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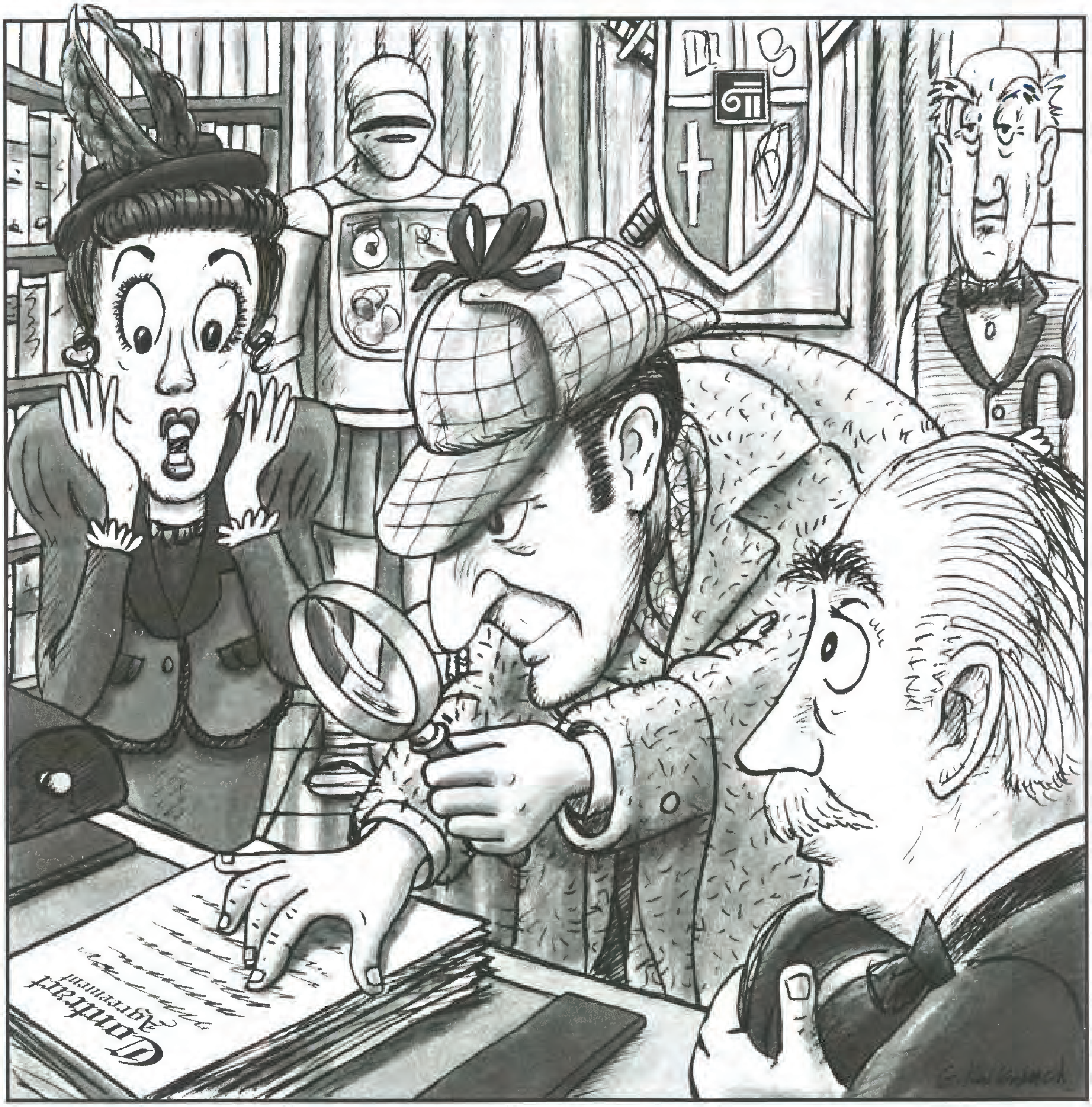

Deducing Contract Terms

Illustration: Garrett Kallenbach

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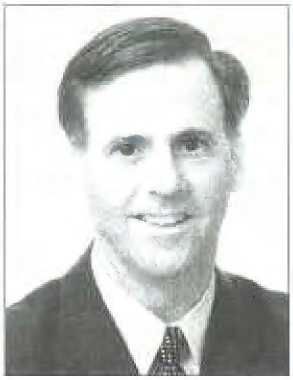
"Deal . . . or No Deal": Identifying and Addressing Gray Areas in Construction Contracting

By K. Brett Marston, Spencer M. Wiegard, Joshua C. Johnson, and Abigail E. Murchison



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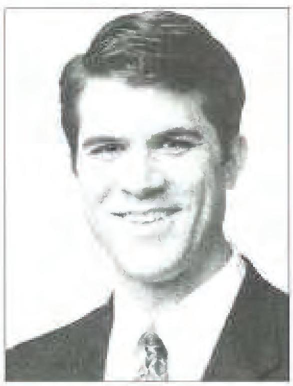

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"Do we have a deal?" Although these may be well-worn words in the business arena, they can form an often difficult issue when posed by a construction client to its attorney. In a business focused on competitive margins and keeping projects moving, and where paperwork can be a perceived hindrance to progress, knowing whether there is a deal and what the terms are can present a challenging circumstance. In an environment where a contractor's handshake used to be his bond, the movement toward enhanced use of written price quotes, contract documents, and change orders ought to help clarify the existence and boundaries of the deal, right? Not so fast.

In at least three major aspects of construction contracting discussed in this article, the answer to the question of whether there is a deal is a resounding "Maybe." When a subcontractor submits a price quote that the general contractor relies upon to bid on a project, is there a deal? When a proposed contract is sent by the general contractor to a subcontractor but is not signed even though work has begun, is there a deal, and, if so, what are its terms? When an owner gives a contractor the oral direction to proceed with extra work during the course of a project, but a written change order is not signed, is there a deal, and what is it? Understanding the legal analysis of those issues in advance will help attorneys educate clients so they will understand the risks inherent in each of those situations, and help them prepare to handle those situations to their advantage.[1]

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"Let's Make a Deal . . . to Make a Deal"

One of the murkiest areas of construction contracting surrounds the back and forth between general contractors and subcontractors on and just after bid day. Subcontractors bidding on a particular scope of work on a project often submit their price quotation, or quotes, to more than one general contractor. For every subcontractor, there is a different quote document, containing differing verbiage. Those quotes are often transmitted a very short time before the general contractor has to compile quotes from many subcontractors with its own numbers to submit a bid for the overall project. General contractors may even communicate with representatives from particular subcontractors about the contents and viability of the quote. With their bid submissions, general contractors often have to list the subcontractors they intend to employ if successful in obtaining the contract.

These circumstances are a breeding ground for uncertainty and dispute. When the general contractor is successful in obtaining a project from an owner, having based its proposed price on one of the subcontractor's quotes, there are several ways in which it can proceed. If the general contractor enters into a written contract with the lowest-priced subcontractor, then a dispute likely will not arise, and there is no litigation (at least over that issue). If the general contractor decides to negotiate with the subcontractor or other potential subcontractors, and ultimately enters into an agreement with a different subcontractor, then—somewhat surprisingly—there has been limited litigation by subcontractors trying to force a general contractor to contract with it after using its quote but later "bid shopping" it.[2]

The primary dispute that arises is where the subcontractor, on whose quote the general contractor based its bid to the owner, elects not to proceed to contract with the general contractor and refuses to perform the work on which it quoted. The judicial case reports are full of lawsuits filed by general contractors against a would-be subcontractor when the general contractor has had to employ an alternate subcontractor and pay it more money than it would have had to pay to the original subcontractor.

When general contractors file those lawsuits, there are two general theories upon which the cases are usually based.[3] The cases often include a count for breach of contract.[4] Though some courts have allowed claims to proceed to trial on this theory, the decisions from most states do not support a theory that the back and forth between a general contractor and a subcontractor equates to a binding contract.[5]

The 2012 Florida appellate decision in *West Construction, Inc. v. Florida Blacktop, Inc.* illustrates the challenges in succeeding on a breach of contract theory.[6] In that case, in which the court submitted only a breach of oral contract count to the jury, the appellate court held that the trial court erred in not sustaining a directed verdict in favor of the subcontractor/defendant on that breach count. The paving subcontractor had included in its form proposal document language attempting to create an acceptance of the proposal if the general contractor took certain action with, or in relation to, the proposal.[7] The general contractor was the low bidder and submitted a list of proposed subcontractors including this particular paving subcontractor. Later, the general contractor asserted that it had included the paving subcontractor's name by mistake and ultimately used another paving subcontractor to perform the work.

The jilted paving subcontractor sued the general contractor for breach of contract, promissory estoppel, and unjust enrichment. The jury found, as a preliminary fact, that there was an oral contract between the two. As a result, only the breach of contract theory was submitted for determination by the jury, which found that the general contractor had breached the oral contract and it awarded damages to the paving subcontractor.

The appellate court reversed the trial court judgment. In ruling for the general contractor, the court emphasized several key points upon which it ruled for the subcontractor: (1) the bid does not become a contract unless it is accepted by the general contractor; (2) the use of the quote by the general contractor in its bid to the owner did not "amount to a manifestation of its assent because of the preprinted paragraph" in the proposal; and (3) the equities of the bidding process weigh in favor of the general contractor having "leeway to maintain its flexibility in executing subcontracts and selecting the subcontractors it will hire for a project."[8]

Given the general difficulty in proving a breach of contract theory, general contractors have sought an alternative theory to recover damages from the subcontractor. The primary alternate theory is promissory estoppel, and, as explained in more detail below, the courts in a vast majority of the states have recognized this as a viable, offensive cause of action.[9] In doing so, the courts rely heavily upon the Restatement (Second) of Contracts section 90 (RSC § 90) as the foundation for analyzing and applying promissory estoppel. RSC section 90 states that

Across the United States, the enforceability of these oral changes involves issues of modification, waiver, and estoppel.

> [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.[10]

One of the landmark cases applying RSC section 90 and concluding that promissory estoppel is a viable theory for the general contractor is the California decision in *Drennan v. Star Paving Co.*[11] In this case, Star Paving submitted a quote to a general contractor, Drennan, to perform the paving scope of work on a school construction project. After discussing the quote by telephone with a representative of Star Paving, Drennan submitted a bid to the owner including Star Paving's name as the intended subcontractor and its quote as part of the overall bid amount. The day after the owner awarded Drennan the contract as the low bidder, an employee of Drennan visited Star Paving. A Star Paving employee told Drennan's representative that Star Paving could not do the work for that amount, as there had been a mistake, and its price would have to be more than doubled. In the ensuing litigation filed by Drennan, Star Paving took the position that it had revoked its offer before the plaintiff had communicated its acceptance. Drennan, however, contended that it had relied upon Star Paving's offer, thus making the offer irrevocable.

In its often-cited opinion, the court in *Drennan* cited the then-current version of RSC section 90 and confirmed that it was applicable law in California. In the circumstances of that particular case, the court reasoned that when the general contractor used the subcontractor's

> offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this 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 probability 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 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.[12]

Similarly, other jurisdictions have found that the parties' verbal requests for extra work created an implied waiver of the contract's written change order requirement.

As to the contention of Star Paving that it had made a mistake in its quote, the court concluded that the alleged mistake was insufficient to relieve Star Paving of responsibility for the damages incurred by Drennan in replacing Star Paving and affirmed the trial court's judgment in favor of Drennan. The court reviewed several instances where this approach of binding the subcontractor would not apply:

(1) the general contractor's reliance on the subcontractor's quote was unreasonable; (2) the subcontractor's quote was expressly revocable; (3) the general contractor unreasonably delayed acceptance; and (4) the general contractor engaged in bid shopping.[13]

With two exceptions, the courts of every other state to address this issue have followed the lead of *Drennan* and held that promissory estoppel is a viable, offensive cause of action that general contractors can employ to recover damages from subcontractors who have failed to fulfill their quotes.[14] Courts are not united in how they apply promissory estoppel. What follows is an overview of the approaches taken across the country, assessing whether courts invoke RSC section 90, how they apply *Drennan* and its exceptions, and what elements of the doctrine they emphasize or elevate.

Despite the varying approaches, a reliable theme is that courts require general contractors not only to prove their entitlement under RSC section 90, but also to demonstrate good faith in their actions. With "promissory estoppel [being] an equitable doctrine," many courts have imposed "certain limitations to prohibit its application where the general contractor's conduct renders it unfair to hold the subcontractor to its bid."[15]

The General Camps of State Decisions

Among the states recognizing promissory estoppel as a viable claim for general contractors to assert, there are various camps into which the decisions fall. Some states make the claim much more difficult to sustain, while others abide more closely to the language of RSC section 90.

On one end of the spectrum, some courts use the exact language of the Restatement and do not require any element of "definiteness" in an action based upon promissory estoppel.[16] At this end of the spectrum, the standard for proving promissory estoppel is more generous, though the practical application remains difficult. Similarly, some states apply some hybrid of RSC section 90 and pre-RSC section 90 common law.[17] This group includes New York, where, to establish promissory estoppel in construction-bidding cases, a general contractor must demonstrate that the subcontractor "made a clear and unambiguous promise to perform certain work for a certain price and that plaintiff reasonably relied on this promise in making its bid on the project."[18]

Other states, including Maryland and New Jersey, require a "clear and definite promise" as a threshold matter. The issue in those states hinges upon what the subcontractor originally submitted as a quote to the general contractor.[19] For example, where the subcontractor's quote letter stated that it was for informational purposes only, a New Jersey federal court concluded that any reliance by the general contractor was unreasonable.[20] Missouri specifically requires that the "promise" be made by the defendant to the plaintiff; the defendant's promise to a third party is insufficient to state a claim for promissory estoppel.[21]

Closely aligned are those states, such as Washington, that require a showing that the general contractor "justifiably" relied upon the promise.[22] In the 1986 case of *Arango Construction Co. v. Success Roofing*, the subcontractor unsuccessfully pressed the argument that the general contractor failed to meet this element of proof because the general contractor should have known that the subcontractor's quote was "too low for the job involved."[23] Looking at the record from the trial court, including the amount of the only other bid submitted to the general contractor for this same scope of work, the appellate court concluded that there was "nothing in the record to support an inference that [the general contractor] knew or should have known that [the subcontractor] had made a mistake" with its bid.[24]

In contrast to the states requiring proof of a "clear and definite promise" by the subcontractor, some states, such as Idaho and Iowa, go so far as to require a "clear and definite *agreement*" or "sufficiently definite *agreement*."[25] This standard for proving promissory estoppel is on the more difficult end of the spectrum. Requiring evidence of "agreement" suggests that these courts look for a meeting of the minds, as if applying traditional contract principles rather than a doctrine to enforce promises in the absence of formal agreement.

Two states—Louisiana and Georgia—have adopted promissory estoppel by statute.[26]

Reasons General Contractors Do Not Recover

Even when courts find that RSC section 90 and promissory estoppel are viable theories, there are still circumstances in which they do not rule in favor of the general contractor. Similar to the analysis in *Drennan*, one Ohio court has summarized the grounds upon which general contractors do not tend to recover:

> Among the grounds upon which courts have denied recovery are the following: (1) the general contractor did not rely on the [subcontractor's] bid; (2) the general contractor failed to accept the bid within a reasonable time; and (3) the general contractor made a counteroffer, in effect rejecting the subcontractor's offer.[27]

One prime example of where courts have not allowed the general contractor to enforce a claim for promissory estoppel is where the general contractor has engaged in "bid shopping" with other subcontractors. In the above-quoted case from Ohio, the court concluded that a subcontractor was "not bound to honor its original quote."[28] The court also reached this conclusion because the general contractor "admittedly resumed negotiations with other subcontractors regarding the structural steel subcontract and did not accept [the subcontractor's] original quote."

Policy Considerations

In the end, courts must, and do, wrestle with the public policy implications of these decisions and the practical interplay with the construction industry. As such, some courts have recognized that the application of promissory estoppel has the practical effect of encouraging subcontractors to be cautious when formulating their bids. This policy objective is crucial in the context of the modern construction industry, where subcontractors customarily submit bids at the last moment that need to be binding for a reasonable time.[29] Courts and commentators have observed that, by justifying lawsuits against reneging subcontractors, RSC section 90 "raises the cost to subcontractors of both making and retracting offers; this in turn tends to reduce the number of offers and affect the time at which they are made."[30]

Through the doctrine of promissory estoppel, courts supervise reliance decisions made by parties in a precontractual setting. Was it reasonable for the general contractor to rely on the subcontractor's low bid, for example, or was that a signal of an unreliable mistake? States where promissory estoppel is not a cognizable cause of action avoid these tough questions but, by the same token, disregard the investment that parties make in preliminary negotiations. The majority rule, enforcing promises that trigger reasonable reliance, protects these precontractual investments and compensates those who suffer losses when relying on the ordinary meaning of another party's words and actions.

Letters of Intent

General contractors have endeavored to bridge the gap between a subcontractor's quote and the entry into a formal subcontract with the signing of a letter of intent. How the courts treat these letters of intent is an evolving issue. Historically, courts do not enforce these "agreements to agree."[31] As an example, Virginia has drawn a line between intentions to contract and an actual agreement.

> The whole question is one of intention. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. If though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.[32]

Conversely, the Supreme Court of Virginia has differentiated that "[w]here the minds of the parties have met and they are fully agreed and they intend to be bound there is a binding contract, even though a formal contract is later to be prepared and signed."[33]

The 1987 decision of a federal district court in New York in *Teachers Insurance & Annuity Association v. Tribune Co.* analyzed the enforceability of preliminary agreements.[34] In that case, the court differentiated between Type I and Type II preliminary agreements. It concluded that Type I agreements are enforceable and occur when parties have reached a complete agreement on all issues perceived to require negotiation but desire to have a more elaborate formalization of the agreement. Type II agreements are agreements where the parties commit to negotiate open items in good faith. These Type II agreements are not binding as contracts, but require the parties only to continue negotiations.[35] In the Type II situation, the damages are likely to be limited to reliance damages incurred during the stalled negotiations, but not expectation damages.[36] One court has referred to this way of enforcing preliminary agreements as "the modern trend in contract law," and that "pragmatism and commercial necessity" has led to enforcement of preliminary agreements.[37]

"A Handshake . . . and a Prayer"

Even once the parties agree to work together on a construction project, the contract paperwork often drags far behind. The project work may begin long before the parties place their signatures on the bottom line of a written contract. The failure of the parties to endorse a written contract may be unintentional. The lack of an endorsed written contract is often attributed to the hectic pace of the project work, with the parties focusing on getting the work done quickly and correctly rather than documenting the terms of their agreement. The parties may have both intended to document their agreement in writing, but either they never got around to doing so or one party mistakenly assumed that the other party endorsed a proposed written agreement that remains unsigned.

On the other hand, the lack of an endorsed written contract may be intentional on the part of one party. A party may refrain from signing the written contract because the party disagrees with one or more proposed terms. A subcontractor may refuse to endorse a proposed contract because it lacks the bargaining power to change the contractual terms with which it disagrees. In this instance, the subcontractor may believe that it is better off without an endorsed written agreement.

Regardless of the reason that the contract remains unsigned, several important questions remain. If the parties have not signed the written contract, does an agreement exist? If so, what forms the basis of the agreement between those parties that have not yet signed the written contract? What are the terms of the agreement if some dispute or accident occurs before the parties sign the written contract? Must a party rely upon other legal theories to recover if it has not endorsed the proposed contract?[38]

Does an Agreement Exist if at Least One Party Has Not Signed?

If the parties have agreed to the material terms of an agreement, the lack of a signed contract does not mean that the parties have not reached an enforceable agreement.[39] For example, the Virginia Supreme Court has held that the acceptance of a proposed contract "need not be given in express words, but may be inferred from the acts and conduct of the offeree."[40] The court has further held that "[t]he absence of an authorized signature does not defeat the existence of the contract. . . ."[41]

Under certain circumstances, the parties may have reached an unwritten or verbal agreement concerning the work, and the unsigned paperwork is just documentation of that deal. Generally, a construction contract does not fall under the statute of frauds, even though the parties fix the period of performance of the work as more than a year.[42] In *Lankton-Ziegel-Terry and Associates, Inc. v. Griffin*, a contractor agreed to perform construction services on a lounge and banquet hall.[43] Although the parties did not prepare a written contract, the Illinois Court of Appeals held that the parties verbally agreed to the material terms of a binding agreement.[44]

Whether the parties have reached an agreement in the absence of an endorsed written contract is a fact-intensive inquiry. In *Building Mart, Inc. v. Allison Steel Manufacturing Co.*, a general contractor entered into a handshake agreement with a subcontractor.[45] The subcontractor subsequently prepared a written subcontract document, signed it, and sent it to the general contractor.[46] Instead of endorsing the subcontract document, the general contractor informed the subcontractor that it could not accept the written subcontract document.[47] The parties engaged in conduct that demonstrated a mutual understanding that the parties had entered into a subcontract, including meeting on the job site to discuss job progress, laying out the fabrication areas for the project work, and agreeing to a clearing area for the subcontractor's crane.[48] Despite the parties' conduct, the trial court granted the general contractor's motion for summary judgment on the basis that no subcontract existed.[49] The Court of Appeals for the Tenth Circuit reversed and remanded the case, holding that "[t]he question whether the parties intended any prior agreement to be binding notwithstanding a contemplated later written memorialization also was a question of fact inappropriate for summary resolution."[50]

An agreement may exist even if the parties expressly state that they intend to subsequently endorse a specific form contract document but ultimately fail to endorse that document. In *Lehigh Structural Steel Co. v. Great Lakes Construction Co.*, a general contractor invited a subcontractor to submit a proposal.[51] The subcontractor submitted a proposal, which the general contractor believed was too high, and after a few rounds of negotiations, the subcontractor agreed to provide a limited scope of work for a reduced price.[52] The parties documented their agreement on a proposal form with the notation "Contract subject to Board of Trade Form."[53] The parties did not ultimately endorse a standard "Board of Trade Form" contract, and the general contractor subsequently awarded the trade contract to another subcontractor.[54] The US Court of Appeals for the Second Circuit held that the parties had a meeting of the minds as to all details of the agreement, regardless of the lack of a signed "Board of Trade Form" contract.[55] For this reason, the court of appeals held that the general contractor breached a valid agreement and affirmed the trial court's judgment for the plaintiff.[56]

What Are the Terms of the Agreement?

Assuming the parties reached a meeting of the minds concerning the material terms of the agreement, what are the actual terms of the agreement if at least one party has not signed the proposed written contract? A contractor who submits a written contract document to its subcontractor should not assume that all terms in the written document will apply by adhesion in the event the other party does not sign the written contract document. In *Brooks & Co. General Contractors, Inc. v. Randy Robinson Contractor, Inc.*, a general contractor sent a proposed written contract to the subcontractor, and the subcontractor intentionally refused to sign the proposed written contract because it disagreed with the terms in that document.[57] Although the proposed written contract remained unsigned by either party, the general contractor attempted to enforce an arbitration provision embedded in the proposed written contract.[58] The court concluded that the general contractor did not inform the subcontractor of its intent to replace the oral agreement between the parties with the proposed written contract, and therefore the parties did not achieve a "meeting of the minds" on the written form.[59] The court further held that based upon the existence of the verbal agreement, and the failure of the parties to agree to replace that agreement with a written contract, the court would not deem the subcontractor's performance an acceptance of the terms in the unsigned written document.[60]

Although in *Brooks & Co.* the subcontractor expressly informed the general contractor that it disagreed with the terms of the proposed written contract, a proposed written contract submitted by one party is occasionally met with no written or verbal response from the other party. The lack of written or verbal response is often intentional, due to the receiving party's disagreement with the terms of the proposed written contract. It is often the case that the party receiving a proposed written contract returns an "acceptance" that contains terms that differ from those in the offer. In reality, the "acceptance" is actually a counteroffer in response to the original proposal.[61] The question remains: Which terms control the relationship between the parties?

The general common law rule concerning the acceptance of a proposal requires that the terms of the acceptance mirror the terms of the offer.[62] In *Iselin v. United States*,[63] the Supreme Court of the United States held that:

> it is well settled that a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.[64]

This point was illustrated in *Batson-Cook Co. v. TRC Worldwide Engineering, Inc.*[65] In *Batson-Cook*, an engineering firm submitted a proposal to perform structural engineering and design services for a project, which included a written description of the engineering services to be provided and a one-page set of "General Conditions."[66] The general contractor did not endorse the proposal or return it to the engineering firm; rather, it sent the engineering firm a purchase order that referenced the proposal as a contract document but included different terms and a separate set of "Conditions, Terms and Instructions."[67] The US District Court for the Middle District of Georgia held that the purchase order constituted a counteroffer, which the engineering firm accepted by beginning the work, and therefore the terms of the purchase order governed the dispute between the parties.[68]

What if the parties point to multiple documents as the memorialization of their agreement? In *Richardson v. Greensboro Warehouse & Storage Co.*, the Supreme Court of North Carolina addressed the circumstance where the parties' agreement was documented in multiple writings, without a single signed contract.[69] In *Richardson*, the court held:

> Where the contract, as here, is in several writings—an offer and acceptance—and not contained in a single document which both parties have executed, the Court will not, of course, be astute to detect immaterial differences in the phrasing of offer and acceptance which might defeat the contract, but will try to give to each writing a reasonable interpretation under which substantial justice may be reached according to the intent of the parties. But it is the mutual intent that governs, and for this reason there must be substantial agreement between offer and acceptance in all material particulars in order that such mutuality may appear. There must be no lack of identity between offer and acceptance, and the parties must appear to have assented to the same thing in the same sense.[70]

Acceptance of Terms by Doing the Work

Ignoring a proposed written contract that is tendered by the other party is not risk free. If a subcontractor ignores the proposed written contract because it disagrees with the terms therein, while also beginning to perform the work, the subcontractor may be deemed to have accepted an otherwise unfavorable subcontract. In *Galloway Corp. v. S.B. Ballard Construction Co.*, the court held that a subcontractor had accepted the terms of the modified AIA subcontract by performance, despite the fact that the subcontractor had failed to sign the written agreement as a result of a simple oversight.[71]

In *Johnson v. M.J. O'Neil, Inc.*, a general contractor subcontracted with a company to furnish and install electrical appliances and wiring.[72] The subcontractor issued a written offer to the general contractor, to which the general contractor responded with a qualified "acceptance" containing slightly different terms.[73] The subcontractor did not respond to the "acceptance" and began its work, at which point a dispute arose concerning the scope of the subcontract work.[74] The Supreme Court of Minnesota held that the "acceptance" was actually a counteroffer, which the subcontractor accepted by commencing the subcontract work.[75] As the court in *Johnson* stated, "It falls within the general rule that where one to whom an offer is made goes ahead and performs in accordance with the offer, his act is an acceptance."[76]

Similarly, if a general contractor receives an "acceptance" from a subcontractor that includes different, additional, or altered terms and conditions, and the general contractor performs its part of the agreement (by issuing a notice to proceed and/or by paying the subcontractor), then the general contractor may have accepted the altered terms proposed by the subcontractor.[77]

It appears that courts are not inclined to allow an owner to request extra work and then refuse to pay for it because the contractor failed to get the change order in writing.

What if There Is No Agreement—Written or Unwritten—Between the Parties?

A court may still determine that there was not any express contract, whether written or unwritten, between the parties or any unsigned contract that has been accepted by performance. What then? In those cases where the contractor performed work without an express contract, and the contractor may have received partial payment, a quantum meruit analysis is necessary. In *Hendrickson v. Meredith*, the Supreme Court of Virginia explained the general rule of law:

> [H]e who gains the labor or acquires property of another must make reasonable compensation for the same. Hence, when one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his services on a *quantum meruit.*[78]

The Maryland Court of Appeals and the Missouri Court of Appeals, among other courts, have also held that in the event that there is no express contract between two parties, the contractor may recover the fair value of his services and money expended on a quantum meruit basis.[79]

Although a deal may exist without a fully endorsed written contract, the uncertainty facing contractors and subcontractors who find themselves operating without a signed document is avoidable. By preparing a written contract, negotiating the contract terms if necessary, and fully endorsing the written document, contracting parties can rest assured that they have a deal and that they know the terms of their agreement. Parties should take care to document their agreement on the front end of the project so that they can avoid having to marshal proof of a meeting of the minds after a dispute arises.

Change Order Two-Step: Enforceability of Unsigned Change Orders in Private Contracts

Even where formal, written construction contracts contain specific provisions about changes, extra work, oral directives, and modifications to the contract, those provisions are often ignored or discarded in the heat of the moment. Private owners give oral directives. Contractors perform the extra work—sometimes gladly, or sometimes under duress. And, more often than not, neither takes the time to execute the written change order required by the contract. Disputes naturally follow.

Across the United States, the enforceability of these oral changes involves issues of modification, waiver, and estoppel. Various jurisdictions handle these scenarios using different conceptual frameworks, but often the results turn out the same and usually hinge on a fact-based analysis in light of principles of fairness and equity. In most jurisdictions, a provision in a construction contract that alterations or extras must be ordered in writing can be avoided where the parties' words, acts, or conduct amount to a waiver, modification, or abandonment of such provision—or when the owner (or the general contractor, in the case of a subcontract) by his conduct is estopped from relying on it. This approach appears prevalent in courts throughout the country with the most significant difference among the jurisdictions being the varying levels of evidence required to support recovery.

Although construction cases involving oral requests for extra work arise from unique factual scenarios, certain trends have emerged that can help shape litigation strategies in the future. This section explores the different legal theories used to seek recovery when a change order provision is ignored after extra work has been requested and provided by the contractor. Then, this section will survey cases from across the country to consider the varying thresholds of proof required for recovery. Finally, this section will analyze some typical fact patterns.

The scope of this article is limited to private contracts between a private owner and a contractor. The article does not address situations where the owner is a governmental or a quasi-governmental entity because, in at least some jurisdictions, contractors on government jobs *must* give written notice of proposed change orders as required by the various procurement acts, and actual notice is insufficient. For instance, in *Commonwealth of Virginia v. AMEC Civil, LLC*, the Supreme Court of Virginia held that where the contract and the procurement statute required a specific process to modify a construction contract for payment of extra work, then those processes must be followed or else the contractor forfeits its compensation for the extra work.[80]

Various Theories of Recovery

Jurisdictions take different approaches to the question of how a written construction contract can be modified in the absence of an express agreement or a change order to that effect. The problem becomes especially thorny when the construction contract itself contains a clause that prohibits oral modifications. Courts have considered whether (1) a distinct oral contract was created to pay for the extra work, (2) an oral agreement waived the contract's writing requirement, (3) there was an implied waiver of the writing requirement, or (4) the party refusing to pay for the extra work is estopped from doing so based on equitable principles. Each of these four theories will be briefly discussed in turn with a listing of some of the jurisdictions where the theories are most likely to be successful. In the end, these theories are all similar and lead to the same result.

The first theory of recovery for an oral request for extra work considers the request a wholly new oral contract for the extra work. The contract requiring change orders is considered a distinct contract, and the court deems the parties as having entered into a new agreement. For instance, in *Western Sierra, Inc. v. Ramos*, the Court of Appeals of California held that when an owner asks the contractor to perform work and agrees to pay for it, then the owner is bound to the agreement and required to pay for the work.[81] The Supreme Court of Alabama has also decided cases in a similar manner.[82]

Under the second theory, other jurisdictions facing the same issue have held that the parties' oral agreement waived their contract's requirement for written change orders. In other words, the subsequent oral agreement of the parties abrogated the contract's change order provision. Some of the jurisdictions that have approached the question in this way include Arizona, Kansas, Massachusetts, and Montana.[83]

Similarly, other jurisdictions have found that the parties' verbal requests for extra work created an implied waiver of the contract's written change order requirement. In *Salomon-Waterton Co. v. Union Asbestos & Rubber Co.*, the Court of Appeals of Illinois found that when a defendant's agent issued verbal orders for extra work, the defendant was found to have waived and abandoned the contract provisions requiring written change orders and was thus estopped from insisting on strict compliance with the contract.[84]

The Court of Appeals of Kentucky, in *Pittsburgh Filter Manufacturing Co. v. Smith*, relied on the principles of estoppel and waiver to allow a subcontractor to recover for extra work when the general contractor tried to propose a defense that the extra work was done without a written change order as required by the contract.[85] Similarly, in *Reebaa Construction Co., Inc. v. Chong*, the Supreme Court of Georgia held that where there was no oral contract for extra work, the contractor was still permitted to recover.[86] Although the parties had not agreed on a specific price for the extra work, the homeowner's repeated statement that "money is no object" convinced the Supreme Court of Georgia that the homeowner's conduct amounted to a waiver of his right to repudiate the contract, and the court affirmed the jury verdict against the homeowner and in favor of the contractor.[87]

Varying Thresholds of Proof

In some jurisdictions it is relatively difficult to modify a contract's requirements for signed, written change orders. New York is certainly at that end of the spectrum, where it appears that contractors must establish an "indisputable mutual departure" from a stipulation for written change orders.[88] And, in at least one case, a New York court affirmatively decided that the parties could not modify by oral agreement a contract requirement for written change orders.[89]

Like New York, several jurisdictions require a higher threshold of proof to establish waiver. The Supreme Court of Virginia faced the issue of whether and how a written construction contract can be modified in the absence of an express agreement to that effect in *Cardinal Development Co. v. Stanley Construction Co. Inc.*[90] Stanley Construction claimed it was entitled to payment of additional funds because the developer, Cardinal, had increased the number of lots being developed and had promised verbally and in written communications to pay Stanley Construction. Cardinal took the position that Stanley Construction was bound to the fixed-price contract amount. The Supreme Court of Virginia concluded that Stanley Construction had proved by "clear, unequivocal, and convincing evidence . . . that Cardinal and Stanley Construction intended to modify the terms of their contract and that Cardinal agreed to pay for the additional work that Stanley Construction had performed."[91] The court found the necessary, sufficient consideration for the modification in Cardinal's agreements to pay for the additional work and in Stanley Construction's actual performance of that work. Arkansas, Minnesota, and Wyoming appear to handle the issue much like Virginia, and they all require contractors to prove oral modifications to the written contract by clear and convincing evidence, or with a similarly higher proof threshold.[92]

In Tennessee, the legislature attempted to settle the issue by enacting a statute that does not permit parties to waive change order provisions. The statute renders effective a provision in "any . . . contract" that states "that no waiver of any terms or provision thereof shall be valid unless such waiver is in writing."[93] The statute accomplishes this by a prohibition directed to the judiciary, which declares that if a contract contains a provision to the effect that no waiver of any terms or provisions of the contract shall be valid unless in writing, then "no court shall give effect to any such waiver unless it is in writing."[94] In spite of the statute, Tennessee courts have still recognized mutual oral agreements to rescind a written contract despite a contract clause that prohibited oral modifications.[95]

On the other hand, several other states more readily recognize oral modifications and have a lower threshold of proof for contractors. As a counterpoint to Tennessee, a provision of Louisiana's civil code states that an architect or workman can increase the contract price for extra work if he can prove that the changes were made "in compliance with the wishes of the owner."[96] The next statute in the code includes an exception that lowers the standard another notch in cases where the change order or extra work is necessary and unforeseen or where it is so great "that it cannot be supposed to have been made without the knowledge of the owner."[97] Consequently, the Louisiana courts have awarded payment for extra work performed on the basis of oral change orders even though the contract required that all extras and alterations be authorized in writing.[98]

Maryland, Nebraska, and Massachusetts all have common law indicating that these jurisdictions require less than a clear and convincing standard to prove that the construction contract was modified. Maryland law appears to require only that the modification be proven by a preponderance of the evidence.[99] A Nebraska court held that the practice of ignoring written change order requirements modifies that part of the contract and removes it as a bar to recovery if the contractor fails to obtain written change orders.[100] A Supreme Court of Massachusetts ruling affirmed a jury's finding that the terms of the contract had been waived and there had been a new oral agreement.[101] The court explained that parties could "substitute a new oral contract by conduct and intimation, as well as by express words."[102]

Typical Fact Patterns

Although there are different theories of recovery and varying thresholds of proof, generally the results in these cases are similar because courts will not allow an owner to play "gotcha" with a contractor. It appears that courts are not inclined to allow an owner to request extra work and then refuse to pay for it because the contractor failed to get the change order in writing. Even in Tennessee, where the legislature passed a statute specifically requiring that change orders be in writing, Tennessee courts still do not allow owners to order and receive extra work without paying for it. The concept of fundamental fairness appears to overcome the change order "gotcha" game. In these cases, the courts unsurprisingly use a fact-driven approach to guide their analysis, and there are certain common fact patterns that inform the courts about whether to find a modification of the contract.

Many courts have carefully considered the course of conduct between the parties leading up to the disputed change orders. If the owner and the contractor routinely disregarded the contract's change order provision in the past, and the owner previously requested and paid for extra work without written change orders, then courts tend to hold that the contract's change order provision was nullified and the actual process used by the parties became the governing procedure in spite of the contract's language. Jurisdictions that have used this logic to find that the parties' conduct waived the contract's change order provision include California, Colorado, Montana, Nebraska, South Carolina, Washington, and Virginia.[103]

Courts will also look specifically at the owner's actions and involvement in the project. If the owners were on-site regularly and had personal knowledge of the costs of the modifications at issue, then courts have required owners to pay for the extra work.[104] The more involved the owner is with the project, the more likely it is that the court will find that the owner waived the strict terms of the contract.[105] Similarly, if owners accept the work and acquiesce to the additional work, then courts will not allow the owner to refuse to pay based on the contractor's failure to follow the contract's technical written change order requirement.[106]

The law of agency often applies in these situations. Owners, of course, are often represented on the construction sites by architects, engineers, or other decision makers. The issue becomes whether such agents have authority to bind the owners to agreements for extra work. Several cases from varied jurisdictions demonstrate that the course of conduct and oral directives of architects, engineers, or other decision makers can modify or waive a contract's strict change order clause—despite lack of direct knowledge by the owner.[107]

Conclusion

Although it is easy to identify these issues and predict that they will continue to occur for as long as there are construction projects, it is more difficult to predict their outcomes and to fully prepare clients to perform preventative maintenance. The details of the conversations, directions, promises and "deals" all factor into the analysis of whether there is a binding agreement and what the terms are. Communication and documentation of a party's understanding are essential for trying to establish whether there really is "a deal . . . or no deal."

Endnotes

1. A version of this article with a Virginia focus first appeared in 2006. *See* K. Brett Marston & J. Barrett Lucy, *Deal or No Deal? Clarifying Gray Areas in Construction Contracting*, 55 Va. Law. 3, Oct. 2006, at 30. The current authors would like to thank the previous authors and *Virginia Lawyer* for granting permission to make use of and elaborate on the 2006 article.

2. One explanation for lack of promissory estoppel claims by subcontractors against bid-shopping general contractors has to do with lack of information. Subcontractors do not have access to whether they submitted the lowest quote to the general contractor or whether the general contractor included a particular subcontractor's name and price in its bid to the owner. Another reason is lack of "promise." *See, e.g.*, Jamison Elec., LLC v. Dave Orf, Inc., No. ED98710, 2013 Mo. App. LEXIS 423 (Mo. Ct. App. Apr. 9, 2013) (affirming dismissal of subcontractor's promissory estoppel and breach of contract claims against bid-shopping general contractor, where the alleged "promise" to use the subcontractor was between the owner and general contractor, and not between the general contractor and the subcontractor).

3. There are other theories that have been asserted by general contractors. *See, e.g.*, W. Constr., Inc. v. Fla. Blacktop, 88 So. 3d 301, 302 (Ct. App. Fla. 2012) (unjust enrichment); AROK Constr. Co. v. Indian Constr. Servs., 848 P.2d 870, 873 (Ariz. Ct. App. 1993) (statutory racketeering for civil remedies).

4. *See, e.g.*, *W. Constr.*, 88 So. 3d at 302; *AROK Constr.*, 848 P.2d at 873; Preload Tech. v. A.B. & J. Constr. Co., 696 F.2d 1080, 1082 (5th Cir. 1983) (applying Texas law).

(Continued on page 53)

definitions of consequential damages but abdicated the issue to the fact finder, stating, "[C]onsequential damages are recoverable only when they are both foreseeable and within the contemplation of the parties at the time the contract was made. Generally, whether the damages are direct or consequential is an issue of fact that must be reserved for trial."); *see also* McNally Wellman Co. v. N.Y. State Elec. & Gas Corp., 63 F.3d 1188, 1195 (2d Cir. 1995) (the court opined that "ordinarily the precise demarcation between direct damages and incidental or consequential damages is an issue of fact").

"Deal . . . or No Deal"

(Continued from page 26)

5. *See, e.g.*, *AROK Constr.*, 848 P.2d at 874–75 (triable issue as to whether there was an oral contract, even though the parties failed to specify such terms as the manner and time of payments, penalty provisions, and time for completion); *Preload Tech.*, 696 F.2d at 1083–84 & n.6 (trial court found for the subcontractor on breach of contract theory, but the appellate court did not address that issue because it affirmed on the basis of promissory estoppel); Drennan v. Star Paving Co., 333 P.2d 757, 759 (Cal. 1958) (breach of contract theory inapplicable where "there was neither an option supported by consideration nor a bilateral contract binding both parties"); Complete Gen. Constr. Co. v. Kard Welding, Inc., 911 N.E.2d 959, 963 (Ohio Ct. App. 2009) (trial court found no firm offer and appellate court concluded that there was no contract between the parties).

6. 88 So. 3d 301.

7. *Id.* at 303. The subcontractor's proposal contained this preprinted, small print clause:

Florida Blacktop, Inc. has devoted time, money and resources toward the preparation of this bid and as consideration therefore it[']s submitting this bid to "buyer" with the express understanding and agreement of the parties that in the event the "buyer" in any way uses Florida Blacktop, Inc.'s bid such as figures contained therein for purposes of shopping the bid with third parties and/or divulging information contained in the bid to third parties similarly competing with Florida Blacktop, Inc. for the work at issue and/or incorporating any portion of Florida Blacktop, Inc.'s bid in correspondence with third parties competing or in any way involved with the construction work on the project at issue such action(s) shall in all instances constitute acceptance of Florida Blacktop, Inc.'s bid and shall create a binding contract between the parties consistent with the bid documents.

Id.

8. *Id.* at 305 (quoting Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 698–99 (Minn. 1983)).

9. As discussed further, only two states have rejected promissory estoppel in these situations as an offensive, or affirmative, claim. *See* W.J. Schafer Assocs., Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512, 516 (Va. 1997); Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co., 86 N.C. App. 540, 358 S.E.2d 539 (1987) (stating that "the doctrine has only been permitted in North Carolina for defensive relief").

10. Restatement (Second) of Contracts § 90 (1981).

11. 333 P.2d 757 (Cal. 1958).

12. *Id.* at 759.

13. Complete Gen. Constr. Co. v. Kard Welding, Inc., 911 N.E.2d 959, 969 (Ohio Ct. App. 2009) (summarizing *Drennan* on when doctrine of promissory estoppel would not apply).

14. *See supra* note 9.

15. *Complete Gen. Constr. Co.*, 911 N.E.2d at 969.

16. *See, e.g.*, Rosnick v. Dinsmore, 235 Neb. 738, 748 (Neb. 1990) (reciting RSC § 90 and stating that "there is no requirement of 'definiteness' in an action based upon promissory estoppel").

17. Alaska, for example, identifies four elements necessary to a successful RSC § 90 action:

(1) the action induced "must amount to a substantial change of position";
(2) the action induced must have been either actually foreseen or reasonably foreseeable by the promisor;
(3) "an actual promise must have been made" and "must itself have induced the action or forbearance in reliance on it"; and
(4) enforcement must be necessary in the interest of justice.

Alaska Bussell Elec. Co. v. Vern Hickel Contr. Co., 688 P.2d 576, 579 (Alaska 1984) (citing pre–RSC § 90 cases).

18. B&G Elec. Constrs. of N.Y., Inc. v. Power House Maint., Inc., 791 N.Y.S.2d 867, 867 (Suffolk Cnty. 2004).

19. *See* CitiRoof Corp. v. Tech Contracting Co., Inc., 159 Md. App. 578, 860 A.2d 425 (Ct. Sp. App. 2004) (citing Pavel Enters. v. A.S. Johnson Co., Inc., 342 Md. 143, 674 A.2d 521 (1996)). In *Pavel*, Maryland's appeals court agreed with the lower court's finding that the subcontractor's bid was "an offer to contract and that it was sufficiently clear and definite." 342 Md. at 161, 674 A.2d at 530. *See also* Kai-Niklas A. Schneider, Comment, *Maryland's Application of Promissory Estoppel in Construction Industry Bidding Disputes: Eliminating Further Confusion*, 30 U. Balt. L. Rev. 171 (2000).

20. Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 421 F. Supp. 2d 831 (D.N.J. 2006) (applying New Jersey law) (concrete subcontractor's bid letter, stating its price quote was for informational purposes and that no reliance was to be placed thereon, was not a clear and definite offer, and any reliance by general contractor was unreasonable).

21. Jamison Elec., LLC v. Dave Orf, Inc., No. ED98710, 2013 Mo. App. LEXIS 423 (Ct. App. Apr. 9, 2013). In *Jamison Electric*, St. Louis County (County) issued a request for proposal (RFP) from construction contractors for a project. The RFP required contractors to submit a list of subcontractors they intended to use. The RFP also stated that the contractors were required to use the subcontractors listed in their bids, unless they obtained permission otherwise. *Id.* at *2. Jamison Electric (Jamison) submitted a bid to Dave Orf, Inc. (Orf) to perform electrical subcontracting work for the project. The County awarded Orf the project based on a bid including Jamison as the intended subcontractor. *Id.* at *2–3. Orf ultimately used another subcontractor, and Jamison sued for breach of contract and promissory estoppel. Affirming the trial court's dismissal of both claims, the appellate court noted that "the existence of a *promise made by Orf to Jamison* is an essential element." *Id.* at *5. The RFP—whereby Orf promised the owner he would use his intended subcontractors—"did not constitute a promise by Orf to Jamison." *Id.* at *9. "The allegations contained in the petition relating to the RFP are insufficient as a matter of law to allege a promise by Orf to Jamison." *Id.* at *10.

22. *See, e.g.*, Arango Constr. Co. v. Success Roofing, 730 P.2d 720, 726 (Wash. Ct. App. 1986) (noting that "[t]he only element of promissory estoppel in dispute is whether Arango justifiably relied on Success's bid").

23. *Id.*

24. *Id.*

25. *See, e.g.*, Chapen v. Linden, 162 P.3d 772 (Idaho 2007); Nat'l Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889 (Iowa 1989).

26. *See* La. Civ. Code Ann. art. 1967 (1985); Ga. Code Ann. § 13-3-44(a) (Lexis 2013).

27. Complete Gen. Constr. Co. v. Kard Welding, Inc., 911 N.E.2d 959, 969 (Ohio Ct. App. 2009).

28. *Id.* at 970.

29. *See* Alaska Bussell Elec. Co. v. Vern Hickel Contr. Co., 688 P.2d 576, 580–81 (Alaska 1984) (citing Michael L. Closen & Donald G. Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories to the Relations Between General Contractors and Subcontractors*, 13 J. Marshall L. Rev. 565 (1979–1980)).

30. Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 Yale L.J. 1249, 1265–66 (1996). To promote economic efficiencies in preliminary negotiations, Mr. Katz posits a promissory estoppel regime "holding large, informed, wealthy repeat players to their precontractual offers and representations, while excusing small, uninformed liquidity-constrained novices from theirs." *Id.* at 1302.

31. *See, e.g.*, Marketplace Holdings, Inc. v. Camellia Food Stores Inc., 64 Va. Cir. 144, 145 (2004) (in sale of a business situation, "an agreement to negotiate is not enforceable in Virginia," as "there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances in order to have an enforceable contract"); Nuline Indus. Inc. v. Media Gen. Inc., 32 Va. Cir. 352, 354 (1994) ("An agreement to make an agreement fails because there is no mutual commitment.").

32. *See* Boisseau v. Fuller, 96 Va. 45, 46, 30 S.E. 457, 457 (1898) (citation omitted); *see also* Atl. Coast Realty Co. v. Robertson's Ex'r, 135 Va. 247, 253–54, 116 S.E. 476, 478 (1923) ("[W]hen it is shown that the parties intend to reduce a contract to writing, this circumstance creates a presumption that no final contract has been entered into, which requires strong evidence to overcome.").

33. *See* Agostini v. Consolvo, 154 Va. 203, 212, 153 S.E. 676, 678 (1930).

34. 670 F. Supp. 491 (S.D.N.Y. 1987).

35. *See* Trianco v. IBM, 583 F. Supp. 2d 649 (E.D. Pa. 2008) (general contractor's letter of intent was an enforceable Type II preliminary agreement to negotiate in good faith with the subcontractors, on the condition that the general contractor received the prime contract; letter did not bind parties to reach their ultimate objectives).

36. *See* Copeland v. Baskin Robbins, 96 Cal. App. 4th 1251 (2002) (noting that, if the plaintiff prevailed under a Type II theory, it could recover only reliance damages incurred during stalled negotiations, but not expectation damages).

37. Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 409 (4th Cir. 2002).

38. For a general discussion of unsigned contracts, see Michael J. Cook & Brett R. Gunnell, *Interpreting and Enforcing Unsigned Construction Contracts*, Constr. L. Notes, Sept. 1998, http://www.consultingalliance.net/Articles/Enforcing%20Unsigned%20Contracts.pdf.

39. *See* 13 Am. Jur. 2d *Building and Construction Contracts* § 5, which states, in pertinent part:

Where the parties to a building contract have orally agreed to the terms of performance and the price, there is an express contract. In the absence of a statute providing otherwise, a contract to erect an addition to a building may be oral.

40. Bernstein v. Bord, 146 Va. 670, 675, 132 S.E. 698, 699 (1926).

41. Galloway Corp. v. S.B. Ballard Constr. Co., 250 Va. 493, 505, 464 S.E.2d 349, 356 (1995).

42. *See* 13 Am. Jur. 2d *Building and Construction Contracts* § 5, which states, in pertinent part:

A building contract does not come under the statute of frauds as a contract incapable of being performed within a year, even when the time for the performance is fixed at a period of over a year, since this does not prevent the contract from being capable to be performed within a year.

43. 156 Ill. App. 3d 765, 765, 509 N.E.2d 785, 785 (3d Dist. 1987).

44. *Id.* at 766, 509 N.E.2d at 786.

45. 380 F.2d 196, 197 (10th Cir. 1967).

46. *Id.* at 198.

47. *Id.*

48. *Id.*

49. *Id.* at 196.

50. *Id.* at 199 (citing Fed. Sec. Ins. Co. v. Smith, 259 F.2d 294 (10th Cir. 1958); Melo-Sonics Corps. v. Cropp, 342 F.2d 856 (3d Cir. 1965); Nat'l Gas Appliance Corp. v. Manitowoc Co., 311 F.2d 896 (7th Cir. 1962); Lehigh Structural Steel Co. v. Great Lakes Constr. Co., 72 F.2d 229 (2d Cir. 1934)).

51. *Lehigh Structural Steel Co.*, 72 F.2d at 229.

52. *Id.*

53. *Id.* at 230.

54. *Id.*

55. *Id.* at 231.

56. *Id.*

57. 257 Va. 240, 242, 513 S.E.2d 858, 859 (1999).

58. *Id.* at 243, 513 S.E. 2d at 859.

59. *Id.* at 245, 513 S.E.2d at 860.

60. *Id.*

61. *See* 17A Am. Jur. 2d *Contracts* § 81:

A qualified or conditional acceptance, or one that adds a new material term, is a counteroffer. If a condition is affixed to the acceptance by the party to whom the offer is made, or any modification of or change in the offer is made or requested, there is a rejection of the offer, which puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested. The effect of an acceptance containing conditions not found in the offer is to make a counterproposal, upon which the parties have not yet agreed, but which is open for acceptance or rejection.

62. *See, e.g.*, Centric-Jones Co. v. Hufnagel, 848 P.2d 942, 956–57 (Colo. 1993).

63. 271 U.S. 136 (1926).

64. *Id* at 139 (internal citations omitted).

65. No. 3:10cv193, 2011 U.S. Dist. LEXIS 59259 (N.D. Ga. June 3, 2011) (applying Georgia law).

66. *Id.* at *1–2.

67. *Id.* at *2.

68. *Id.* at *3 (citing Am. Aluminum Prod. Co., Inc. v. Binswanger Glass Co., 194 Ga. App. 703, 706, 391 S.E.2d 688 (1990)).

69. Richardson v. Greensboro Warehouse & Storage Co., 223 N.C. 344, 26 S.E.2d 897 (1943).

70. *Id.* at 346, 26 S.E.2d at 898 (internal citations omitted).

71. *See* 250 Va. 493, 505, 464 S.E.2d 349, 356 (1995).

72. Johnson v. M.J. O'Neil, Inc., 182 Minn. 232, 233, 234 N.W. 16, 16 (1931).

73. *Id.* at 233–34, 234 N.W. at 16–17.

74. *Id.* at 234, 234 N.W. at 17.

75. *Id.* at 235, 234 N.W. at 18.

76. *Id.* (internal citations omitted).

77. *See* 17A Am. Jur. 2d *Contracts* § 90; Princess Cruises, Inc. v. Gen. Elec. Co., 143 F.3d 828, 834 (4th Cir. 1998).

78. Hendrickson v. Meredith, 161 Va. 193, 198, 170 S.E. 602, 604 (1933) (internal citations omitted).

79. *See* Duck v. Quality Custom Homes, Inc., 242 Md. 609, 614, 220 A.2d 143, 147 (1966); Robinson v. Powers, 777 S.W.2d 675, 682 (Mo. App. 1989).

80. Commonwealth of Va. v. AMEC Civil, LLC, 280 Va.

396, 699 S.E.2d 499 (2010). The subsequent history of this case involved the proper calculation of damages to which AMEC was entitled. *See* AMEC Civil, LLC v. Commonwealth, No. CL06-340, 2011 Va. Cir. LEXIS 83 (Aug. 11, 2011); Commonwealth v. AMEC Civil, LLC, No. 2134-11-2, 2012 Va. App. LEXIS 174 (May 22, 2012).

81. 97 Cal. App. 3d 482 (1979).

82. *Id.*; *see also* Badders & Britt v. Davis, 88 Ala. 367, 375, 6 So. 834, 837 (1889).

83. J.T. Majors & Son, Inc., v. Lippert Bros, Inc., 263 F.2d 650 (10th Cir. 1958); Sitkin v. Smith, 35 Ariz. 226, 276 P. 521 (1929); Lynch v. Culhane, 241 Mass. 219, 135 N.E. 119 (1922); Inter-State Lumber Co. v. W. Mortg. & Warranty Title Co., 51 Mont. 190, 149 P. 975 (1915).

84. 263 Ill. App. 583 (1931).

85. 176 Ky. 554, 196 S.W. 150 (1917).

86. 283 Ga. 222, 657 S.E.2d 826 (2008).

87. *Id.* at 224, 657 S.E.2d at 829.

88. Austin v. Barber, 227 A.D.2d 826, 642 N.Y.S.2d 972 (App. Div. 1996) (oral modification where "conduct of the parties demonstrates an indisputable mutual departure from the written agreement and the changes were clearly requested by [the homeowner] and executed by [the contractor]").

89. Morris Glasser & Son, Inc. v. Jonwal Constr. Co., 60 N.Y.S.2d 25 (1946) (holding that a stipulation in writing requiring "a claim" for extras to be "in writing and signed" by the owner could not be modified by oral agreement).

90. 255 Va. 300, 497 S.E.2d 847 (1998).

91. *Id.* at 306, 497 S.E.2d at 851 (citing Stanley's Cafeteria Inc. v. Abramson, 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)).

92. Rich Johnson Homes, Inc. v. Sheehan, No. A07-758, 2008 Minn. App. Unpub. LEXIS 511 (Minn. App. May 6, 2008) (holding the district court did not err in determining that the general contractor was required to prove oral modifications to the written contract with clear and convincing evidence); Hall Contracting Corp. v. Entergy Servs., Inc., 309 F.3d 468 (8th Cir. 2002) (granting summary judgment to the owner because the contractor failed to meet its burden and failed to establish waiver by clear and unmistakable evidence); Huang Int'l, Inc. v. Foose Constr. Co., 734 P.2d 975 (Wyo. 1987) (upholding damages to the contractor for extra work performed pursuant to oral agreements with Chinese restaurant owner, despite written contract requiring change orders in writing; the contractor demonstrated "by clear and convincing evidence that [the owner] modified the terms of the written agreements by orally approving extra work on the project").

93. Tenn. Code Ann. § 47-50-112(c) (Lexis 2013).

94. *Id.*

95. Tidwell v. Morgan Bldg. Sys., Inc., 840 S.W.2d 373 (Tenn. Ct. App. 1992).

96. La. Civ. Code Ann. art. 2763 (Lexis 2013).

97. *Id.* art. 2764.

98. *See, e.g.*, Nat Harrison Assocs., Inc. v. Gulf States Util. Co., 491 F.2d 578 (5th Cir. 1974); Roff v. S. Constr. Corp., 163 So. 2d 112 (La. Ct. App. 3d Cir. 1964).

99. Freeman v. Stanbern Constr. Co., 205 Md. 71, 106 A.2d 50 (1954).

100. D.K. Meyer Corp. v. Brevco, 206 Neb. 318, 292 N.W.2d 773 (1980).

101. Bartlett v. Stanchfield, 148 Mass. 394, 19 N.E. 549 (1889).

102. *Id.* at 395, 19 N.E. at 550.

103. Weber Constr., Inc., v. Spokane Cnty., 124 Wn. App. 29, 98 P.3d 60 (2004); Cardinal Dev. Co. v. Stanley Constr. Co., 255 Va. 300, 305, 497 S.E.2d 847, 851 (1998); T.W. Morton Builders, Inc. v. Von Buedingen, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994); D.K. Meyer Corp. v. Brevco, 206 Neb. 318, 292 N.W.2d 773 (1980); H.T.C. Corp. v. Olds, 486 P.2d 463 (Colo. Ct. App. 1971); Howard J. White, Inc. v. Varian Assoc., 178 Cal. App. 2d 348, 355 (1960); Inter-State Lumber Co. v. W. Mortg. & Warranty Title Co., 51 Mont. 190, 194, 149 P. 975, 976 (1915).

104. Brinich v. Jencka, 757 A.2d 388 (Pa. Super. Ct. 2000); Austin v. Barber, 227 A.D.2d 826, 642 N.Y.S.2d 972, 973–74 (App. Div. 1996).

105. C.L. Maddox, Inc. v. Coalfield Servs., Inc., 51 F.3d 76 (7th Cir. 1995).

106. Wisch & Vaughn Constr. Co. v. Melrose Props. Corp., 21 S.W.3d 36, 41 (Mo. Ct. App. 2000); Miller v. McMahon, 523 N.Y.S.2d 185, 135 A.D.2d 1030 (1987); *T.W. Morton Builders*, 316 S.C. 388, 450 S.E.2d 87.

107. Son-Shine Grading, Inc. v. ADC Constr. Co., 68 N.C. App. 417, 315 S.E.2d 346 (1984); Consol. Elec. Distrib., Inc. v. Gier, 24 Wn. App. 671, 602 P.2d 1206 (1979); J.R. Graham & Son, Inc. v. Randolph Cnty. Bd. of Educ., 25 N.C. App. 163, 212 S.E.2d 542 (1975); W.E. Garrison Grading Co. v. Piracci Constr. Co., 27 N.C. App. 725, 221 S.E.2d 512 (1975); Walter v. Horwitz, 60 N.Y.S.2d 326, *aff'd*, 65 N.Y.S.2d 672 (1946).

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320 N.W.2d 886, 890 (Minn. 1982).

35. *Id.*

36. *See* Cerami-Kote, Inc. v. Energywave, 773 P.2d 1143 (Idaho 1989); Idaho Code Ann. § 29-110 (2012).

37. *See* Ariz. Rev. Stat. Ann. § 32-1129.05 (2012); Cal. Civ. Proc. Code § 410.42 (West 2012); Conn. Gen. Stat. § 42-158m (2012); Del. Code. Ann. tit. 6, § 3507(e) (West 2012); Fla. Stat. § 47.025 (2012); 815 Ill. Comp. Stat. 665/10 (2012); Ind. Code § 32-28-3-17 (2012); La. Rev. Stat. Ann. § 9:2779 (2012); Minn. Stat. § 337.10, subd. 1 (2012); Mont. Code Ann. § 28-2-2116(1) (2012); Nev. Rev. Stat. § 108.2453(2)(d) (2012); N.M. Stat. Ann. § 57-28A-1(A) (2012); N.Y. Gen. Bus. Law § 757(1) (McKinney 2012); N.C. Gen. Stat. § 22B-2 (2012); Ohio Rev. Code Ann. § 4113.62(D)(2) (LexisNexis 2012); Okla. Stat. tit. 15, § 221(E) (2012); Or. Rev. Stat. § 701.640(1)(a) (2012); 73 Pa. Cons. Stat. § 514 (2012); R.I. Gen. Laws § 6-34.1-1(a) (2012); Tenn. Code Ann. § 66-11-208 (2012); Tex. Bus. & Com. Code Ann. § 272.001 (West 2012); Utah Code Ann. § 13-8-3(2) (LexisNexis 2012); Va. Code Ann. § 8.01-262.1 (2012); Wis. Stat. § 779.135(2) (2012).

38. *See, e.g.*, Minn. Stat. § 337.10, subd. 1 (2012) (stating, "Provisions contained in, or executed in connection with, a building and construction contract to be performed in Minnesota *making the contract subject to the laws of another state* or requiring that any litigation, arbitration, or other dispute resolution process on the contract occur in another state are void and unenforceable.") (emphasis added).

39. Ariz. Rev. Stat. Ann. § 32-1129.05 (2012).

40. N.Y. Gen. Bus. Law § 757(1) (McKinney 2012); Okla. Stat. tit. 15, § 221(E) (2012); Or. Rev. Stat. § 701.640(1)(a) (2012).

41. Utah Code Ann. § 13-8-3 (West 2012).

42. Cal. Civ. Proc. Code § 410.42 (West 2012); La. Rev.