

# The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel

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## THE "FIRM OFFER" PROBLEM IN CONSTRUCTION BIDS AND THE NEED FOR PROMISSORY ESTOPPEL

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.<sup>1</sup> 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. To comprehend fully the problems that have arisen, the construction industry's method of operation must first be analyzed.

### THE PROBLEM

There are basically three parties involved when a construction bid is let: (1) the letting party, who calls for bids on his job; (2) the general contractor,<sup>2</sup> who makes a bid on the whole project, but who often does little, if any, of the actual work;<sup>3</sup> and (3) the subcontractor,<sup>4</sup> who is a specialist in a certain field, e.g. plumbing or tile-setting, and who bids only on that portion of the whole job. Once a project has been announced, the subcontractor, either on his own initiative or at the general contractor's request, prepares an estimate for one or more general contractors whom he knows to be interested in the project. The general, who has received bids from many subs, then evaluates the bids made by the subs in each field and uses these bids to compute his total bid.<sup>5</sup> The letting party, after receiving bids from all interested generals, awards the contract to the lowest reputable bidder among the generals.

From this basic framework a problem emerges. It will be noted that there is no formal contract at law until the award is made by the letting

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1. Schultz, *The Firm Offer Puzzle*, 19 U. CHI. L. REV. 237, 240 n. 7 (1952). Professor Schultz found less than a dozen cases litigated in courts of record between the period beginning in 1914 and ending in 1952.

2. Hereinafter referred to as "the general."

3. See generally Schultz, *supra* note 1.

4. Hereinafter referred to as "the sub."

5. The general 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.

party to the general. Prior to the award, there is no offer or acceptance secured by a valid consideration. This fact then raises the question as to what status the bid between the sub and the general occupies.

At common law there are three possibilities, each of which depends on the particular facts of the case. The offer can be viewed as calling for a unilateral contract<sup>6</sup> which is completed by the general's use of the offer in his bid. A unilateral contract is one that calls for an act or forbearance rather than a promise in exchange,<sup>7</sup> and nothing but full performance will constitute binding consideration.<sup>8</sup> Thus, it is possible to view the sub's bid as calling for an act, i.e., the use of the bid. If the bid is used by the general, a unilateral contract is then complete.<sup>9</sup> The act supplies the necessary consideration to make a legally binding agreement.<sup>10</sup>

Another view treats the offer as calling for a return promise; the offer is held to contemplate a bilateral contract.<sup>11</sup> The exchange of promises in a bilateral contract provides the consideration<sup>12</sup> and thus makes the contract legally binding.<sup>13</sup> If this view is to be applied, there must be an affirmative acceptance of the sub's bid by the general and a return promise to give the sub the job, or there is no valid contract.<sup>14</sup> Since it is customary in the construction industry to delay such formal commitments until after the award of the general contract,<sup>15</sup> this theory

6. See *Baird v. Gimble Bros.*, 64 F.2d 344 (2d Cir. 1933). See generally Llewellyn, *Our Case Law of Contract: Offer and Acceptance, II*, 48 YALE L. REV. 779, 783-789 (1939).

7. RESTATEMENT OF CONTRACTS § 12 (1932).

8. *Id.* at § 75 (1) (a & b).

9. *Baird v. Gimble Bros.*, 64 F.2d 344 (2d Cir. 1933).

10. *Id.* The decision in *Baird v. Gimble Bros.* implies that the general's act of using the bid constitutes full performance.

11. *Supra* note 7.

12. See generally Llewellyn, *supra* note 6.

13. RESTATEMENT OF CONTRACTS § 75 (1) (c&d).

14. 64 F.2d 344.

15. Schultz, *supra* note 1 at 262. Professor Schultz conducted a "questionnaire survey" of 137 general contractors and 275 subcontractors in Indiana during 1951. He posed the question "Have you ever considered binding the subcontractor before the award by

1. a contract;
2. an option;
3. a bid bond;
4. some other device;
5. never considered;
6. no response?"

Only twenty of the eighty generals had ever considering using one of the three

allows the sub to revoke his offer at any time before the contract is awarded. Thus, the general, who has relied on the sub's bid in making his own bid, is left with no remedy if he has not formally accepted the offer and promised something in return.<sup>16</sup>

The third theory that has been applied to construction cases is commonly termed "promissory estoppel."<sup>17</sup> While this doctrine can be traced back to the English case of *Jorden v. Money*,<sup>18</sup> its modern articulation is found in the Restatement of Contracts.<sup>19</sup> The comments and illustrations to this section indicate that the doctrine applies only to gratuitous promises,<sup>20</sup> and the section has been so interpreted.<sup>21</sup> However, promissory estoppel has been invoked recently to bind a sub who withdrew his offer before the general had formally accepted but after the general had used it in his bid.<sup>22</sup> This doctrine requires (1) a clear and definite offer; (2) a reasonable expectation of substantial reliance by the promisor; (3) actual, reasonable and substantial reliance by the promisee; and (4) detriment which can only be avoided by the enforcement of the promise.<sup>23</sup> Provided that the general can prove the foregoing elements, the provisions of this section constitute a means by which the Courts can bind a sub to his promise even if there is no

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binding devices. Forty-six had never considered binding the sub, and twelve made no response.

16. This is exactly what occurred in *Baird v. Gimble Bros.*, 64 F.2d 344 (2d cir. 1933)

17. Promissory estoppel is not considered a true estoppel. It differs from estoppel in pais, and, in fact, stands in a class by itself. See generally note, *Contracts—Promissory Estoppel*, 20 VA. L. REV. 214, 216 (1933); note *Subscriptions—Enforcement of Charitable Subscriptions*, 12 MINN. L. REV. 643 (1929); note, *Contracts—Revocability of an Offer to Form a Unilateral Contract—Promissory Estoppel*, 13 MINN. L. REV. 366, 367 (1929). While promissory estoppel has been criticized on the grounds that it is not a true estoppel, no court or writer has produced a better name for the doctrine.

18. 5 H.L.C. 185 (1854).

19. RESTATEMENT OF CONTRACTS § 90 provides: "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 the enforcement of the promise."

20. *Id.*, illustrations 1-4.

21. 64 F.2d at 346. "But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. . . . The doctrine of 'promissory estoppel' is to avoid the harsh result of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise."

22. *E. A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246, 252 (1966); see also *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 333 P.2d 757 (1958).

23. See C.D., 26 Mo. L. REV. 356 (1961).

accepted bilateral or unilateral contract.<sup>24</sup> Many courts have been reluctant to apply this doctrine. This reluctance can be ascribed to two sources: (1) the gratuitous promise gloss of the doctrine<sup>25</sup> and (2) the legacy of the *Baird* decision,<sup>26</sup> discussed *infra*.

Since the adoption of the Uniform Commercial Code by most jurisdictions,<sup>27</sup> a new theory may now be available to the courts in a certain percentage of cases involving construction bids. Section 2-205 thereof 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. . . .

This section, it should be noted, applies only to written offers,<sup>28</sup> and, unfortunately, a substantial number of subcontractors do not make either firm or written offers;<sup>29</sup> hence, this section is inapplicable in most instances.

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,<sup>30</sup> 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.<sup>31</sup>

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24. *E. A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (1966).

25. RESTATEMENT *supra* at note 19, illustrations 1-4.

26. 64 F.2d at 344.

27. THE UNIFORM COMMERCIAL CODE has been adopted in all states but Louisiana. It is also in effect in the District of Columbia and the Virgin Islands. UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, Art 1-3 (supp. 1967).

28. UNIFORM COMMERCIAL CODE § 2-205, comment 2.

29. This fact was clearly revealed by Professor Schultz's survey in Indiana. Schultz, *supra* note 1.

30. *See*, *Robert Gordon, Inc. v. Ingersoll Rand Co.*, 117 F.2d 654 (7th Cir. 1941) and *Tatsch v. Hamilton-Erickson Mfg.*, 76 N.M. 729, 418 P.2d 187 (1966).

31. No jurisdiction has yet decided whether UNIFORM COMMERCIAL CODE § 2-205

There is another facet to the construction bid problem. The remedies discussed above are oriented toward protecting the general if he has relied on the sub's bid. But the general is not the only one who requires legal aid; the sub may also need protection. Reliance is a two-way street. If the sub submits a bid and if informed by the general that his bid is being used in the overall bid, the sub may rely upon being awarded the contract. If he is not thereafter awarded the subcontract, he may have incurred damages; e.g., the accumulation of material in preparation to perform. Therefore, any legal remedy or solution to the bid problem must protect the rights of both general and subcontractor. A remedy that will protect both parties is especially important in view of the balance of bargaining power between those parties. This power is in a constant state of flux.

At the time when the sub submits his bid to the general, he is in a relatively strong position.<sup>32</sup> Since the general does not have the contract at this stage and is still competing with other generals, he cannot force the sub to lower his bid by threatening not to give the sub the contract. Thus, at this stage, the general is usually forced to rely on the sub's bid. But once the general has secured the contract, he has a monopoly on the market. It is in his financial interest to try to reduce the sub's bid by threatening to give the subcontract to another. The sub, who needs the work to keep his equipment moving, will usually surrender even if he can make no profit. This practice is known as "bid shopping"<sup>33</sup> and results in a windfall profit to the general at the sub's expense. The practice is so common that certain generals anticipate such reductions when making their bid<sup>34</sup> and arbitrarily reduce the sub's low

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is applicable to an offer for *both* goods and services. *But see* E. A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966). Therefore, it is unknown whether the courts will strictly construe this section to apply only to offers for goods, or whether they will regard the offer as a whole. Should a court take the latter view, it could interpret an offer for goods and services as one calling primarily for goods rather than services, thereby opening the door for its extended application.

32. Schultz, *supra* note 1, at 256-274.

33. The term "bid shopping" is used when the general tries to secure lower bids from subs. The term "bid peddling" is used when a sub reduces his bid once all sub bids have been submitted in an effort to get the contract. Both these practices are condemned as unethical by subcontractor's associations, but they are quite common in the industry.

34. Most subcontractors will admit that certain unethical generals commonly anticipate these reductions in their overall bid.

offer by as much as ten percent.<sup>35</sup> Consequently, it is not uncommon for a sub to submit the low bid, and yet not be awarded the contract. Ultimately, the sub is the weaker party, and it is apparent that he needs as much, if not more, legal protection as the general. Therefore, any legal theory that allows the general to depend on the sub's offer must be reciprocal, allowing the sub to rely on the subcontract if his bid is used and if he is notified of its use. In essence, what the construction industry needs is a legal theory that will provide for a balanced and equitable relationship between the parties.

#### LINES OF AUTHORITY

Two divergent lines of authority have emanated from the courts which have attempted to deal with this problem. The first and oldest stemmed from the leading case of *Baird v. Gimble Brothers*,<sup>36</sup> while the modern view traces its origin to *Drennan v. Star Paving*.<sup>37</sup>

#### *The Baird Decision*

The Baird decision, despite much criticism,<sup>38</sup> has enjoyed remarkable longevity, although it is dubious whether its following will be enlarged in the future. The *Baird* case arose when a sub, who had learned of a proposed project, sent unsolicited "firm" offers to all generals known to be interested in the job. After his bid was received and used by the winning general, Gimble, the sub, discovered an error in his bid and withdrew the offer immediately by telephone and later by letter. The general, after receiving these withdrawals, formally accepted the sub's offer and Gimble refused to perform. The court in its decision wrestled with three basic issues: (1) was there a bilateral contract; (2) was there a unilateral contract; and (3) even if there was no contract, could the doctrine of promissory estoppel be invoked to bind the sub?

The resolution of the first issue was not difficult because the offer had been revoked before there was an acceptance, and thus there could be no bilateral contract.<sup>39</sup> Even prior to the adoption of the Uniform

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35. Schultz, *supra* note 1. This fact was established during Schultz's interviews with general contractors.

36. 64 F.2d 344.

37. 51 Cal. 2d 409, 333 P.2d 757 (1958).

38. For criticism of Baird, see generally note, *Once Around the Flag Pole—Construction Bidding and Contracts at Formation*, 39 N.Y.U. L. REV. 816 (1964); note, *Contracts—Revocation of Offer Before Acceptance—Promissory Estoppel*, 28 ILL. L. REV. 419 (1934); note, *Contracts—Promissory Estoppel*, 20 VA. L. REV. 214 (1933).

39. RESTATEMENT OF CONTRACTS § 35.

Commercial Code, written firm offers, if unsupported by consideration, were revocable<sup>40</sup> at any time before acceptance.

The second issue was more troublesome. Its resolution depended entirely on the court's interpretation of the intent of the parties as manifested by their correspondence and action.<sup>41</sup> In other words, did the sub intend to propose a unilateral contract which would be binding once the general used the sub's bid? If the answer was affirmative, there would be valid consideration to support the firm offer, and it would then be irrevocable for the period stated. However, the court held that reason and the language of the offer precluded this interpretation.<sup>42</sup> Therefore, there was no unilateral contract. As for the final issue, the court, while it *in arguendo* accepted the doctrine of promissory estoppel, held that it was inapplicable because the doctrine was meant to apply to only donative or gratuitous promises.<sup>43</sup> Here the offer was for an exchange and was not a gratuitous promise. In effect, then, the court held that there was no enforceable contractual relationship between the parties, and consequently the general had no legal remedy against the sub.

The first two issues were decided strictly on the specific facts of this case. Though the court's interpretation of certain facts may be criticized, its legal basis was sound. The third issue, however, raised a question of law: What are the limits of the doctrine of promissory estoppel's applicability? The court in *Baird* chose to take the narrow view and construed the doctrine as being applicable only to gratuitous promises. This result was undoubtedly based on a careful reading of the illustrations found in the Restatement,<sup>44</sup> and the decision in *Allegheny College v. National Bank*<sup>45</sup> which also exerted an influence on this issue.<sup>46</sup> However, it was not long before the narrow interpretation of the promissory estoppel doctrine was questioned,<sup>47</sup> and even subsequent cases, which cited *Baird* in support, chose to avoid the issue of promis-

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40. *Id.* at § 47.

41. The offer stated "we are offering these price for reasonable [sic] prompt acceptance after the general contract has been awarded." The court construed this to mean that the offer contemplated a return promise, a bilateral contract. 64 F.2d at 346.

42. *Id.*

43. *Id.* See also *supra* note 21.

44. 64 F.2d 344.

45. 246 N.Y. 369, 159 N.E. 173 (1927).

46. *Baird v. Gimble Bros.*, 64 F.2d 344, 346.

47. *Robert Gordon, Inc. v. Ingersoll Rand Co.*, 117 F.2d 654; *Northwestern Eng'r Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943).



sory estoppel.<sup>48</sup> In fact, no court directly supported the *Baird* rule on the Restatement's applicability.

### *The Drennan Decision*

In 1958 the leading case of *Drennan v. Star Paving Co.*<sup>49</sup> squarely challenged the *Baird* holding on promissory estoppel. In the *Drennan* case, the general had used the sub's oral bid which was communicated to the general's secretary by telephone. This bid did not purport to be a firm offer as had the sub's bid in the *Baird* case. The sub had also revoked prior to acceptance; thus there could be no valid bilateral contract.

While the facts favored the sub in both *Drennan* and *Baird*, there was a material difference in the relative weight of the equities in the two cases. In *Baird*, the general had not listed his subcontractors and therefore had not committed himself to any one sub. The court did not sympathize with the general and left the parties as it found them.<sup>50</sup> In *Drennan*, however, the general had listed all the subcontractors whose bids he had used. The practical effect of this listing was the foreclosure of the general's ability to "shop" after the award. Thus, the court in *Drennan* sympathized with the general and not with the sub. The court held that the sub "... had reasons not only to expect plaintiff the general to rely on its bid but to want him to." The court reasoned further that though the sub's bid was silent on revocability, this silence must be interpreted with reference to the facts. Since it was clear that the defendant wanted the general to use the bid and rely on it, the court held that the Restatement applied. This decision challenged the *Baird* rule on two grounds: (1) on the analysis of the sub-general relationship and (2) on the applicability of promissory estoppel. It should be noted, however, that (1) the *Drennan* result was based on a particular set of equities, and that (2) the court cautioned that had the

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48. *Albert v. R. P. Farnsworth & Co.*, 176 F.2d 198 (5th Cir. 1949); *Traff v. Fabro*, 337 Ill. App. 83, 84 N.E.2d 874 (1949); *Am. Handkerchief Corp. v. Frannat Realty*, 17 N.J. 12, 109 A.2d 793 (1954); *Harris v. Lillis*, 24 So. 2d 689 (Miss. 1946); *R. J. Daum Constr. Co. v. Child*, 122 Utah, 194, 247 P.2d 817 (1952); *Milone & Tucci, Inc. v. Bonafide Builders*, 49 Wyo. 2d 363, 301 P.2d 759 (1956).

49. 51 Cal. 2d 409, 333 P.2d 757.

50. 64 F.2d at 346. The *Baird* court noted that the general had a means by which he could have bound the sub. One can infer that the court felt that the general wished to shop around otherwise he would have sought to bind the sub. See *Schultz*, *supra* note 1 at 247-252.

sub's bid been specifically revocable the opposite result would have been reached.<sup>51</sup>

#### RECENT DEVELOPMENTS

Only one court, it is interesting to note, has explicitly rejected the *Drennan* holding on promissory estoppel,<sup>52</sup> and it would appear that this decision was due to a peculiar legal situation existing in Florida.<sup>53</sup> While some other courts have reached different results, none has questioned the basic *Drennan* hypothesis that promissory estoppel applies where equity so demands.

In 1960, a Kansas court considered a case<sup>54</sup> in which a general sought to recover from a sub for non-performance. The sub had limited his firm offer to ten days, and the general had not accepted during that period. The court held that the *Drennan* rule did not apply here since it was clear that the offer had expired before acceptance was communicated.<sup>55</sup> Another case,<sup>56</sup> which was decided in favor of the defendant sub, arose in Washington, D. C., in 1963. In this instance, the sub's oral bid seemed too low, and the general asked the sub to reconsider it. The sub did so, but retained his original figure. The general notified the sub that he was using the sub's bid, and later, when awarded the general contract, he sent the sub a proposed contract which contained many different terms. The court held that no contractual relationship arose by virtue of the mere use of the sub's offer.<sup>57</sup> Furthermore, the

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51. 51 Cal. 2d 409, 333 P.2d 757.

52. *Southeastern Sales & Service Co. v. T. T. Watson, Inc.*, 172 So.2d 153 (Fla. App. 1962). In this case, brought in the Florida District Court of Appeals, the court reviewed both the Baird and *Drennan* views. The general solicited the sub's bid, which was abnormally low. The general asked the sub if his bid contained everything called for in the specifications, and when the sub responded affirmatively, the general used the sub's bid in his computations. The sub then discovered an error and withdrew his bid. The court adopted Baird's strict approach, considering a unilateral contract, a bilateral contract and promissory estoppel. It held that none of these theories applied and that there was no enforceable contract. The court also said that the sub's bid was so obviously incorrect as to put the general on notice; therefore, he should have sought relief from his own bid instead of attempting to hold the sub to his offer.

53. There is precedent in Florida for granting equitable relief from a bid containing a unilateral mistake. See *Board of Control v. Clutter Constr. Corp.*, 139 So.2d 153 (Fla. App. 1962).

54. *Sharp Bros. Contract Co. v. Commercial Restoration*, 334 S.W.2d 248 (Kan. 1960).

55. *Id.* at 253.

56. *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963).

57. *Id.* at 739.

court went on to say, a reply to an offer cannot add conditions not present in the offer. If the purported acceptance does add such conditions it is a counter-offer and not an acceptance.<sup>58</sup> The court here did not reject the *Drennan* rule on promissory estoppel, but in fact seemed to favor this rule.<sup>59</sup> The court held that the general was not entitled to summary judgment on the basis of the Restatement because estoppel is a question of fact, which must be considered at trial.<sup>60</sup> *Air Technology Corp. v. General Electric Co.*<sup>61</sup> is another instructive case in point. Here the sub was told he was "a member of the team" when his bid was used. Subsequently, the general got the contract and refused to give the sub the job, whereupon the sub sued. The court held for the sub on the grounds that the general was unjustly enriched and that he had violated a duty owed to the sub. There was no mention of promissory estoppel or of the Restatement, but the result is in keeping with the *Drennan* decision in that it turned on a violation of a duty owed. Another 1965 case<sup>62</sup> rejected *Baird* and applied the *Drennan* rule, binding a sub who sought to withdraw after he discovered a mistake. The court said "justice demands that the loss resulting from the subcontractor's carelessness should fall upon him who was guilty of the error rather than upon the principal contractor who relied in good faith upon the offer that he received."<sup>63</sup> A Utah court reached the opposite result in a case having similar facts.<sup>64</sup> In this instance, it appeared that the sub was misled by the general's representations, and that his mistake was obvious on the face of the bid. The court held that promissory estoppel is a doctrine of equity, the benefit of which the plaintiff can claim only by showing facts which justify its application.<sup>65</sup>

In *C. H. Leavell and Co. v. Grafe and Associates, Inc.*,<sup>66</sup> the general solicited the sub's bid, which was later orally reduced, and both parties entered into an oral "lock in" agreement. The general, who won the contract using the sub's bid, asked the sub to confirm in writing the reduction. He also requested that the sub confirm the posting of a

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58. RESTATEMENT OF CONTRACTS § 60. See also *Heddon v. Lupinsky*, 405 Pa. 609, 176 A.2d 406 (1962).

59. *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d at 738-739.

60. *Id.* at 740. See also *E. A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super 69, 75, 216 A.2d 246, 252.

61. 347 Mass. 613, 199 N.E.2d 538 (1964).

62. *Reynolds v. Texarkana Constr. Co.*, 237 Ark. 583, 374 S.W.2d 818 (1964).

63. *Id.* at 820.

64. *Union Tank Car Co. v. Wheat Bros.*, 15 Utah 2d 101, 387 P.2d 1000 (1964).

65. *Id.* at 1003.

66. 90 Idaho 502, 414 P.2d 873 (1966).

performance bond. Since there had been no previous agreement regarding this bond, the sub refused to post it. The court held that no binding contract had been reached because each party had been making offers and counter offers. While rejecting the applicability of promissory estoppel to this set of facts,<sup>67</sup> the court supported the doctrine in principle.<sup>68</sup>

The Supreme Court of New Mexico held in *Tatsch v. Hamilton-Erickson Mfg.*<sup>69</sup> that the sub's offer, used in the general's bid, to supply equipment not conforming to the specifications did not bind the sub to provide equipment meeting these specifications. The court further stated that the general's acceptance should have been clear and defined and should have conformed to the sub's offer in order to justify the application of promissory estoppel. It was decided that there was no such acceptance in this case, and thus, there could be no reliance upon the sub's bid. Promissory estoppel was not applied here, but its validity was not questioned.

The most recent case directly in point is *E. A. Coronis Assocs. v. M. Gorden Constr. Co.*<sup>70</sup> in which the New Jersey Superior Court considered both the applicability of the Uniform Commercial Code and promissory estoppel. Here the general contractor relied on a letter containing the sub's bid for erecting structural steel. The general won the contract, and then the sub revoked; but the general had never accepted his offer. The court first rejected the argument of the Uniform Commercial Code, holding that the sub's letter was not a "signed writing which by its terms gives assurance that it (the offer) will be held open,"<sup>71</sup> and thereby avoided deciding whether the letter dealt with goods. Turning then to the question of promissory estoppel, the court reviewed the authority and concluded that the better line of decisions applied the doctrine.<sup>72</sup> Promissory estoppel was held to be applicable, and the court remanded the case for determination on those grounds.

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67. *Id.* at 873. The court said, "... the offeree must accept the offer unconditionally. As stated in *Drennan v. Star Paving Co.*,

... 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 re-open bargaining with the subcontractor and at the same time claim a continuing right to accept the offer. 333 P.2d at 760.

68. "That doctrine has been applied with increasing frequency and is especially applicable to the construction industry." 414 P.2d 873.

69. 76 N.M. 729, 418 P.2d 187 (1966).

70. 90 N.J. Super. 69, 216 A.2d 246 (1966).

71. 216 A.2d at 249. See also UNIFORM COMMERCIAL CODE § 2-205.

72. 216 A.2d at 251.

These cases illustrate that there is a reluctance on the part of most courts to apply promissory estoppel. However, where the facts and circumstances required it, the decisions have followed *Drennan* and have utilized the doctrine to achieve a just result.<sup>73</sup>

The underlying rationale for the application of promissory estoppel is best expressed by Justice Jacobs in *Schipper v. Levitt & Sons*,<sup>74</sup> cited in the *Coronis* case:

The law should be based on current concepts of what is right and just, and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected.<sup>75</sup>

It seems, then, that the effort of the Courts should be to seek solutions that conform to contemporary business practices.

#### LEGAL REMEDIES

##### *Contract Theory*

Unfortunately, strict contract theory has proven inadequate in many instances as a solution to problems produced by modern business operations. It is very seldom that a bona fide contract is concluded between the subcontractor and the general prior to the letting of the overall bid.

Unilateral or option contracts<sup>76</sup> rarely arise because one must first construe the sub's bid as an offer that contemplates acceptance by its use in the general's bid.<sup>77</sup> Such acceptance is usually not intended;<sup>78</sup> and even should that be the sub's intent, it is often difficult to determine if his bid has been used by the general unless the letting party requires that subcontractors be listed in the general's bid.<sup>79</sup> Generals frequently "doctor" the subs' figures by combining the lowest estimates of several

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73. Cf. *Southeastern Sales & Service Co. v. T.T. Watson, Inc.*, 334 S.W.2d 258 (Kan. 1960).

74. 44 N.J. 70, 207 A.2d 314 (1965).

75. *Id.* at 325.

76. Unilateral contracts are now termed option contracts by RESTATEMENT (SECOND) OF CONTRACTS (Tent. Draft No. 1, 1964).

77. RESTATEMENT OF CONTRACTS §§ 45, 55, 56.

78. 64 F.2d 344.

79. Listing of subcontractors is usually required in U.S. Government contracts, and a few states also require listing in state contracts. In private contracts, however, while the practice varies, listing is not generally required.

bids.<sup>80</sup> Upon mere examination of the general's figures, no one can determine which sub's offer was used. For this reason, one seldom finds that a unilateral contract exists in practice. This doctrine of option contracts is not sufficiently flexible to adapt to present modes of operation in the construction industry.

Bilateral contracts do not satisfactorily resolve the problem, either, since a bilateral contract requires a return promise to become binding. Seldom will a general accept a sub's bid prior to the letting of the general contract. General contractors have no wish to be bound before the final contract is let. Therefore, the court is frequently unable to find that a bilateral contract has indeed been made.<sup>81</sup> If the court can so find, the difficulties are easily resolved, the sub being bound according to the terms of the contract.

In the final analysis, unilateral and bilateral contract theory, while it governs generally the whole spectrum of relationships in the con-

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80. For example:

Sub #1 air conditioning equipment	\$5,000.00
freon & piping	1,000.00
installation	3,000.00
	<u>\$9,000.00</u>
Sub #2 air conditioning equipment	\$7,000.00
freon & piping	500.00
installation	1,500.00
	<u>\$9,000.00</u>

The general might use Sub #1's equipment figure and use Sub #2's installation and freon figures. Thus, his bid in this area would be \$7,000.00 (\$5,000.00, \$500.00 and \$1,500.00). Moreover, it is not uncommon to find that the subs' individual bids do not all include the same items. For example:

Sub #1 air conditioning equipment	\$5,000.00
freon & piping	1,000.00
	<u>\$6,000.00</u>
Sub #2 air conditioning equipment	\$5,000.00
installation	2,000.00
	<u>\$7,000.00</u>

In this event the general must combine the figures to reach a complete bid which would be as follows:

air conditioning equipment	\$5,000.00
freon and piping	1,000.00
installation	2,000.00
	<u>\$8,000.00</u>

81. *Contra*, JayBe Constr. Co. v. Beco, Inc., 3 Conn. Cir. 406, 216 A.2d 208 (1956); cf. C. H. Leavell & Co. v. Grafe & Assocs., 90 Idaho 502, 414 P.2d 873 (1966).

struction industry, does not apply to the sub-general relationship during bidding if no formal agreement has been reached by the parties. Since, as previously discussed, formal agreements at the bidding stage are the exception rather than the rule,<sup>82</sup> there remains an area of dispute that is not amenable to the usual theories of contract formation.

### *Promissory Estoppel*

The doctrine of promissory estoppel has enabled the courts to resolve these disputes and grant relief. A court can view whatever issues are presented and determine in whose favor the equities lie. If the equities are in favor of the general contractor, the court can invoke promissory estoppel to create a contract and bind the sub. If the court finds that a contract exists, it may award damages for the breach thereof.<sup>83</sup> However, should the equities of the case lie in favor of the subcontractor, the court may simply find that promissory estoppel does not apply and hold that no contract ever existed.<sup>84</sup> The value of the promissory estoppel doctrine therefore lies in its flexibility.

However, while the flexibility of promissory estoppel enables the adaptation of legal remedies to modern business practices as the equities demand, it is less than ideal as a guide to the layman contractor who seeks a concrete formula by which he can determine his liability. Costly and time-consuming litigation is necessary to determine the equities between the parties, and this procedure is detrimental to all concerned.

If he is willing to change some of his business practices, the general contractor can forestall much of the litigation involving construction bids. He may require all subcontractors to make offers in writing which will be held open for a reasonable length of time. If these offers are for the sale of goods only, they will fall within the provisions of the Uniform

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82. *Id.*

83. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965). The tentative draft has changed this section in some important respects. The Reporter's Note to this section states,

The principal change from the original RESTATEMENT is the recognition of the possibility of partial enforcement . . . [citations omitted]. Partly because of that change, the requirement that the action or forbearance have a 'definite and substantial character' is deleted; and provision is added for reliance by beneficiaries.

84. *Id.* A court, under the proposed § 90 may afford partial relief to the general should the equities require it. "The remedy granted for breach may be limited as justice requires."

Commercial Code.<sup>85</sup> If the bids are for services alone, or for both goods and services, the Code of course, will not apply.<sup>86</sup> Contract law recognizes firm offers but requires either that they be made under seal<sup>87</sup> if they are to be irrevocable for a certain period of time. Thus, firm offers for goods and services, which are not supported by consideration or seal, must be accepted prior to the sub's revocation, preferably in writing; whereas firm offers for goods, which come under Section 2-205 of the Code, since they are held open for a definite period, may be accepted at any time within that period and still be binding upon the sub. In any event, it would benefit all parties concerned if the general were to accept the sub's offer in writing, subject to the award of the general contract. Such an acceptance cements the relationship and normally creates a binding bilateral contract.<sup>88</sup> The rights of the parties are then fixed, the general being assured of a certain cost for the subcontractor's work and the sub being assured that he will be paid a specific sum for his performance.

The general has yet another option; he can require each sub to post a bid bond as a prerequisite to consideration of the bid. This course of action has the advantage of guaranteeing damages to the general without the necessity of a suit for breach of contract should the sub withdraw his offer or otherwise default. From the general's point of view, the bid bond is perhaps the best solution to the firm offer problem. But bonds are an expense, and the burden of payment falls initially on the sub. Since the cost of the bonds diminishes proportionately as the expense of the project increases, the sub can bury the cost in his bid where large projects are concerned. But if the project is small, the expense of the bonds becomes prohibitive in relation to the cost of the job, and the sub cannot conceal all of the expense in his bid; consequently, he must cut his profit margin. For this reason bid bonds are no panacea, and their value is limited.

### CONCLUSION

The complexity of the firm offer problem is best reflected by the

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85. Offers which fall under this section are irrevocable for the time stated or for a reasonable time, if the period is not specified.

86. *Supra* note 31.

87. RESTATEMENT OF CONTRACTS §§ 24, 47. *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 24, 24a (Tent. Draft No. 1, 1964).

88. In addition to the other prerequisites, the offer and acceptance must meet the requirements of definiteness before a binding contract can be created. *See generally* RESTATEMENT OF CONTRACTS §§ 32, 22 and comments.



number of possible solutions. No one theory can claim to resolve all the issues that can be presented. Hallowed contract principles of offer and acceptance are uncomfortable in the new vistas opened by the business practices of the construction industry. Modern codifications, such as the Uniform Commercial Code, have not aged sufficiently for their impact to be determined. The burden of resolving the dilemma falls squarely upon the equitable doctrine of estoppel. Its flexibility and common-sense orientation provides courts with a legal peg upon which to base their decisions. The present trend has been to expand the application of promissory estoppel, a trend which is reflected in case law and in the tentative draft of the Restatement. While the extension of the doctrine to construction bids has been gradual, its application is now well-settled in precedent since it offers the best means of balancing the equities of all parties concerned—the subcontractor, the contractor and the letting party.

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