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Contracts—Consideration—Subcontractor Bidding*

The doctrine of promissory estoppel presents an exception to the general rule that a promise not supported by a valid consideration is unenforceable.[1] This doctrine has been developed in cases where a promisee, to his detriment, has acted in reasonable reliance on a promise not supported by consideration and injustice would result if the promise were not enforced.[2] The "reasonable reliance" is said to serve "in lieu of the consideration ordinarily required to make the offer binding."[3] Thus, the "reasonable reliance" serves to support the promise. This is the essence of promissory estoppel.[4]

Promissory estoppel has been applied to various fact situations where a promisee has relied upon a promise to his detriment.[5] It has been applied in cases where there were promises not to plead the statute of limitations,[6] promises to make charitable contributions,[7] gratutitous promises to extend, renew, or modify leases,[8] promises of pensions to employees,[9] promises of gifts for personal services,[10] promises of franchises to dealers,[11] and many others.[12]

There has been some controversy as to whether promissory estoppel should be applicable in commercial cases, and more specifically, in subcontract-bidding situations.

In the recent New Mexico case of *Tatsch v. Hamilton-Erickson*,[13] the supreme court indicated that the doctrine of promissory estoppel was not applicable to commercial cases in New Mexico. The plaintiff, a prime contractor, was awarded a contract for the construction

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* Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966).

1. 1A A. Corbin, Contracts § 204 (1963).
2. *Id.*
3. Drennan v. Star Paving Co., 51 Cal. 2d 409, 411, 333 P.2d 757, 760 (1958).
4. The doctrine is well expressed in Restatement of Contracts § 90 (1932):

   > 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 of forbearance is binding if injustice can be avoided only by enforcement of the promise.

   For an analysis of the elements of promissory estoppel see Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. Pa. L. Rev. 459 (1950).
5. Annot., 48 A.L.R.2d 1069 (1956).
6. Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806 (1949).
7. Danby v. Osteopathic Hosp. Ass'n, 34 Del. Ch. 427, 104 A.2d 903 (1954).
8. Drake v. Eggleston, 123 Ind. App. 306, 108 N.E.2d 67 (1952).
9. Hunter v. Sparkling, 87 Cal. App. 2d 711, 197 P.2d 807 (1948).
10. Klein v. Farmer, 85 Cal. App. 2d 545, 194 P.2d 106 (1948).
11. Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948).
12. See generally, Annot., 48 A.L.R.2d 1069 (1956).
13. 76 N.M. 729, 418 P.2d 187 (1966).

of a junior high school. When he was preparing his bid for the construction of this and also a bid for the construction of Bayard Elementary School, he sent invitations to several suppliers, including the defendants, to make subcontract bids on various items including folding tables and benches. The prime contract specifications called for twelve tables and benches "as manufactured by Schieber Mfg. Co."[14] In response to the invitation, the defendant suppliers sent the following telegram:

> Re: Bayard Elementary School. We offer fourteen (14) folding tables and benches Specifications Section 16-3 standard Hamilton-Erickson products $4,858.00. . . .
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> * * * *
>
> Re: Cobre Junior High School. We offer ten (10) [Hamilton-Erickson] folding tables and benches as above specification section 15-6 for $3,470.00. . . .[15]

The contractor took the total price quoted in the supplier's bid for Cobre Junior High and divided it by ten to get a unit price. He then multiplied this unit price by twelve and used the resultant figure, $4,164.00, in his own bid.[16]

On the day after the contractor was awarded the contract on the Cobre Junior High School job, he called the supplier and congratulated him on being the low bidder for the folding tables and benches. The supplier replied that he was not sure that the standard Hamilton-Erickson tables, as bid, would meet the specifications of the architect but that maybe the architect would accept them anyway. Tatsch replied that he would "expect him to furnish a product that would be acceptable to the architect." When the supplier refused to supply any tables and benches except their own standard Hamilton-Erickson products, the contractor sued for breach of contract.[17]

The trial court found for the contractor, ruling that there had

14. *Id.* at 730, 418 P.2d at 188.

15. Brief for Appellant at 5, 6, Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966). The statement "as above specification section 15-6 . . ." in the bid regarding Cobre Junior High School refers to the specifications given by the bidder himself in the bid regarding Bayard Elementary School. Since the telegram was the only thing sent by the bidder to the contractor, "as above specifications" could not refer to anything except a previous part of the telegraphic offer. It would not refer to "Specification section 16-3" since the specifications for Cobre were "specifications 15-6." It could only refer to the "above specifications" given by the bidder, that is, "standard Hamilton Erickson products."

16. *Id.* at 7.

17. Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 418 P.2d 187 (1966).

been a binding contract formed between the two parties which called for the supplier to furnish twelve folding tables and benches meeting the architect's specifications.[18]

On appeal the New Mexico Supreme Court *held*, Reversed; the offer had been revoked before it was ever accepted. The court based its holding on the following rule of law: "An offer not under seal or given for a consideration may be withdrawn at any time prior to an unconditional acceptance by the offeree."[19] The court also said that promissory estoppel could not be applied to make the offer irrevocable. The court cited *James Baird Co. v. Gimbel Bros.*[20] for the proposition that "such offer so relied upon [does not] constitute a promissory estoppel."[21] The court, in citing *Baird*, at least implies that promissory estoppel is not applicable in commercial cases.

The purpose of this Comment is first, to demonstrate that the doctrine of promissory estoppel should apply to commercial cases in New Mexico and second, to emphasize the fact that the Uniform Commercial Code provision on the firm offer has modified the rule of law relied upon by the court.

Perhaps the leading case to hold that promissory estoppel is not applicable in such cases is the one cited by the court, *James Baird Co. v. Gimbel Bros.*[22] In this case the defendant was a supplier of linoleum who prepared a subcontract bid to supply the linoleum requirements for a proposed building. He sent a copy of his bid to twenty or thirty contractors, including the plaintiff, who were bidding on the new building. The contractor who was awarded the contract had used the supplier's offer in his own bid. Before he could accept the supplier's offer, the supplier found it had made a mistake in the estimate and revoked its offer. The contractor sued the supplier for breach of contract. The court, in an opinion written by Judge Hand, held that there was no contract because the offer was revocable until accepted and it had been revoked before it was accepted. Judge Hand, recognizing that the doctrine of promissory estoppel was applicable in cases involving gratuitous promises for charitable subscriptions said:

> But an offer for an exchange is not meant to become a promise

18. *Id.*
19. *Id.* at 734, 418 P.2d at 189.
20. 64 F.2d 344 (2d Cir. 1933).
21. Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 733, 418 P.2d 187, 189 (1966).
22. 64 F.2d 344 (2d Cir. 1933).

> until a consideration has been received, either a counter-promise or whatever else is stipulated. . . . There is no room in such a situation for the doctrine of 'promissory estoppel.'[23]

Eight years after the *Baird* decision, the Seventh Circuit in *Robert Gordon, Inc. v. Ingersoll-Rand Co.*,[24] rejected the idea that promissory estoppel was not applicable in commercial cases. This case also involved a contractor and a supplier. The contractor and his competitor asked the supplier for price quotations on refrigeration units. The price quote was ambiguous and could have been interpreted as offering two units for the price of one. The contractor used this interpretation of the figure in his own bid even though his competitor recognized the ambiguity in the offer and called the supplier to determine the correct figure. The supplier notified the contractor of the correct meaning of the offer but the contractor had already used the other figure in his bid. When the contractor was awarded the prime contract, he attempted to accept the offer as he had interpreted it. When the supplier would not perform the contract at that price, the contractor sued for breach of contract. The court would not allow the contractor to recover on the theory of promissory estoppel because he had not satisfied the element of "justifiable reliance." However, the court made it plain that promissory estoppel was applicable in such situations: "However we choose not to follow the Baird case. The mere fact that the transaction is commercial in nature should not preclude the use of the promissory estoppel."[25]

A more recent case involving a similar fact situation is *Brennan v. Star Paving Co.*[26] There, the general contractor used the defendant's subcontract bid in his general bid and was awarded the prime contract. The day after the award the subcontractor told the general contractor that he could not do the job at the bid price since there had been a mistake in the subcontractor's estimate. The general contractor sued the subcontractor for breach of contract. In an opinion written by Justice Traynor, the California Supreme Court applied section 90 of the *Restatement of Contracts* and held that the

23. *Id.* at 346. The decision in *Baird* was immediately criticized. One critic noted that it was hard to see how injustice was any less repugnent in commercial cases than in charitable subscription cases. Note, 20 Va. L. Rev. 214 (1933). For further criticism see, comment, 28 Ill. L. Rev. 419 (1933).

24. 117 F.2d 654 (7th Cir. 1941).

25. *Id.* at 661.

26. 51 Cal. 2d 409, 333 P.2d 757 (1958).

offer was irrevocable for a reasonable time. Justice Traynor used the following reasoning:

> 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.
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> * * * *
>
> Defendant's mistake should not defeat recovery. It should foresee harm which would ensue from erroneous underestimate. It was motivated by its own interest. It should exercise reasonable care in preparing its bid. . . . As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it.[27]

The doctrine of promissory estoppel is now recognized in many jurisdictions as being applicable in commercial cases.[28] If the doctrine of promissory estoppel had been applied in *Tatsch v. Hamilton-Erickson*,[29] the case would still have been decided in favor of the defendant, Hamilton-Erickson. As in the case of *Robert Gordon, Inc. v. Ingersoll-Rand Co.*,[30] the contractor, Tatsch, would still have been unable to meet the requirement of "justifiable reliance." The offer in *Tatsch* was ambiguous as was the offer in *Ingersoll-Rand*. It could have been interpreted as meaning that "standard Hamilton-Erickson products" would meet the architect's specifications or it could have been interpreted as an offer for "standard Hamilton-Erickson products" as a substitute for those "as manufactured by

27. *Id.* 333 P.2d at 760, 761.

28. Since the case of James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933), few cases have held that the doctrine of promissory estoppel is not applicable in commercial cases. Most have recognized the doctrine as being applicable: Robert Gordon, Inc. v. Ingersoll-Rand Co., 117 F.2d 654 (7th Cir. 1941); Weiner v. Romley, 94 Ariz. 40, 381 P.2d 581 (1963); Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806 (1949); C. H. Leavell and Co. v. Grafe & Associates, Inc., 414 P.2d 873 (Idaho 1966); Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962); Northwestern Engr. Co. v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1953); Wheller v. White, 398 S.W.2d 93 (Tex. 1966); Petty v. Gindy Mfg. Corp., 404 P.2d 30 (Utah 1965); Hilton v. Alexander & Baldwin, Inc., 400 P.2d 772 (Wash. 1965).

29. 76 N.M. 729, 418 P.2d 187 (1966).

30. 117 F.2d 654 (7th Cir. 1941).

Schieber Mfg. Co." With Tatsch's knowledge of the situation it could not be said that he relied on this ambiguous offer in good faith.[31]

Promissory estoppel should be applicable in commercial cases in New Mexico under the proper circumstances. This view is not wholly without precedent in New Mexico. In *Kingston v. Walters*,[32] the New Mexico Supreme Court said: "Where a representation as to the future relates to an intended abandonment of an existing right, and is made to influence others, and they have been influenced by it to act, it operates as an estoppel."[33] The *Kingston* case can be distinguished in that it involved a sale of property but to paraphrase one of the criticisms of the *Baird* decision: it is hard to see how injustice is any less repugnant in commercial cases than in property cases.[34]

The reasoning of Justice Traynor in *Drennan v. Star Paving*[35] is an excellent argument of why promissory estoppel should be applicable under the proper circumstances. A contractor should be able to rely on the offer of a subcontractor or supplier. The revocation of a sub-bid after the contractor has relied on it in his main bid could mean the difference between a profit and a loss. The ancient doctrine of consideration should not be allowed to inflict injustice and hardship on a party who, to his detriment, relied in good faith on a promise.

A second ground open to the plaintiff in *Tatsch* would have been to argue for the applicability of section 2-205 of the Uniform Com-

31. There are several reasons for this. First is the fact that the offer was ambiguous on its face. Also Tatsch knew that the University Book Store was the exclusive agent in New Mexico for products manufactured by Schieber Mfg. Co. Further, the offer was for ten folding tables and benches and Tatsch tried to rely on it as an offer for twelve. There was also apparently a large discrepancy in the price quotations of the various offers. The price of the Hamilton-Erickson products would have been $4,164.00. Tatsch finally purchased products that would meet the specifications for $7500.00. That is $3336.00 or about eighty per cent more than the price of the Hamilton-Erickson products. This should have put Tatsch on notice that the Hamilton-Erickson products might not meet the specifications.

32. 16 N.M. 59, 113 P. 594 (1911). In this case there was a written agreement that the buyer would have until Aug. 26, to make a partial payment for the purchase of land. If the payment was not made, the buyer was to forfeit a previous payment and the right to buy the land. The seller orally agreed to let the buyer have "five or ten days" extra to make the payment. The buyer attempted to pay Sept. 1, and the seller said the payment was too late. In its decision the court ruled that the buyer could make the payment even though the oral promise was not supported by consideration.

33. *Id.* at 60, 113 P. at 595.

34. See note 23 *supra*.

35. See note 27 *supra* and accompanying text.

mercial Code.[36] This is the firm offer provision which says: "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 . . . ."[37]

This certainly modifies the rule of law relied on by the court that: "An offer not under seal or given for a consideration may be withdrawn at any time prior to an unconditional acceptance by the offeree."[38]

It is not clear what is included in the phrase, "which by its terms gives assurance." It has been argued that it includes terms which can be implied from the particular circumstances of the offer and the situation of the parties, as long as the offer itself is in written form. This construction is certainly possible. The framers of the Uniform Commercial Code could have restricted the provision to include only written assurances as the framers of the Uniform Written Obligations Act[39] and the New York General Obligations Law[40] did. The Uniform Written Obligations Act requires that, "the writing also contains an *additional express statement*, in any form of language, that the signer intends to be legally bound."[41] The New York General Obligations Law states:

> *Except as otherwise provided* in section 2-205 of the uniform commercial code with respect to an offer by a merchant to buy or sell goods, when an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which *states* that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability.[42]

A comparison of the New York General Obligations Law with section 2-205 of the Uniform Commercial Code would indicate that the Uniform Commercial Code requires less to make an offer irrevocable than does the New York General Obligations Law. The latter, with its clear qualification, "except as otherwise provided

36. N.M. Stat. Ann. § 50A-2-205 (Repl. 1962).

37. *Id.* (emphasis added).

38. Tatsch v. Hamilton-Erickson Mfg. Co., 76 N.M. 729, 734, 418 P.2d 187, 190 (1966).

39. Pa. Stat. Ann. tit. 33, § 6 (1949). Pennsylvania is the only state which adopted the Uniform Written Obligations Act.

40. N.Y. Gen. Obligations Law § 5-1109 (McKinney 1964).

41. Pa. Stat. Ann. tit. 33, § 6 (1949) (emphasis added).

42. N.Y. Gen. Obligations Law § 5-1109 (McKinney 1964) (emphasis added).

in section 2-205 of the uniform commercial code,"[43] seems to imply that the Uniform Commercial Code requires something less than a "writing . . . which *states* that the offer is irrevocable . . . ."[44]

Further comparison shows that an offer made irrevocable under the New York General Obligations Law is irrevocable for any amount of time stated in the offer. Thus, the consequences of making an irrevocable offer are much more serious under the New York General Obligations Law than under the Uniform Commercial Code which limits the time that an offer can be made irrevocable to three months.[45] The possibility of making an offer irrevocable over a long period of time is a good reason for making the requirements of the New York General Obligations Law almost a requirement of form much like the common law seal. Since an offer cannot be made irrevocable for a period of time longer than three months under section 2-205 of the Uniform Commercial Code, it would seem reasonable that the requirements of the Uniform Commercial Code would be less demanding than the requirements of the New York General Obligations Law.

If section 2-205 of the Uniform Commercial Code were found to be applicable in *Tatsch*, the plaintiff would have had to meet two requirements. First, he would have had to show that the sub-bid offer had created the required "assurance" in view of the particular circumstances. Second, he would have had to prove that the offer was truly for what he said it was; this issue was never resolved by the supreme court.

Thus, it appears that the doctrine of promissory estoppel and the firm offer provision of the Uniform Commercial Code may serve to protect the prime contractor who relies upon an offer submitted by a subcontractor. If the tests required by section 2-205 of the Uniform Commercial Code are met, there would seem to be no need to invoke the doctrine of promissory estoppel. But that doctrine should apply if the code provision is not satisfied and yet the prime contractor reasonably relies on the subcontractor's bid and such reliance works to his detriment.

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43. *Id.*

44. *Id.* (emphasis added).

In the New Jersey case, E. A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 216 A.2d 246 (1966), the court seemed to imply that to satisfy Section 2-205 of the Uniform Commercial Code, the assurance of irrevocability must actually be in writing. It should be noted that this was not the highest court in New Jersey.

45. An offer may be made irrevocable for a period longer than three months under the Uniform Commercial Code but it must be supported by a consideration.