ill. App. 3d 16, 372 N.E.2d 946 (1978) (subcontractor had to withdraw quotation because there had been a substantial error in its bid).

41. See *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 722, 456 P.2d 975, 978, 79 Cal. Rptr. 319, 319 (1969) (Plaintiff read the report [which listed plaintiff as a subcontractor in the accepted bid] and, acting on the assumption that its bid had been accepted, refrained from bidding on other construction jobs in order to remain within its bonding limits.); *Bid Shopping and Peddling*, *supra* note 5, at 407.

42. *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 726 n.7, 456 P.2d 795, 981 n.7, 79 Cal. Rptr. at 325 n.7.

43. *Id.* at 319 n.5.

APPLICATION OF TRADITIONAL CONTRACT THEORY IN  
UNCONTESTED CASES

In the typical case where the parties do not encounter disputes and litigation, the eventual result of the bidding process is the formation of a traditional bilateral contract between the general contractor and the subcontractor. The bid submitted by the subcontractor constitutes an offer to enter into a bilateral contract.<sup>44</sup> It is a promise to do the work prescribed in the specifications for the amount stated. This offer should remain open while a number of subsequent events occur. The general contractor computes and submits its bid on the prime contract; the owner or the developer opens and considers the bids, and awards the prime contract to the general contractor; and the general contractor decides which subcontractor to use on various parts of the project. The notice by the general contractor that a certain portion of the work is being awarded to the subcontractor constitutes acceptance under traditional contract analysis.<sup>45</sup> Thus, a bilateral contract is formed. The general contractor has promised to use the subcontractor and to pay for its work, in exchange for the earlier promise of the subcontractor to do the job at the price stated in the bid.

This proposition had been advanced in the famous 1933 case of *James Baird Co. v. Gimbel Brothers*.<sup>46</sup> In *Baird*, a public building was to be constructed, and the public authority had advertised for competitive bids from general contractors. The plaintiff James Baird Company was one such contractor. The defendant Gimbel Brothers (a subcontractor or materialman) was interested in supplying the linoleum for the project and it prepared a bid on that portion of the job. It then sent the bid to 20 to 30 general contractors (including the plaintiff) that were likely to bid on the overall project. The linoleum bid contained a recital to the effect that the defendant was offering the stated prices for the linoleum for "reasonable, [sic] prompt acceptance after the general contract has been awarded."<sup>47</sup> The defendant sent the linoleum bid on December 24, and the plaintiff received it on December 28. The defendant, however, had erred by about fifty per cent in its measurement for the linoleum

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44. See note 31 *supra*.

45. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 345 (2d Cir. 1933) ("Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late."). *Klose v. Sequoia Union High School Dist.*, 118 Cal. App. 2d 636, 258 P.2d 515 (1957); *Loranger Constr. Corp. v. E.F. Hauserman, Co.*, 384 N.E.2d 176 (Mass. 1978) (plaintiff sent an unsigned subcontract form based on the bid figure).

46. 64 F.2d 344 (2d Cir. 1933).

47. *Id.* at 345.

needed on the project. The defendant discovered its mistake on December 28 and immediately sent a telegram to the general contractor correcting the bid by nearly doubling the prices stated originally. Earlier that day, however, the plaintiff had sent in its bid on the overall project using the defendant's original bid for the linoleum as the basis for computation of the cost of that part of the job. On December 30, the public authority awarded the project to the plaintiff, and the plaintiff formally accepted the defendant's original bid on January 2. The court held that the defendant's original bid was an offer and was revoked before it was accepted.<sup>48</sup> Therefore, there was no contract, and the defendant was not obligated to abide by its original bid, even though the plaintiff had used that bid in the computation of the bid on the overall project.

Had the court held that the defendant's offer (its original bid) had been accepted when the general contractor used it in computing the bid on the prime contract, it would have held that a unilateral contract binding on the subcontractor was formed very early in the bidding process. This analysis was rejected in *Baird* where Judge Learned Hand wrote, ". . . it seems entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids."<sup>49</sup> Furthermore, the court rejected the notion that the subcontractor's bid constituted an option.<sup>50</sup> Later decisions reached the same conclusions: use of the subcontractor's bid did not constitute an acceptance, and the subcontractor's bid was not an option.<sup>51</sup> Thus, because the bar-

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48. *Id.*

49. *Id.* at 346.

50. *Id.*

51. *Southern Cal. Acoustics Co. v. C. V. Holder, Inc.*, 71 Cal. 2d 719, 722, 456 P.2d 975, 978, 79 Cal. Rptr. 319, 322 (1969) (In the absence of an agreement to the contrary, listing of the subcontractor in the prime bid is not an implied acceptance of the subcontractor's bid by the general contractor); *Klose v. Sequoia Union High School Dist.*, 118 Cal. App. 2d 636, 641, 258 P.2d 515, 517 (1953) ("A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor. No contractual relationship is created between the subcontractor and the general contractor even though the bid is used as part of the general overall bid by the general contractor and accepted by the awarding authority."); *Mitchell v. Siqueiros*, 99 Idaho 396, 399, 582 P.2d 1074, 1077 (1978) (It is a settled common law contract principle that utilizing a subcontractor's bid in submitting the prime or general contract bid does not, without more, constitute an acceptance of the subcontractor's offer conditioned upon being awarded the general contract by the awarding authority.); *C.H. Leavell & Co. v. Grafe & Assocs., Inc.*, 90 Idaho 502, 506, 414 P.2d 873, 879 (1966) (Mere use of respondent's bid is not tantamount to acceptance); *R. J. Daum Constr. Co. v. Child*, 122 Utah 194, 247 P.2d 817 (1952) (contractor did not accept subcontractor's bid and proposed written contract constituted a counter offer); *Milone & Tucci Inc. v. Bona Fide Builders*, 49 Wash. 2d 363, 301 P.2d 759 (1956) (mere use of subcontractor's figures did

gained for exchange which the subcontractor was held to be seeking is the award of the job by the general contractor and because that award comes at the end of the bidding process, there is considerable opportunity for the parties (and even incentive for the general contractor) to elude a binding agreement upon the terms of the bid originally submitted by the subcontractor.

As noted above, the subcontractor is free to submit a bid and to revoke it at any time before being awarded the job by the general contractor (even though the general contractor may have used the subcontractor's bid in computing the bid on the prime contract and may be thus placed in a difficult financial position when the subcontractor withdraws the bid). Furthermore, the general contractor is free to use a subcontractor's bid in computing the prime bid and then "bid shop" and encourage bid chopping at any time before awarding the job to the subcontractor.

Although Judge Hand rejected the theory that use of the subcontractor's bid constituted an acceptance of an offer for a unilateral contract, his opinion left open the possibility that a binding contract—presumably a conditional bilateral contract<sup>52</sup>—could have been formed at that point in the process if the parties had desired one. As he suggested, "The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures. . . ."<sup>53</sup> It was of course possible for the parties to make such a contract [a contract arising when the contractor acted upon the subcontractor's bid by using that bid in computing the bid on the overall project]."<sup>54</sup> However, this approach to contract formation mentioned by Hand was forgotten for more than 50 years until it was revived by the Massachusetts decision.

As Judge Hand emphasized, the parties could have avoided the dispute and litigation that arose in this case, and the plaintiff could have protected itself by negotiating a contract at the beginning of the bidding process. Similarly, if general contractors and subcontractors wanted to do so, they could avoid the disad-

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not constitute an acceptance of subcontractor's offer to perform work for that price).

52. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 345 (2d Cir. 1933). Even if the parties had entered into a contract binding the general contractor to use of the subcontractor's bid it would have been a conditional bilateral contract. It is, of course, conditional because the parties do not know at the time of contracting if the general contractor will be awarded the prime contract. The contract based on the bid would be conditioned upon the general contractor getting the project.

53. *Id.* at 346.

54. *Id.*

vantageous results of bid shopping, bid peddling, and bid withdrawing by changing the bidding procedure to resemble more closely the procedure between owners or developers and general contractors. For example, subcontractors could be required to submit their bids earlier. This requirement would grant the general contractors sufficient time to examine the bids and to investigate the bidders in order to select a responsible subcontractor. The subcontractors could also be required to post bid bonds that would be forfeited in the event that the bids were withdrawn. General contractors could pay consideration for subcontractors' bids thereby creating option contracts. This procedure would require time and money. Blacklisting of unscrupulous subcontractors could be practiced by general contractors, but this procedure is too informal and ineffective. Regrettably, such changes have not been forthcoming, and construction industry bidding disputes are often thrust into the judicial process.

#### APPLICATION OF PROMISSORY ESTOPPEL TO THE CONSTRUCTION INDUSTRY BIDDING CASES

Although the theory of promissory estoppel<sup>55</sup> was developed in response to issues arising from disputes in other settings and its applicability to the construction industry bidding cases was expressly rejected by one old, but important decision,<sup>56</sup> the doctrine has found wide acceptance in the bidding

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55. The forerunner of the doctrine of promissory estoppel was the doctrine of equitable estoppel. Equitable estoppel was based upon the notion that one who makes a representation of fact, upon which it is reasonable for another to rely, should be estopped to deny the existence of that fact where such denial would result in injury to the other party (once he has relied). To allow the one who made the representation of fact to later deny it would allow him to effectively practice fraud. Many times however, the fact that was represented included a promise upon which the promisor later reneged, and the denial of the making of such a promise seemed equally unfair. In *Ricketts v. Scotchorn*, 57 Neb. 51, 77 N.W. 365 (1898), for example, the court invoked equitable estoppel, where a grandfather had promised to pay a gratuitous promissory note of \$2000 to his granddaughter which induced her to forego employment. Thus, promissory estoppel is an expansion of the earlier theory and allows a promisee to recover a contract-type remedy where he has been reasonably induced to rely to his substantial detriment. This theory for recovery has grown from cases involving purely gratuitous promises (such as the charitable contribution cases, described in note 61 *infra*) to include cases in commercial settings. See *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948); *Siegal v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923); *Hoffman v. Red Owl Stores*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965). Today the theory of promissory estoppel enjoys wide recognition and approval. See generally WILLISTON, *CONTRACTS* §§ 139-40 (3d ed. Jaeger 1961); CALAMARI & PERILLO, *CONTRACTS* ch. 6 (2d ed. 1977).

56. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

cases decided since 1943.<sup>57</sup> The promissory estoppel doctrine was developed by the courts to protect the promisee who reasonably relied to his detriment upon a gratuitous promise where the conventional requirement of consideration from the promisee was lacking. The detrimental reliance served as a substitute for consideration.<sup>58</sup> Judge Learned Hand explained this notion as follows:

Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that

57. *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 408, 10 N.W.2d 879, 883 (1943) decided not to follow the reasoning of *Baird* "notwithstanding the eminence of its author. . . ." *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176, 179 n.1 (Mass. 1976) cites the following cases for the holding that a subcontractor may be bound on the basis of reliance by the general contractor: *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 777-778 (7th Cir. 1976) (Wisconsin law); *Debron Corp. v. National Homes Constr. Corp.*, 493 F.2d 352, 356-357 (8th Cir. 1974) (Missouri law); *N. Litterio & Co. v. Glassman Constr. Co.*, 115 U.S. App. D.C. 335, 337-339, 319 F.2d 736, 738-740 (1963); *F.B. Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 584-585, 374 S.W.2d 818, 820 (1964); *Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 15 Cal. App. 3d 95, 106, 92 Cal. Rptr. 799, 802 (1971); *Bumby & Stimpson, Inc. v. Southern Reinforcing Steel Co.*, 348 So. 2d 1216, 1217 (Fla. Dist. Ct. App. 1977); *C. H. Leavell & Co. v. Grafe & Assocs.*, 90 Idaho 502, 513-514, 414 P.2d 873, 878, (1966); *S. N. Nielsen Co. v. National Heat & Power Co.*, 32 Ill. App. 3d 941, 944, 337 N.E.2d 387, 389, (1975); *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 79, 216 A.2d 246, 253, (App. Div. 1966); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 116, 190 N.W.2d 71, 73 (1971); *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 104, 387 P.2d 1000, 1003, (1964). *But cf.* *Albert v. R.P. Farnsworth & Co.*, 176 F.2d 198, 203 (5th Cir. 1949) (Louisiana law); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933) (no state specified); *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 732-733, 418 P.2d 187, 189, (1966).

58. *Air Conditioning Co. of Hawaii v. Richards Constr. Co.*, 200 F. Supp. 167 (D. Hawaii 1961), *aff'd on other grounds*, 318 F.2d 410 (9th Cir. 1963) (sufficient consideration in modification of informal contract); *Porter v. Commissioner*, 60 F.2d 673 (2d Cir. 1932), *aff'd*, 288 U.S. 436 (1933) (L. Hand, Circuit Judge) (promissory estoppel is a species of consideration for contract); *E. A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966) (doctrine equivalent of or substitute for consideration). *See also* Billings and Henderson, *Promissory Estoppel, Equitable Estoppel and Farmer as a Merchant: the 1973 Grain Cases and the UCC Statute of Frauds*, 1977 UTAH L. REV. 59; Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 349 (1969) ("[D]espite the Restatement directive that section 90 promises are enforceable without consideration, the theme of consideration is . . . the point of departure for nearly every judicial discussion of promissory estoppel. Consequently it is fashionable to portray the doctrine of promissory estoppel as some kind of stand in for consideration."); Peebles, *Promissory Estoppel May Not be Asserted to Avoid Statute of Frauds — Farmland Services Co-op v. Klien*, 196 Neb. 538, 244 N.W.2d 86 (1976); 11 CREIGHTON L. REV. 12 (1977) (promissory estoppel used to supply the element of consideration); Note, *Reliance Losses: Promissory Estoppel as a Basis of Recovery for Breach of Agreement to Agree: Hoffman v. Red Owl Stores, Inc.*, 51 CORNELL L.Q. 351 (1966) (as originally promulgated in the Restatement, promissory estoppel was intended as a substitute for consideration in cases where the promisee relies to his detriment on a gratuitous promise).

each promise or performance is an inducement to the other. But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of "promissory estoppel" is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise.<sup>59</sup>

Professor Williston played perhaps the most significant role in the development and adoption of the doctrine of promissory estoppel,<sup>60</sup> and the doctrine found special appeal in the early charitable contribution cases.<sup>61</sup> The Restatement of Contracts,

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59. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933).

60. 1 WILLISTON, CONTRACTS § 139 (1st ed. 1920); see *Janke Constr. Co. v. Vulcan Materials Co.*, 527 F.2d 772, 777 (1976), citing *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 697, 133 N.W.2d 267, 275 (1965); Billings and Henderson, *Promissory Estoppel, Equitable Estoppel and Farmer as a Merchant: The 1973 Grain Cases and the UCC Statute of Frauds*, 1977 UTAH L. REV. 59; Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459 (1950).

61. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 117, 190 N.W.2d 71, 74 (1971). The validity of subscriptions, the contract in which an individual gratuitously engages to contribute a sum of money for a designated purpose, has been upheld by the courts under three different rationales. 83 C.J.S. *Subscriptions* § 1 (1955). Some jurisdictions have found that the parties formed a bilateral contract. The return promise by the charity to fulfill an implied request made by the contributor to employ the funds as discussed constituted consideration for the promise by the contributor to pay. *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927); *Keuka College v. Ray*, 167 N.Y. 96, 60 N.E. 325 (1901). The courts have also sustained the agreements under a unilateral contract theory. A charitable subscription is enforceable as an offer for a unilateral contract which becomes a binding obligation when the charity accepts the offer by incurring liability in reliance thereon. *I. & I. Holding Corp. v. Gainsburg*, 276 N.Y. 427, 12 N.E.2d 532 (1938); *Trustees of Hamilton College v. Stewart*, 1 N.Y. 581 (1848). Finally, the courts invoked the theory of promissory estoppel. The theory was applied to render a charitable subscription enforceable where there was an agreement by individuals to contribute funds for the accomplishment of an enterprise which would not otherwise have been undertaken or continued, or where the charity incurred obligations, expended money or performed. *Lake Bluff Orphanage v. Magill's Ex'rs*, 305 Ky. 391, 204 S.W.2d. 244 (1947); *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S.W.2d 125 (1943). Under the theory of promissory estoppel, the charities could enforce subscriptions in the absence of consideration for the promise. The courts, seeking for public policy reasons to uphold these agreements, also approved of the doctrine. Previously, the usual tendency of the courts was to stretch contract principles and sustain the validity on some more or less plausible theory. *In re Lord's Will*, 175 Misc. 921, 25 N.Y.S.2d 747 (1941). However, the courts refused to accept the theory that all charitable contributions should be enforced, and held that the elements of promissory estoppel must be satisfied. *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S.W.2d 125 (1943). Recent decisions continue to apply the doctrine of promissory estoppel to sustain subscriptions. *Mount Sinai Hosp. v. Jordan*, 290 So. 2d 484 (Fla. 1974); *In re Estate of Timko v. Oral Roberts Evangelistic Ass'n*, 51 Mich. App. 662, 215 N.W.2d 750 (1974). Some

Section 90, set forth the doctrine:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.<sup>62</sup>

### *Early History*

In 1933, the theory of promissory estoppel was asserted for the first time in a construction industry bidding case. In *James Baird Co. v. Gimbel Brothers, Inc.*,<sup>63</sup> the plaintiff-general contractor asserted that the defendant-subcontractor or materialman had promised to provide linoleum at stated prices in its bid and that the general contractor had reasonably relied to its detriment by incorporating the defendant's bid into the computations for the bid on the prime contract. The court, in an opinion by Judge Hand, rejected application of the theory of promissory estoppel under the peculiar circumstances of this case because the subcontractor had conditioned its bid. The bidder had said that it was offering the prices for "reasonable [sic] prompt acceptance after the general contract has been awarded."<sup>64</sup> This language served as a warning to the general contractor not to rely upon the bid and effectively precluded assertion of promissory estoppel in this case. Furthermore, it was noted that the subcontractor's bid did not constitute an option.<sup>65</sup> The *Baird* precedent stood untested by reported cases for the next ten years,<sup>66</sup> but eventually a few cases did follow its lead on this is-

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jurisdictions still require actual detrimental reliance on the part of the charity in order to hold the subscription enforceable. *Mount Sinai Hosp. v. Jordan*, 290 So. 2d 484 (Fla. 1974); *Thompson v. McAllen Federal Woman's Bldg. Corp.*, 273 S.W.2d 105 (Tex. 1954). However, others are in effect upholding the validity of subscriptions on public policy alone. *Salsbury v. Northwestern Bell Tel. Co.*, 221 N.W.2d 609 (Iowa 1974); *In re Lipsky's Estate*, 45 Misc. 2d 320, 256 N.Y.S.2d 429 (1965).

62. RESTATEMENT OF CONTRACTS § 90 (1932). The language was revised in the RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973):

#### Promise Reasonably Inducing Action or Forbearance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

63. 64 F.2d 334 (2d Cir. 1933).

64. *Id.* at 345.

65. *Id.* at 346.

66. The first case to consider *Baird* was *Robert Gordon v. Ingersoll-*



sue.<sup>67</sup>

In 1943, *Northwestern Engineering Co. v. Ellerman*<sup>68</sup> became the first construction industry bidding case to recognize promissory estoppel as an appropriate theory for holding the subcontractor to its bid. The plaintiff-contractor alleged that the defendant-subcontractor had submitted a written bid to the plaintiff promising to perform the work on part of the sewer system for the project in question at a specified price (which was later amended by the parties). The written agreement containing the bid of the defendant was signed by both parties.<sup>69</sup> It recited that the plaintiff-contractor proposed to submit a bid on the portion of a government air base project regarding the construction of the water supply and sewage treatment facilities and to use the defendant as the subcontractor on the sewer system. The plaintiff was awarded the prime contract, but the defendant refused to perform the subcontracting work. Thus, the plaintiff was required to obtain another subcontractor to do the work at a price in excess of that bid by the defendant. The court concluded that there was no traditional contract because the plaintiff was not required to submit a bid on the prime contract.<sup>70</sup> The written agreement provided only that the plaintiff "proposes" to submit a bid on the project. The lack of considera-

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Rand Co., 117 F.2d 654 (7th Cir. 1941). In dicta the court in *Gordon* chose not to follow the *Baird* holding against the applicability of promissory estoppel in commercial transactions, but held that the facts did not present a case for promissory estoppel:

In the *Baird* case the court refused to apply promissory estoppel to enforce a promise in a commercial transaction similar in nature to the instant transaction. Unquestionably the *Baird* case is in point, for we fail to differentiate between the revocation of the offer in that case and the effect in this case of knowledge on the offer as originally understood. However, we choose not to follow the *Baird* case. The mere fact that the transaction is commercial in nature should not preclude the use of promissory estoppel. But even so, the doctrine may not be invoked here. Justifiable reliance and irreparable detriment to the promisee are requisite factors among others. In the instant case the promisee has failed to show irreparable detriment.

*Id.* at 661.

*Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943) was the first case to hold opposite to the conclusion reached by Judge Hand in *Baird*. See text accompanying notes 68-71 *infra*.

67. *Southeastern Sales & Service v. Watson*, 172 So. 2d 239 (Fla. App. 1965); *Tatsch v. Hamilton-Erickson Mfg. Co.*, 76 N.M. 729, 418 P.2d 187 (1966); *Milone & Tucci v. Bona Fide Builders*, 49 Wash. 2d 363, 301 P.2d 759 (1956).

68. 69 S.D. 397, 10 N.W.2d 879 (1943).

69. The written bid agreement in this case is not the usual procedure found in the reported cases. Ordinarily bids are made during calls or oral communication or by wire at the last possible moment before preparation of the prime bid is completed. See notes 24 and 35 *supra*.

70. *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 406, 10 N.W.2d 879, 883 (1943).

tion on the part of the plaintiff, however, was not fatal to the plaintiff's suit. Relying upon the doctrine of promissory estoppel as expressed in Section 90 of the Restatement of Contracts, the court held the subcontractor to its promise to do the work at the agreed price. It stated:

The pleaded facts disclose that knowing of appellant's intention and desire to place a bid on the airport project, the respondents promised to enter into a binding contract to do the specified work at a fixed price, this promise was not withdrawn, and relying upon the promise, the appellant submitted its bid to the government, as contemplated in the agreement. Obviously it would seem unjust and unfair, after appellant was declared the successful bidder and imposed with all the obligations of such, to allow respondents to then retract their promise and permit the effect of such retraction to fall upon the appellant.<sup>71</sup>

The court distinguished *Baird* because the *Baird* court had emphasized the qualifying language of the subcontractor's bid. The *Ellerman* court concluded: "In spite of this opinion, we believe that reason and justice demand that the doctrine [of promissory estoppel] be applied to the present facts."<sup>72</sup>

Two omissions from the *Ellerman* opinion are somewhat troublesome. First, why was a bilateral contract not formed at the end of the bidding process when the contractor accepted the bid of the subcontractor? The court did not provide an answer. As suggested earlier in this article, the bid of the subcontractor constitutes an offer which remains open and capable of being accepted unless, and until, it is revoked<sup>73</sup> (or some other occurrence causes its termination by operation of law).<sup>74</sup> Here, the facts did not indicate that the bid was withdrawn or revoked. Thus, after the contractor had been awarded the prime contract, the contractor's announcement to the subcontractor that it would be looked to for performance of the sewer system work would seem to be an acceptance. This would create a bilateral contract. If the subcontractor's refusal to perform came after

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71. *Id.* at 406-7, 10 N.W.2d at 883.

72. *Id.* at 408, 10 N.W.2d at 884.

73. Generally, the bid as an offer can be revoked any time before it is accepted. See note 31 *supra*.

74. See RESTATEMENT (SECOND) OF CONTRACTS § 35 (Tent. Draft Nos. 1-7, 1973);

Methods of Termination of the Power of Acceptance

- (1) An offeree's power of acceptance may be terminated by
  - (a) rejection or counter-offer by the offeree, or
  - (b) lapse of time, or
  - (c) revocation by the offeror, or
  - (d) death or incapacity of the offeror or offeree.
- (2) In addition, an offeree's power of acceptance is terminated by the non-occurrence of any condition of acceptance under the terms of the offer.

this announcement, it clearly came too late. The facts of the case indicate only that the plaintiff-contractor alleged that the subcontractor "refused to carry out the terms and conditions of the agreement."<sup>75</sup> The fact that the parties had initially entered into a written agreement lacking in consideration on the part of the contractor would not preclude the result just suggested.

The second question is what is the precise impact of the doctrine of promissory estoppel? The court did not explain. The court merely concluded that in order to avoid injustice the promise of the subcontractor must be enforced (the retraction of such a promise would be unfair).<sup>76</sup> This view is a rather superficial one, as the discussion below of *Drennan v. Star Paving Co.*<sup>77</sup> will disclose.

### *Drennan v. Star Paving Company*

Although *Drennan* was not the first construction industry bidding case to apply promissory estoppel, the opinion by Justice Traynor was, and still remains, the most significant in this line of cases because its analysis was more thorough and accurate in explaining the application of contract principles to the bidding process. In *Drennan*, the plaintiff-general contractor received a bid from the defendant-subcontractor for the paving work involved in the construction of a school facility on which the plaintiff intended to bid. The defendant's bid was the lowest for the paving work, and the plaintiff used the amount of that bid in the calculation of the bid on the prime contract. The plaintiff was awarded the prime contract, but before the plaintiff could formally accept the defendant's bid, the defendant withdrew it.<sup>78</sup> The plaintiff, nevertheless, informed the defendant that the defendant would be expected to honor its bid.<sup>79</sup>

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75. 69 S.D. at 406, 10 N.W.2d at 882.

76. *Id.* at 408, 10 N.W.2d at 884.

77. 51 Cal. 2d 409, 333 P.2d 757 (1958); see note 7 *supra*.

78. Defendant withdrew the bid because "they [defendant's agents] had made a mistake in their bid" in preparing and submitting the bid by telephone to the plaintiff. 333 P.2d at 758.

79. *Id.* at 759. When the general contractor in *Drennan* told the subcontractor that the general [contractor] expected the sub [contractor] to carry through with the original bid, this action was important because it was the technical acceptance. The Court in *Drennan* found that the general [contractor's] reliance made the bid irrevocable, but the bid still had to be accepted by the general [contractor] to complete the bilateral contract. See *C.H. Leavell & Co. v. Grafe & Assocs., Inc.*, 90 Idaho 502, 513-4, 414 P.2d 873, 878 (1966):

Appellants contend that even if the court finds that the parties did not enter into a binding contract, they nevertheless are entitled to recover damages under the theory of promissory estoppel. That doctrine has been applied with increasing frequency and is especially applicable to

As in *Baird*, the *Drennan* court noted that the subcontractor's bid constituted an offer, but rejected the theories that the use of the bid amounted to an acceptance of it or that the bid amounted to an option.<sup>80</sup> Instead, the court applied the doctrine of promissory estoppel and referred to the analysis in *Ellerman*,<sup>81</sup> while it made only passing reference to *Baird*.<sup>82</sup> Justice Traynor's explanation of the precise means by which the doctrine fits the fact pattern of the subcontractor bidding situation was thoughtful and persuasive. He analogized to the circumstance where there is an offer for a unilateral contract and where the offeror attempts to withdraw the offer after the offeree begins to perform (but before performance is completed). He wrote, "In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance."<sup>83</sup> Section 45 of the Restatement of Contracts governs such circumstances.

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.<sup>84</sup>

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the construction industry—fundamentally it provides that when an offer (bid) is made and the offeror knows or has reason to know that the offeree will act in reliance upon that offer, the offeror is thereafter estopped from withdrawing his offer until the offeree has had a reasonable opportunity to accept. As noted, the offer is irrevocable for a reasonable time and the application of the doctrine merely nullifies an attempted revocation by the offeror during this period. The circumstance is analogous to an option—in both instances, before a binding contract is formed, the offeree must *accept* the offer unconditionally. (emphasis in original).

80. 51 Cal. 2d at 413, 333 P.2d at 759.

81. *Id.* at 415, 333 P.2d at 760.

82. *Id.*

83. *Id.* at 414, 333 P.2d at 759. This comment suggests the notorious Brooklyn Bridge Hypothetical put forth by Professor Wormser: "Suppose *A* says to *B*, 'I will give you \$100 if you walk across the Brooklyn Bridge'. . . . *B* starts to walk across the Brooklyn Bridge and has gone about one-half of the way across. At that moment *A* overtakes *B* and says to him, 'I withdraw my offer.'" Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916). Professor Wormser concluded that *B* has no rights against *A*. Section 45 of the RESTATEMENT OF CONTRACTS creates an option contract under these circumstances. Professor Wormser later recanted his position and agreed with § 45. Wormser, Book Review, 3 J. LEGAL ED. 145 (1950).

84. RESTATEMENT OF CONTRACTS § 45 (1932) was modified in the RESTATEMENT (SECOND) OF CONTRACTS (Tent. Drafts Nos. 1-7, 1973), as follows:

Option Contract Created by Part Performance or Tender

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror's duty of performance under any option contract so

The impact of Section 45 is that an option contract by operation of law arises for the purpose of protecting the offeree once he has commenced performance. Justice Traynor also quoted a portion of the commentary to the Restatement, Section 45, which explains that the offer for a unilateral contract "includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer . . ."<sup>85</sup> This analogy was intended to have promissory estoppel serve as the vehicle by which an offer for a bilateral contract is held open. The bid of a subcontractor is such an offer. The court explained:

Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.<sup>86</sup>

Under the facts of the case, the court found no difficulty in holding that promissory estoppel was indeed applicable. The court reasoned:

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for the use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.<sup>87</sup>

The reasoning in *Drennan* is more sound than that of *Ellerman* because the *Drennan* court used the doctrine of promissory estoppel merely as a vehicle by which to make irrevocable the bid of the subcontractor. Thus, the recovery itself was actually founded upon a traditional bilateral contract, which resulted when the general contractor announced its acceptance of

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created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

85. 51 Cal. 2d at 415, 333 P.2d at 760.

86. *Id.*

87. *Id.*

the bid of the subcontractor even though the subcontractor had previously proclaimed that its bid was revoked.<sup>88</sup> Basing the actual recovery in subcontractor bidding cases on traditional contract theory, rather than promissory estoppel, is appropriate because the remedy allows traditional contract damages (namely, recovery for the expectation losses, including lost profits) to the general contractor. On the other hand, the relief available under the doctrine of promissory estoppel is equitable in nature, which is much more loosely defined, and ordinarily does not include recovery for anticipated lost profits.<sup>89</sup> The *Drennan* analysis has been widely followed.<sup>90</sup>

### Post *Drennan*

The drafters of the Restatement (Second) of Contracts included a new provision, Section 89B(2), which specifically covers the *Drennan* type case. Additionally, Section 89B(2) may have significant effect in unilateral contract settings.<sup>91</sup> That section provides: "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character

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88. See note 79 *supra*.

89. *Goodman v. Dicker*, 169 F.2d 684 (D.C. Cir. 1948) (true measure of damages is the loss sustained by expenditures made in reliance upon assurances, not loss of anticipated profits); *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (not breach of contract action if based upon promissory estoppel so cannot award loss of profits—damages only such as are necessary to prevent injustice).

90. *N. Litterio & Co., Inc. v. Glassman Constr. Co., Inc.*, 319 F.2d 736, (D.C. Cir. 1963); *F.B. Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 375 S.W.2d 818 (1964); *Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 190 N.W.2d 71 (1971); *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super 69, 216 A.2d 246 (1966).

91. As Professor Henderson has suggested:

There are obvious advantages in frank recognition that foreseeable and substantial reliance upon unaccepted offers, standing alone, is a sufficient reason for binding offerors. The tentative drafts of the 2d RESTATEMENT OF CONTRACTS take this position in a new section [89B(2)] dealing with reliance prior to acceptance. Its approach makes clear that the reliance principle is applicable to bargains, whether unilateral or bilateral in form. Presumably this would permit the use of promissory estoppel theory to prevent revocation of an offer of a unilateral contract—a question presently unsettled because of the exclusion of preparations to perform from the scope of § 45 . . . ." Henderson, "*Promissory Estoppel and Traditional Contract Doctrine*," 78 YALE L.J. 343, 368 (1969). Professor Henderson further noted: "Because of the often vague line separating performance and preparations to perform, the respective areas of operation of §§ 45 and 90 have been difficult to distinguish. See, e.g., *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965). Some courts have indicated that preparations to perform will provide a basis for enforcement of a unilateral contract on the rationale of § 90. E.g., *Lazarus v. American Motors Corp.*, 21 Wis. 2d 76, 123 N.W.2d 548 (1963)." *Id.* at 368 n.131.

on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice."<sup>92</sup> Clearly, the decision in *Drennan* played an important role in the adoption of Section 89B(2), as evidenced by Illustration No. 6 to that section which the Reporter's Note indicates is based on the *Drennan* case.<sup>93</sup> *Ellerman* is also cited as authority for Illustration No. 6, and *Baird* is cited as contrary authority.<sup>94</sup>

With the inclusion of Section 89B(2) in the Restatement (Second), courts had the opportunity to use it as authority in future subcontractor bidding cases. Surprisingly, however, such has not been the case. Although the courts have overwhelmingly applied the reliance doctrine to hold open offers of subcontractors, they have continued to rely upon *Drennan*.<sup>95</sup> Most courts do not even mention Section 89B(2).<sup>96</sup>

According to the theory of *Drennan* and Section 89B(2), the subcontractor's bid, once relied upon by the general contractor, becomes an option which is then irrevocable. The bid remains irrevocable for a reasonable period of time, and "reasonable time" is to be determined by the circumstances of the particular case. Ordinarily, the subcontractor's bid is held open at least until the prime contract has been awarded to the general contractor and the general contractor has had the opportunity to accept the subcontractor's bid. If there is a delay in the award of the prime contract, however, (even without any fault on the part

92. RESTATEMENT (SECOND) OF CONTRACTS § 89B(2) (Tent. Drafts Nos. 1-7, 1973).

93. RESTATEMENT (SECOND) OF CONTRACTS § 89B(2), comment e (Tent. Drafts Nos. 1-7, 1973), Illustration 6:

A submits a written offer for paving work to be used by B as a partial basis for B's bid as general contractor on a large building. As A knows, B is required to name his subcontractors in his general bid. B uses A's offer and B's bid is accepted. A's offer is irrevocable until B has had a reasonable opportunity to notify A of the award and B's acceptance of A's offer.

And Reporters note: Comment e: "Illustration 6 is based on *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958); cf. *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943). But cf. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933)."

94. RESTATEMENT (SECOND) OF CONTRACTS § 89B(2), comment e (Tent. Drafts Nos. 1-7, 1973).

95. See note 90 *supra*. The cases cited in the above note relied upon *Drennan* without citing Section 89B(2).

96. Only a few cases have discussed the use of § 89B(2) in the subcontractor bidding situation. See *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176 (Mass. 1978); *Cannavino & Shea, Inc. v. Water Works Supply Corp.*, 361 Mass. 363, 280 N.E.2d 147 (1972); *David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc.*, 392 N.E.2d 1066 (Mass. App. 1979); *Ferrer v. Taft Structural, Inc.*, 21 Wash. App. 832, 587 P.2d 177 (1978). See also *Bid Shopping and Peddling*, *supra* note 5, at 389, n.13.

of the general contractor), such delay might allow the subcontractor to withdraw its bid before the award of the prime contract if circumstances warranted such withdrawal. Such circumstances include strikes, material shortages, and severe fluctuations in market prices. These circumstances would effectively shorten the time period before a subcontractor could withdraw its bid. After the prime contract is awarded, the general contractor should be required to act with reasonable speed to accept the subcontractor's bid. In *Loranger Construction Corporation v. E.F. Hauserman Co.*,<sup>97</sup> the court wrote:

A general contractor seeking recovery from a subcontractor based upon promissory estoppel may not, in the hope of getting a better price, unreasonably delay its attempted acceptance of a subbid. . . . Such a delay presents the possibility of a fluctuation in price to the advantage of a general contractor and to the detriment of a subcontractor. We have found no case dealing with a delay in attempted acceptance for so long as two and a half months, the time span in the present case. But there has been no showing of prejudice to Hauserman occasioned by the delay, and no showing that the delay was so long as to be unreasonable as a matter of law. . . . In our view the present case is governed by the general rule that a determination of what constitutes a reasonable time is a question for the jury.<sup>98</sup>

Certainly, if the general contractor delays such acceptance in order to bid shop, that activity should cause the option protection to lapse and permit the subcontractor to withdraw its bid even if the subcontractor suffers no prejudice from the delay. As the court remarked in *Drennan*:

It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.<sup>99</sup>

Because the doctrine of promissory estoppel is essentially equitable in nature, the general contractor should be required to have "clean hands," which would be lacking if it had been guilty of bid shopping.

The effect of the *Drennan* and Section 89B(2) analysis in the subcontractor bidding cases is that subcontractors are bound, but general contractors are not. In *Southern California Acoustics Co. v. C.V. Holder, Inc.*<sup>100</sup> the court held that general con-

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97. 374 N.E.2d 306 (Mass. App. 1978).

98. *Id.* at 310.

99. *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 412, 333 P.2d 757, 760 (1958).

100. 71 Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969) (plaintiff prevailed in his cause of action on a statutory ground, not on a promissory estoppel theory).



tractors are not bound under the doctrine of promissory estoppel. In *Acoustics Co.*, a subcontractor sued a general contractor for failure to hire the subcontractor to perform certain work on which the subcontractor had bid. The plaintiff was a licensed specialty subcontractor that had bid on the furnishing and installation of acoustical tile for a public construction project. The defendant-general contractor was required, under the state's naming statute, to list subcontractors who were to perform work valued at one-half of one per cent or more of the cost of the project. The defendant listed the plaintiff as the acoustical subcontractor, and the defendant was awarded the prime contract by the public authority. The plaintiff learned that the defendant had been awarded the prime contract and that the plaintiff had been listed as the acoustical subcontractor. The plaintiff alleged that it had refrained from bidding on other projects in order to stay within its bonding capacity. About three to four weeks later, the defendant substituted another subcontractor in place of the plaintiff. The plaintiff sued upon the theory of promissory estoppel under Restatement, Section 90. The plaintiff claimed that it had relied to its substantial detriment by refraining from bidding on other projects due to the defendant's use of the plaintiff's bid and failure to promptly reject the bid after the prime contract had been awarded to the defendant. The court rejected this contention on the ground that the defendant had made no promise on which the plaintiff could have relied.<sup>101</sup> The defendant had not promised to use the plaintiff to do the acoustical work, but had merely complied with the statutory duty to list the selected subcontractors.

This result appears sound, and is likely to occur in all such cases because the general contractors have not been viewed to have made promises to subcontractors simply by using their bids in preparing bids on the prime contracts. Furthermore, promissory estoppel theory would be unnecessary in such cases even if a general contractor had promised to actually hire a subcontractor. Instead, traditional contract theory would govern. There would be a mutual exchange of promises—the bid of the subcontractor followed by the use of that bid by the general contractor.

Under other circumstances, however, the subcontractor should succeed on the reliance theory of Section 90. For instance, where the general contractor (in its solicitation of bids from subcontractors) guarantees that it will award the subcontract to the lowest bidder, the general contractor has made, at

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101. *Id.* at 723, 456 P.2d at 979, 79 Cal. Rptr. at 323.

least, a promise.<sup>102</sup> If the subcontractor, in reliance on this promise, takes substantial detrimental action or non-action (such as expending substantial funds in the preparation of its bid<sup>103</sup> or, refraining from bidding on other jobs after learning that it is the low bidder, in order not to exceed its bonding capacity or performance capability<sup>104</sup>), the subcontractor should be permitted to recover under the promissory estoppel theory. Promissory estoppel theory would prove unnecessary, however, if the general contractor's solicitation was held to constitute an offer. Then, traditional bilateral contract theory would be applicable—the general contractor's offer in exchange for the promise of the subcontractor by way of its bid. Of course, the likelihood that the general contractor would guarantee the award of the subcontract to the low bidder would be minimal if the general contractor believed that it would be bound by that guarantee.

THE MASSACHUSETTS CASE OF *LORANGER CONSTRUCTION CORPORATION v. E.F. HAUSERMAN CO.*

The case of *Loranger Construction Corporation v. E.F. Hauserman Co.*<sup>105</sup> appeared to be just another subcontractor bidding case when it was decided by the Appeals Court of Massachusetts in 1978. The defendant-subcontractor Hauserman, a manufacturer of movable metal partitions, telephoned a bid to the plaintiff-general contractor Loranger. The bid was for the supplying of metal partitions and their installation on a construction project, on which Loranger planned to bid. This conversation occurred on the same day that the bids on the prime contract were due. Hauserman's bid was the only one for the metal partitions. Loranger used Hauserman's bid in computing the bid on the prime contract, and submitted an overall bid on the project. About one month later, the prime contract was awarded to Loranger. Almost another three months passed before Loranger sent Hauserman a subcontract form based on the earlier bid of Hauserman. Hauserman refused to accept the subcontract, and Loranger was required to obtain a substitute to

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102. See note 134 and accompanying text *infra*.

103. See *Warren G. Kleban Eng'r Corp. v. Caldwell*, 361 F. Supp. 805, 807 (N.D. Miss. 1973), *vacated on other grounds*, 490 F.2d 800 (1974) (subcontractor alleged a loss of \$4800 in expenses in preparing a bid and \$57,000 in lost profits).

104. See *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 71 Cal. 2d 719, 456 P.2d 975, 79 Cal. Rptr. 319 (1969) (subcontractor asserted that it had refrained from bidding on other projects after it learned that its bid had been used by the general contractor to which the prime contract had been awarded).

105. 374 N.E.2d 306 (Mass. App. 1978).

do the work at a substantially higher cost. Loranger sued to recover the difference, and the jury found for Loranger.<sup>106</sup>

Although the appeals court seemed to conclude that Loranger had pleaded a case for traditional contract recovery based on offer, acceptance, and consideration, the court reached the opposite conclusion later in the very same paragraph of its opinion.

In Count I of its amended complaint, Loranger alleged that Hauserman's telephone quotation . . . was an offer which Loranger accepted and relied upon in submitting its general bid. . . . With respect to Count I Loranger does not assert, nor does the evidence demonstrate, that any action taken by it prior to the award of the general contract . . . constituted an acceptance by Loranger. Thus Loranger is foreclosed from recovery on any traditional contract theory.<sup>107</sup>

Yet, the appeals court affirmed the jury's verdict upon the theory of promissory estoppel under Section 90 of the Restatement of Contracts, even though that theory had not been expressly accepted by the courts of Massachusetts.<sup>108</sup> As the appeals court reasoned:

Application of the theory is appropriate upon the facts presented by this appeal. Hauserman submitted its bid knowing that Loranger might use that figure in its general bid. Hauserman realized that if that figure were used and Loranger were awarded the general contract, Loranger would be bound by its bid price. Because Hauserman reneged, Loranger was forced to pay a higher price for another subcontractor. The jury could have found that Loranger had relied upon Hauserman's figure, that the reliance was reasonable, and that injustice could be avoided only by the imposition of appropriate damages.<sup>109</sup>

The case was petitioned for further appeal and was accepted for review by the Supreme Judicial Court of Massachusetts.<sup>110</sup> The well-reasoned decision of that court establishes that *Loranger* is not an ordinary subcontractor bidding case. Rather, it is potentially a very significant opinion in that the court affirmed by using traditional contract theory instead of promissory estoppel.

The court's opinion was drafted by Justice Robert Braucher, a former professor of law at Harvard University who had served as Reporter for the Restatement (Second) of Contracts, and who had written a textbook on part of the Uniform Commercial Code entitled *Introduction to Commercial Transactions*.<sup>111</sup> In apply-

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106. *Id.* at 308.

107. *Id.*

108. *Id.* at 309.

109. *Id.* at 309-310.

110. 384 N.E.2d 176 (Mass. 1978).

111. R. BRAUCHER & R. RIEGERT, *INTRODUCTION TO COMMERCIAL TRANSACTIONS* (The Foundation Press 1977).

ing traditional contract theory to the circumstances described above, the court opened the door to the possibility that, in many of these cases, a conditional bilateral contract may arise at the time of the submission of a subcontractor's bid. At another point in the opinion, the court abandoned a long established precedent (dating back to the *Baird* case) to the effect that a subcontractor's bid does not constitute an offer for a unilateral contract. The approach of the Massachusetts court is a significant departure from application of promissory estoppel theory to application of traditional contract theory based on the bargaining process of offer and acceptance. Indeed, the court itself commented that "review of the cases suggest that many decisions based on reliance might have been based upon bargain."<sup>112</sup>

The Supreme Judicial Court began its analysis of the case by noting that the plaintiff's evidence could have supported recovery under a reliance theory.<sup>113</sup> Unlike the appellate court approach of utilizing Section 90 of the Restatement, however, the Supreme Judicial Court cited to Section 89B(2) as authority for the reliance doctrine.<sup>114</sup> Yet, the court concluded that the case was not a proper one for such a theory because the jury had not been instructed upon a reliance theory, only upon traditional contract theory. The court stated:

But we find that the case was presented to the jury on the basis of offer, acceptance and consideration; there was no reference in the charge to reliance on a promise. We therefore cannot attribute to the jury a finding that the offer or promise of the defendant induced action 'of a substantial character' on the part of the plaintiff. We consider the case on the basis on which it was submitted to the jury.<sup>115</sup>

The court proceeded to find three ways in which a traditional contract might have been formed. Of course, the subcontractor's bid constitutes the offer in each of the three possibilities.

### *Conditional Bilateral Contract Analysis*

The court first considered that "there might have been an exchange of promises in the plaintiff's telephone conversation with the defendant's engineer, before the plaintiff's bid was sub-

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112. *Loranger Const. Corp. v. E.F. Hauserman Co.*, 384 N.E.2d 176, 180 (Mass. 1978).

113. *Id.* at 180. The Supreme Judicial Court commented: "When a promise is enforceable in whole or in part by virtue of reliance, it is a 'contract,' and it is enforceable pursuant to a 'traditional contract theory' antedating the modern doctrine of consideration . . . we do not use the expression 'promissory estoppel,' since it tends to confusion rather than clarity."

114. *Id.* at 179.

115. *Id.* at 180.

mitted."<sup>116</sup> In this instance, a conditional bilateral contract would have been formed as a result of the telephone conversation. The contract would be bilateral because of a mutual exchange of promises. It would be conditional because there would be no binding obligation on either party unless the plaintiff were to be awarded the prime contract.<sup>117</sup> This condition is so obvious and basic in the construction industry setting that it should be implied from the circumstances even if the parties did not expressly so state in the course of their telephone conversation.

The impact of this reasoning on the construction industry would be dramatic if its use were to become widespread, for the consequence would be that both the general contractor and the subcontractor would be bound at the early stage of the bidding process (as long as the general contractor were to ultimately win the award of the prime contract). Unlike the result in cases where promissory estoppel is applied and only subcontractors are bound, here the general contractor is also committed. The general contractor, if locked into an agreement with the subcontractor, would no longer be free to bid shop or to pressure the subcontractor to bid chop.

Apparently, the practice of making mutual promises at the time the subcontractor submits its bid happens fairly frequently.<sup>118</sup> Of course, the exchange of promises would not have to occur during a telephone conversation. There might be a written agreement. In fact, the circumstances in the *Ellerman* case in which there was a written document would come very close to a conditional bilateral contract<sup>119</sup> under the *Loranger* analysis.

The frequency of these occurrences in the future is likely to diminish, however, because general contractors will undoubtedly be advised by their attorneys not to make such promises to subcontractors at the time the subcontractors submit their bids. The general contractors would, of course, prefer to have their freedom while at the same time holding the subcontractors to the amounts of their bids.

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116. *Id.*

117. See note 52 *supra*.

118. See, e.g., *Construction Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 291 Minn. 113, 121, 190 N.W.2d 71, 76 (1971): "Plaintiff's witness Saudin testified that plaintiff conditionally accepted subcontract bids in about 50 per cent of the cases when they were first offered, depending on the size of the job involved."

119. See note 69 *supra*. See also *Williams v. Favret*, 161 F.2d 822 (5th Cir. 1947) (where the parties exchanged telegrams regarding the subcontractor's bid).

*Unilateral Contract Analysis*

The court analyzed a second method of acceptance. Here, the offer might have been accepted by the performing of an act, using the defendant's estimate in submitting the plaintiff's bid. "Acceptance in this way might be complete without notification to the offeror."<sup>120</sup> The court seemed to propose that the jury could find the bid of the subcontractor to constitute an offer for a unilateral contract which was accepted by the general contractor when it used the subcontractor's bid in computing and submitting the bid on the prime contract. The court in adopting the unilateral contract analysis cited to *Bishop v. Eaton*<sup>121</sup> and Section 56 of the Restatement (Second) of Contracts.<sup>122</sup> Both of these authorities concern notice of acceptance of an offer for a unilateral contract. The court's use of unilateral contract theory is a clear departure from the early precedents of *Baird* and *Drennan*, which had rejected such reasoning.<sup>123</sup>

Although the impact of this second approach on legal theory is significant, the practical impact is minimal, for again only the subcontractor is bound. Only the offeror in a unilateral contract setting is bound once the offeree commences performance. In the subcontractor bidding case, the subcontractor-offeror makes an offer for a unilateral contract. The offer is intended to induce a performance from the general contractor-offeree. The performance sought is not merely the use of the subcontractor's bid in the computation of the bid on the prime contract, but the use of the bid as well as the selection of the subcontractor as the party to actually do the work. Thus, when the general contractor uses the subcontractor's bid, the general contractor has simply commenced (not completed) performance. As a result of commencing performance, an option contract by operation of law

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120. 384 N.E.2d at 180.

121. 161 Mass. 496, 37 N.E. 665 (1894).

122. RESTATEMENT (SECOND) OF CONTRACTS § 56:

Acceptance by Performance; Necessity of Notification to Offeror

(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.

(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless

(a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or

(b) the offeror learns of the performance within a reasonable time, or

(c) the offer indicates that notification of acceptance is not required.

Cited by *Loranger*, 384 N.E.2d at 180.

123. See notes 49 and 83 and accompanying text *supra*.

comes into existence for the protection of the general contractor-offeree under Section 45 of the Restatement.<sup>124</sup> The subcontractor-offeror may not revoke its offer, but the general contractor-offeree does not have to complete the performance.

With regard to the notification point raised by the opinion, the court cited the Restatement (Second), Sections 56(1) and (2)(c), as authority for the statement that "[a]cceptance in this way might be complete without notification to the offeror."<sup>125</sup> Those provisions indicate that notification of acceptance of an offer for a unilateral contract is not ordinarily required unless notification is requested by the offeror. Even where the offeree "has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty," notification is not ordinarily required.<sup>126</sup> In other words, the offer may dispense with the requirement of giving notice, or the nature of the setting may permit a court to conclude that no notification is required. Thus, for example, there should be no requirement of notice of acceptance of an offer of reward.<sup>127</sup> Similarly, in the construction industry bidding process, the subcontractors should be aware of the common practice of general contractors using their bids without giving notice to them. This practice occurs because there is a time lag between the general contractor's use of such bids and the award of the prime contract to a general contractor and because there is uncertainty by any given general contractor as to whether it will be awarded the prime contract. Therefore, industry custom indicates that notification is not required. If a subcontractor desires the protection of notification, however, it would be an easy matter to insist upon such notice in the terms of the bid.

#### *Unrevoked Offer Analysis*

Finally, the court stated that "the offer might have remained outstanding, unrevoked, until" it had "been accepted when the plaintiff sent the defendant a subcontract form."<sup>128</sup> This final theory proposed by the court is simply the common means by which a bilateral contract is formed at the end of the bidding

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124. See note 83 *supra*.

125. 384 N.E.2d at 180.

126. RESTATEMENT (SECOND) OF CONTRACTS § 56(2) (Tent. Drafts Nos. 1-7, 1973); note 122 *supra*.

127. See *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (1893) (advertisement offering reward to user of product if user contracted influenza or cold was not a mere puff which meant nothing but an offer to anybody who performs the conditions named in the advertisement and anybody who does perform the conditions accepts the offer—notice of acceptance dispensed with).

128. 384 N.E.2d at 180.

process. Thus, the parties would be bound when the general contractor submitted a subcontract form. Generally this is not at an early stage of the bidding process and therefore would not prevent bid shopping or bid withdrawing.

As of the time of publication of this article,<sup>129</sup> the courts of other jurisdictions have not addressed the new, traditional contract theories advanced by the Supreme Judicial Court of Massachusetts in *Loranger*. Only the lower courts of Massachusetts have cited it, and they have done so not only for its position on the traditional contract theories but also for its reference to the appropriateness under proper circumstances of application of the reliance doctrine under Section 89B(2).<sup>130</sup> Future decisions in the subcontractor bidding area will be interesting to follow. Whether other jurisdictions adopt the new approaches of *Loranger*, or reject them, or ignore *Loranger* altogether remains to be seen.

#### ANALOGY TO AUCTION WITHOUT RESERVE

Under appropriate circumstances, one more theory of contract law might be applied to establish a contract at the early stage of a subcontractor bidding case. If the general contractor in its solicitation of bids from subcontractors were to announce that it assured or guaranteed the award of the subcontract to the lowest bidder, the general contractor should be bound to its promise. In such a case, the general contractor's solicitation of bids would constitute an offer, and subcontractors would be offerees. Moreover, the general contractor's offer should be irrevocable. The authority for such a result is found by analogy to an "auction without reserve."

An auction without reserve is described in the Restatement (Second) of Contracts as follows: "[W]hen goods are put up without reserve, the auctioneer makes an offer to sell at any price bid by the highest bidder, and after the auctioneer calls for bids the goods cannot be withdrawn unless no bid is made within a reasonable time."<sup>131</sup> The Uniform Commercial Code includes a similar provision covering the auction without reserve.<sup>132</sup> These provisions and the theory proposed here are not far removed from the statutory "firm offer" established in the

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129. This article was submitted for publication on May 10, 1980.

130. See *David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc.*, 392 N.E.2d 1066, 1068-69 (Mass. App. 1979). See also *Tull v. Master Donut Dev. Corp.*, 389 N.E.2d 447, 448 (Mass. App. 1979); *Noble v. John Hancock Mut. Life Ins. Co.*, 386 N.E.2d 735, 737 (Mass. App. 1979).

131. RESTATEMENT (SECOND) OF CONTRACTS § 27 (Tent. Drafts Nos. 1-7, 1973); See note 16 *supra*.

132. U.C.C. § 2-238; see note 16 *supra*.



Uniform Commercial Code.<sup>133</sup> Furthermore, if the general contractor was to guarantee the award of the subcontract to the lowest bidder, the general contractor's statement would be supported by consideration, "the assurance that the award would be made to the lowest bidder."<sup>134</sup>

This reasoning would result in establishment of a conditional bilateral contract between the general contractor and the lowest bidding subcontractor at the early stage of the bidding process. Admittedly, this result is not likely to occur very often. General contractors do not want to be bound so early in the process and, therefore, are not likely to make such guarantees. If the "guarantee" language was used at all, the general contractor would undoubtedly qualify it by stating that the subcontract would be awarded to the lowest *responsible* bidder.

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133. U.C.C. § 2-205, on Firm Offers provides:

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

See Keyes, *supra* note 18, at 461: "But however broadly we are to interpret the Uniform Commercial Code, Section 2-205 can only apply to firm offers to sell goods. Thus, bidding for construction work in order to improve real property — a key area in the field of formally advertised procurements — is to be excluded from operation of this provision."; *Bid Shopping and Peddling*, *supra* note 5, at 400-01. The author states "Article 2 of the Code, by its own terms, applies only to transactions in 'goods.' Since very few construction contracts fit this definition but rather deal only with 'services,' any application of the Code to this area must be effected through judicial reasoning by analogy." *The Firm Offer Problem*, *supra* note 5, at 215:

In addition, Section 2-205 applies only to contracts for the sale of goods. Construction subcontracts commonly involve both goods and services. For example, a plumbing subcontractor not only contracts to supply goods but installation of such as well. However, there are a number of subcontracts which provide only for the furnishing of goods, and consequently, it would be erroneous to assume that the Uniform Commercial Code has no application in this area. But, in the final analysis, it must be conceded that the scope of the Code's applicability in this area is potentially small due to the general practice of including services in subcontracts.

134. In *Wil-Fred's Inc. v. Metropolitan Sanitary Dist.*, 57 Ill. App. 3d 16, 372 N.E.2d 946 (1978), the court noted that the assurance by the Sanitary District (the owner) that it would award the rehabilitation project to the lowest bidder constituted "valuable consideration." Although this case involved a guarantee by an owner to a contractor, the same reasoning ought to apply to a guarantee from a general contractor to a subcontractor. Regrettably, the conclusion reached by the court with respect to the effect of such assurance appears ill-founded. That is, the court concluded that the bid of the contractor amounted to only an option. To the contrary, under those circumstances, the contractor's bid should have constituted an acceptance, creating a bilateral contract upon the submission of the low bid. 57 Ill. App. 3d at 20, 372 N.E.2d at 950.

## CONCLUSION

The construction industry bidding cases constitute a significant problem area in the law of contracts. Disputes between general contractors and subcontractors develop frequently and are litigated regularly. The evils associated with bid shopping by general contractors, encouragement of bid peddling, and withdrawal of bids by subcontractors can be severe. Although the participants in the subcontractor bidding process have the power to change the system to eliminate the loopholes that tend to delay binding contract liability until the very end of the bidding process, the likelihood of such change appears extremely remote. There is no substantial governing organization of general contractors and/or subcontractors to regulate their affairs in the private sector and with which to work to influence such change. Furthermore, the interest of each of the two groups appear to be adverse to the other's interest (although such is not always the case), and the public interest may not be effectively represented at all by either of the groups. Nevertheless, the participants in the bidding process should strive to establish practices which recognize mutually binding commitments on the part of the general contractors and subcontractors at the early stage of the bidding process.

Left to judicial resolution, the subcontractor bidding cases have caused difficulties for the courts in applying contract principles. Thus, the two contract theories that seem applicable in virtually all of the subcontractor bidding cases—unilateral contract theory as recognized in *Loranger* and promissory estoppel theory as recognized in *Ellerman* and *Drennan*—have the impact of holding only the subcontractor to its bid. The general contractor remains largely free to bid shop and to pressure the subcontractor to bid chop. The legislative bodies in those jurisdictions which have not as yet done so should adopt provisions to govern the public bidding cases. Especially, naming statutes should be adopted to provide a statutory remedy to frustrated subcontractors, whose low bids were used by general contractors and whose fates (with regard to particular projects) very likely would otherwise be left to the whims of the general contractors. Furthermore, with the resolution of future cases and under the public policy pressure to avoid the disadvantages of bid shopping and bid peddling, perhaps the courts will be inclined to scrutinize the cases even more closely to find binding bilateral contracts at the early stage of the bidding process. The *Loranger* decision may be the first important step in this direction. The needs and interests of the construction industry and

the public seem to justify innovative interpretation in the resolution of disputes in the subcontractor bidding cases.