

**American Bar Association
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Bid Mistakes and Relief

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“Oops I did it again.” — Britney Spears

I. Introduction¹

The rules on mistakes in bid have to walk a fine line between fairness to the mistake-maker and to the other bidders.² Consider the example where the owner’s estimate was \$1 million and all the other bids are clustered around \$1 million, but someone quotes \$400,000. While some owners might be tempted to immediately award to the low bidder, that action is not in anyone’s best interest. In that situation, the owner would likely be awarding a contract that would be a termination for default waiting to happen and may tie the owner and the contractor up in bankruptcy. Moreover, the acceptance of a bid containing an obvious inadvertent error cannot result in a binding contract.³ One purpose of the mistake in bid rules is to insure that the integrity of the competitive bidding system is protected by preventing bidders from taking advantage of the exposed prices and changing market conditions.⁴

Public owners are typically required by law (and private owners often out of prudence) to send a bid verification letter. Three options then arise: (1) if the contractor can prove both the nature of the mistake and the intended bid, it will be allowed to raise the bid; (2) if the contractor cannot prove both (by a preponderance of the evidence), it may be allowed to withdraw; or (3) the contractor, whether it alleges a mistake or not, may be entitled to take the contract at the low price. For example, the contractor may state that \$400,000 is its bid and it can do the job, or, recognizing that it is a mistake but being unable to provide the necessary proof, may be willing to accept the loss on a high visibility project, especially if it feels it will lead to other work. Nonetheless, even if a

contractor verifies its bid, the owner, especially a public owner, is fully within its rights to reject the bid.⁵

II. Types of Bid Mistakes

A. Errors of Fact

Section 14.407-2(a) of the Federal Acquisition Regulations (“FAR”), entitled “Apparent clerical mistakes,” states that:

Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are—

- (1) Obvious misplacement of a decimal point;
- (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
- (3) Obvious reversal of the price f.o.b. destination and price f.o.b. origin; and
- (4) Obvious mistake in designation of unit.

Clerical or computational errors often readily present themselves as bids significantly out of the range of other bids received. Clerical or arithmetic errors are the most common types of mistakes for which relief is granted.⁶ Such relief can also be granted for clerical or arithmetic errors made by suppliers and subcontractors.⁷

Typically, a clerical mistake means the same as a simple mathematical or other transcribing mistake.⁸ Clerical errors arise when the contractor commits an unintended typographical or mathematical mistake such as addition or multiplication errors, failure to include components such as overhead and profit, or reversal of discount and cost rates.⁹

Chris Berg, Inc. v. U.S.,¹⁰ is a pre-FAR case illustrating the government's duty to verify a bid containing an obvious mistake, and to allow that mistake to be corrected pre-bid when its nature is clerical. In *Berg*, a contractor made a computational error, which resulted in its submitted bid price for a Navy project being significantly low. Suspecting an error, the Navy asked for the price to be reconfirmed. In doing so, the contractor discovered the errors, and sought to reform its pricing, which apparently would have had no effect on it being the low bidder. The Navy refused to allow the reformation, providing the contractor only the options of accepting the contract at its bid price or rescinding its bid.

The *Berg* contractor chose to execute a contract for its bid price, while simultaneously reserving its rights to a contract modification correcting the bid mistake. The pre-FAR regulation to be adhered to by the Navy in its procurements, the Armed Services Procurement Regulation (ASPR), allowed a bidder either to rescind a mistaken bid, or, if proof was available that correction would not displace lower bids (again a fairness issue), to reform the bid.

The *Berg* Court, in ruling in favor of the contractor's right to have reformed his bid, and its motion for summary judgment, characterized the Navy's actions as violative of its own procurement regulations. It said that the procurement regulations are "law which governs the award and its interpretation as fully as if it were made part thereof."¹¹ Characterizing the Navy's actions in the matter, it strongly held that "the award of the contract to plaintiff at the bid price, with knowledge of its mistake and over its protest, was a clear-cut violation of the law."¹²

B. Errors of Judgment

The bid mistake procedures are not designed to permit bidders to correct judgmental errors or incorrect premises that the bidder discovers after the opening of bids.¹³ Relief is precluded for mistakes in judgment. Such mistakes include errors in the estimate of the cost or quantity of materials.¹⁴ “Mathematical errors refer to clearly evident errors, such as misplacing a decimal point, or erring in the processes of addition, subtraction, division or multiplication. The choice of an algorithm in preparing its offer is a mistake in judgment, not a mathematical or arithmetic mistake.¹⁵ As the court said in *Ruggiero v. United States*,¹⁶ “the mistake . . . must be . . . a clear cut clerical or arithmetic error, or misreading of specifications, and the authorities cited do not extend to mistakes of judgment. When a bidder makes a business judgment, it assumes the responsibility that the judgment may be faulty and is “taking a conscious gamble with known risks.”¹⁷

In *Giesler v. United States*,¹⁸ the Court stated “misreading of the specifications includes mistakes such as omissions of costs or mistaken belief about what is called for in specifications. In that case, the *Giesler* court reversed the trial court holding that a contractor’s failure to read the specifications cannot be considered a misreading of the specifications and that such a mistake based upon a mistaken judgment does not entitle the contractor to reformation of its contract.

The *Giesler* case continued that generally “contractors are barred from obtaining equitable relief for mistakes in their bids that arise from other than ‘a clearcut clerical or mathematical error, or a misreading of the specifications’.”¹⁹ The Court went on stating that its case law interpreting the Government’s duty to examine bids for mistakes

uniformly evaluates the duty only in instances where the alleged error was contained in a contractor's original bid, not in other subsequently submitted papers.²⁰

III. Bid Verification

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. Section 14.407-3(g) of the FAR requires that:

- (1) The contracting officer shall immediately request the bidder to verify the bid. Action taken to verify bids must be sufficient to reasonably assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder. To assure that the bidder will be put on notice of a mistake suspected by the contracting officer, the bidder should be advised as appropriate—
 - (i) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;
 - (ii) Of important or unusual characteristics of the specifications;
 - (iii) Of changes in requirements from previous purchases of a similar item; or
 - (iv) Of any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid.
- (2) If the bid is verified, the contracting officer shall consider the bid as originally submitted. If the time for acceptance of bids is likely to expire before a decision can be made, the contracting officer shall request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids in accordance with 14.404-1(d). If the bidder whose bid is believed erroneous does not (or cannot) grant an extension of time, the bid shall be considered as originally submitted (but see paragraph (g)(5) of this section). If the bidder alleges a mistake, the contracting officer shall advise the bidder to make a written request to withdraw or modify the bid. The request must be supported by statements (sworn statements, if possible) and shall include all pertinent evidence such as the bidder's file copy of the bid, the original worksheets and other data used in preparing the bid, subcontractors' quotations, if any,

published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended. If the bidder alleges a mistake, the matter shall be processed in accordance with FAR 14.407.

Regarding the adequacy of the verification request, in *Klinger Constructors, Inc.*,²¹ the Board summarized the requirements as follows:

(T)he bid verification request should aim at informing the bidder of all the pertinent factors that indicate to the Contracting Officer that an error might have been made. The adequacy of verification will turn on an assessment of the reasonableness of the contracting officer's disclosure.

IV. Was the Mistake Mutual or so Obvious that the Owner Should Know?

“The man who makes no mistakes does not usually make anything.”
— Edward J. Phelps

Typically a mistake must be either mutual or, if unilateral by the contractor, so apparent to the agency as to charge the contracting officer with notice of the probability of mistake.²² If the mistake alleged for the first time after award is a mutual mistake where the owner and the bidder have made the same mistake so that the contract does not express the agreement that the parties intended, the contract may be reformed to reflect the true intent of the parties.²³

Imputing knowledge to the owner can be difficult. For example, if a low bid was very close to the owner's estimate and the owner had no actual knowledge of any mistake in the low bid or in the government estimate, then absent facts which reasonably would alert one to suspect the mistake in bid, the Contracting Officer has no duty to ask the low bidder to verify its bid or to review the government estimate for error.²⁴ A difference in bid price alone is not necessarily enough to put a contracting officer on notice that a mistake has been made even if the price differential is great.²⁵

Hunt Constr. Co. v. U.S.,²⁶ demonstrates that the government need not provide an opportunity to all bidders to reform their bids based on its knowledge of one bidder's mistake. The *Hunt Constr.* plaintiff was the successful bidder on a Department of Veteran's Affairs construction project. It brought suit to collect taxes it claimed were not included in its bid, but were required to be paid by it in connection with the project. The solicitation for bid included a notice that all applicable taxes were to have been included in the bidders' pricing. However, it also included a clause stating that any available exemptions from taxes should be sought by the bidders.

During the course of the project, the contractor requested that the government designate it as a government "purchasing agent", apparently in hopes that governmental exemption from certain taxes would then accrue to the contractor via such agency. The government, feeling such designation not in its interest, declined to do so, and the contractor was left with a tax burden not accounted for in its bid pricing.

One of the *Hunt Construction* plaintiff's assertions was that under 14.407-1 the government was obligated to verify its bid before the award, because it had constructive notice, through an exclusion of taxes in another bidder's proposal, that an ambiguity regarding taxes existed in the IFB. Eschewing this argument, the Court of Appeals reiterated the FAR 14.407-1 general rule that a known bid defect should prompt a verification by the awarding agency, but refused to apply it in the matter.

Pointing out that the plaintiff was arguing not that a mistake in its own bid should have prompted a verification, the court said, "the government, when confronted with one bidder's unreasonable interpretation of the contract, does not have an obligation to verify

other bids to ensure that no other bids incorporated the same unreasonable contract interpretation.”²⁷

The *Hunt Constr.* holding is consistent with the general rule that the government’s duty to warn a bidder of problems in a bid is limited to situations in which the awarding agency knew or should have known that a bid: a) included an obvious typographical error; b) included an obvious computational error; or c) was based upon an obvious misreading of the project specifications.²⁸

This concept is particularly well illustrated by *J. Rose Corp. v. U.S.*²⁹, a case in which a contractor asserted that its unit price bid for excavation was so low as to have required a verification of its bid by the Corps of Engineers. While the contractor’s unit price for “unclassified” excavation was significantly lower than the government’s estimate, the contractor’s overall bid was less than two percent lower than the government’s estimate for the project. Despite the fact that the next lowest bidder’s price was nearly \$100,000 higher, the Claims Court determined that “under all the circumstances presented at trial, plaintiff’s bid was not so low as to necessarily alert the contracting officer that the bid was the result of plaintiff’s mistake.....nothing in the bid, aside from the price differential, could have alerted the contracting officer to the possibility of an error.”³⁰

The most common situation where the owner is held to be on notice of the possible error is a wide disparity between the low bid and the other bids and/or the owner’s independent estimate.³¹ Often this will be a judgment call since if there are a cluster of bids relatively close to the putative awardee, a mistake may not be suspected.³²

The burden continues to remain squarely with bidders to assure themselves that their pricing is accurately presented. Without sufficient and apparent reason for the need for a verification, a contracting agency has no obligation to assure itself that every bid is without error. In cases like *Hunt Constr.* and *J. Rose*, it was the bidder's, not the government's failing that was the cause of any ill-considered estimating done, and contracting undertaken by the bidders. "When a mistake is suspected, the contracting officer must seek verification of a contractor's bid; yet, government officials are not required to speculate as to the bases of the contractor's bid."³³

While there are relatively few litigated cases where the owner actually knows of an error and awards without adequate verification, it does happen.³⁴

V. Proof Required

Under the federal system: FAR 14.407-4 states:

Mistakes alleged or disclosed after award shall be processed as follows:

- (1) The contracting officer shall request the contractor to support the alleged mistake by submission of written statements and pertinent evidence, such as—
 - (i) The contractor's file copy of the bid,
 - (ii) The contractor's original worksheets and other data used in preparing the bid,
 - (iii) Subcontractors' and suppliers' quotations, if any,
 - (iv) Published price lists, and
 - (v) Any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

The claimant must prove two things: the nature of the mistake and the expected bid. The general rule is that both must be proven by a preponderance of the evidence.

However, a preponderance of the evidence is a sliding scale. If the closest bid is \$600,000 and the awardee's bid is \$400,000, and the awardee alleges a mistake and wants to go from \$400,000 to \$425,000, that will be allowed. However, if the awardee wants to raise the bid to \$599,999, even though theoretically the same preponderance of the evidence will attach to avoid harming the integrity or the process, the owner will typically demand strict proof and scrutinize it thoroughly.

The contractor must also show what the intended bid would have been. This is especially important in sealed bidding when all the bids are publicly known by that point. Caselaw indicates that it is not necessary to prove the intended bid down to a dime, but it must be in a relatively narrow range. The closer the correction brings the bid to the next low bid, the greater the need for clear evidence and the stricter the examination of that evidence.³⁵

Clear and convincing evidence of an intended bid price cannot be ascertained where the work papers of the bidder seeking correction do not adequately account for profit or overhead in the bid, since an unexplained failure to provide such customary items call into question what bid price was actually intended.³⁶

The Comptroller General of the United States has allowed correction when the contractor has been able to prove by clear and convincing evidence that an error occurred, the manner in which the error occurred and the amount of the intended bid price.³⁷ Types of evidence presented are normally affidavits, bid preparation worksheets, even if they have erasures on them, since that goes to the weight to be accorded such documents.³⁸

VI. IFB/RFP Differences

Most of the above rules were designed for sealed bidding (IFBs) but they also apply to Negotiated Contracting. FAR 15.508 dealing with negotiated procurements (Request for Proposals (“RFPs”)) states that “mistakes in a contractor’s proposal that are disclosed after award shall be processed substantially in accordance with the procedure for mistakes in bids at FAR 14.407-4.” FAR 15.306 addresses pre-award mistakes.

FAR 15.306(a)(2) states:

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror’s past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

FAR 15.306(b)(3)(1) adds that in other circumstances such communications may address “Ambiguities in the proposal or other concerns (*e.g.*, perceived deficiencies, weaknesses, errors, omissions, or mistakes (see 14.407))” [emphasis added].

In an RFP a correction of a mistake is appropriate where the existence of the mistake and the proposal actually intended can be clearly and convincingly ascertained from the RFP and the proposal itself.³⁹

Typically, contracting officers resolve mistakes in RFPs during the discussions process. The purpose of the discussions is to allow the contractors to be aware of the owner’s concerns about their proposals, and especially those areas where there are deficiencies or possible mistakes so that the contractors can take those to heart in preparing their final proposal revisions. So it is incumbent upon government negotiators to be as specific as practical considerations will permit in advising offerors of the corrections required in their proposals.”⁴⁰ The agency’s failure to discuss specific deficiencies in the offeror’s proposal may preclude meaningful discussions which is a

requirement.⁴¹ Merely correcting a mistake is not considered to be the entrance into formal discussions under the FAR.⁴² The correction of a mistake, without conducting discussions with all offerors, is appropriate only where the existence of the mistake in the proposal actually intended can be clearly and convincingly established from the RFP and the proposal itself.⁴³

The issue of a unilateral mistake in bid was discussed in *Information International Associates, Inc. (“IIA”) v. The United States*.⁴⁴ The Air Force issued an RFP to obtain “labor and supplies to man and manage libraries located at five (5) Air Force Bases.” In its Final Proposal Revision (“FPR”) IIA submitted a revised price that was a 4.5% overall decrease and a 24.92% decrease at one Air Force Base. More than four (4) years after award of the contract to IIA, the contractor notified the Contracting Officer of a mistake in the bid. IIA had discovered that one labor category at one Air Force base had been deleted from the FPR except for the first two months of the base year. IIA submitted a Request for Equitable Adjustment requesting reformation of the contract to increase the price. The CO denied the request.

The Court cited *McClure Elec. Constructors, Inc. v. Dalton*,⁴⁵ in which the United States Court of Appeals for the Federal Circuit set forth the elements of proof necessary to establish a unilateral mistake in the context of a government contract:

The contractor must show by clear and convincing evidence that:

- (1) a mistake in fact occurred prior to contract award;
- (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error;
- (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification;

- (4) the Government did not request bid verification or its request for bid verification was inadequate; and
- (5) proof of the intended bid is established.⁴⁶

The Court reviewed the facts against the five elements focusing primarily on item (3). The Court stated that the CO should have been alerted to a possible error in [IIA's] Air Force Base pricing as a result of "Abstract of Proposal/Quotations" to compare [the IIA and Awardee's] final monthly and yearly proposed prices for the five Air Force Bases."

The Court further stated that "price disparity alone is not enough to impute the CO with constructive notice of a possible error in [a] bid, if there are other factors that reasonably could explain the difference". The Court went on to state, however, that "the size of the disparity between the IIA's bid and the next lowest bid, as evidenced by the Air Force Base abstract, and the absence of other factors negating an inference of error, should have alerted the CO to the mistake." The Court decided that IIA "had established by clear and convincing evidence that the CO should have known of a possible error" in the IIA final proposal revision. The Court reformed the contract and awarded \$174,882 plus interest for 2 years to IIA.

VII. Options

Typically the contractor must be presented with three options: either taking the bid at the offered price, a correction upward or to withdraw. If a bidder requests permission to correct a mistake and clear and convincing evidence establishes both the existence of the mistake and the bid actually intended, the agency head may make a determination permitting the bidder to correct the mistake; provided, that if this correction would result in displacing one or more lower bids, such a determination shall

not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself.

While FAR 14.407-3 precludes the use of mistake correction techniques to make non-responsive bids responsive, the Comptroller General has sometimes permitted limited correction of a non-responsive bid at the same standards he used to correct bids which displaced low bids are satisfied.⁴⁷

When a bidder requests to correct a mistake in its bid, and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, correction will normally be allowed.⁴⁸ For instance, Section 14.407-3(b) states that: “If—

- (1) A bidder requests permission to withdraw a bid rather than correct it;
- (2) The evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended; and
- (3) The bid, both as uncorrected and as corrected, is the lowest received, the agency head may make a determination to correct the bid and not permit its withdrawal.

If the evidence is clear and convincing as to the existence of a mistake and the bid actually intended and the bid as uncorrected and corrected is the lowest price received, the agency had been determined to allow bid correction but not bid withdrawal. FAR 14.407-3(b). On the other hand, if “(1) the evidence of a mistake is clear and convincing only as to the mistake but not as to the intended bid, or (2) the evidence reasonably supports the existence of a mistake but is not clear and convincing, an official above the contracting officer, unless otherwise provided by agency procedures, may make a determination permitting the bidder to withdraw the bid. “ FAR 14.407-3(c).

Sometimes allowing one offeror to correct its bid can be considered to be improper and unfairly prejudicial to the other proposers because it allows one offeror to change its proposal after the bid date or date for receipt of initial proposal.⁴⁹ In *Roy McGinnis & Company, Inc.*,⁵⁰ the agency was held to have incorrectly allowed a bidder to correct mistake and the protest by a competitor was sustained.

VIII. Remediating the Mistake

Where a contractor seeks rescission, that remedy is typically available only where reformation is not.⁵¹

Reformation is to reflect the true agreement of the parties on which there was a meeting of the minds and typically permissible only with plain mistakes, usually clerical or mathematical.⁵² To establish reformation, the contractor must show by clear and convincing evidence that: a mistake in fact occurred before contract award; the mistake was a clear cut, clerical or mathematical error or misreading of the specifications and not a judgmental error; before the award the government knew or should have known that a mistake had been made and, therefore, should have requested bid verification; the government did not request bid verification or its verification request was inadequate; and proof of the intended bid is established.⁵³

Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless (i) the amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or (ii) there are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide

bidders. Attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

If the bidder refuses to accept the contract at its bid price, the owner may then have recourse to the contractor's bid bond.

IX. Bid Mistakes from the Standpoint of the General Contractor

A. Introduction

“The cautious seldom err.” — Confucius

Construction bidding is often chaotic, full of pressure and drama. Many subcontractor and supplier bids are submitted to the general contractor minutes before the general contractor's bid is due. The general contractor frequently must make quick decisions based on limited facts and under extreme time pressures. Not surprisingly, bid mistakes are often made.

In many cases, the bidder is not “free from blame” and, in fact, may be guilty of an “egregious blunder.”⁵⁴ Nonetheless, the law of bid mistakes provides an equitable remedy to avoid overreaching by the other party, who knows or should know about the costly mistake and accepts the bid anyway.⁵⁵

The general contractor who gets caught in the bid mistake web may have several options to consider -- against the owner to rescind the bid or change (reform) the price; or against the subcontractor who gave him a mistaken bid but then seeks to walk away from it.

B. Remedies Against the Owner

“To err is human, to forgive, divine.” — Alexander Pope

1. Federal Contracts

a. Forum Shopping

The general contractor who discovers a bid mistake after bid opening and before contract award usually will request permission from the Government’s Contracting Officer to correct or withdraw the bid. The procedures are addressed in FAR 14.407. If the Government refuses the request, the contractor has several options. It may pursue a bid protest at the GAO/Comptroller General⁵⁶, or it may file a disappointed bidder action at the Court of Federal Claims.⁵⁷ If the Government insists on making the award anyway, despite the claim of mistake, some contractors have sued for reformation⁵⁸ or rescission⁵⁹; others have filed a claim at a board of contract appeals for equitable adjustment under the Contract Disputes Act.⁶⁰

The strategy of accepting the contract and then pursuing a claim sometimes backfires. In *Wickham Contracting Co. v. United States*⁶¹, the bidder discovered an error in contract drawings and pointed it out to the Government. The Government told the bidder to withdraw its bid or accept the contract as bid. The bidder, thinking the mistake was by the Government, confirmed its price. After award, the contractor made a claim. The court denied the claim. By confirming its bid, the court held, the contractor assumed the risk of the error.

A bidder may not, however, protest award to a competitor by claiming the competitor’s price was so low it surely must have made a mistake. The disappointed bidder has no standing to claim an error in the bid of another.⁶² The one exception is

where the bid of the disappointed bidder is rejected for mistake but another bid containing a substantially similar mistake is accepted.⁶³

Reformation in price, even where otherwise available as a remedy, may yield only half-a-loaf. Cases have held that the recovery, or price adjustment, may not exceed the difference between the low bid and the second low bid. One case suggests that the difference in prices is the ceiling on the damages⁶⁴ while another refers to it as the measure of them.

b. Contractor Confirmation

In a number of cases, the Government asks for verification of the bid and the general contractor confirms its price, only to discover later, to its chagrin, that it did in fact make a bid mistake. Does the earlier confirmation kill the contractor's chances of obtaining relief? The answer, generally, is "no."⁶⁵ The cases, however, are very fact specific, and the overall test is one of "reasonableness."⁶⁶ The key is whether the Government has made an adequate effort of verification, based on the facts available to it at the time. Nonetheless, the courts tend to be ambivalent about how far the Government's hunt for the mistake should go.

In *Ruggiero*, for example, the bidder's pre-bid telephone call to an unidentified Government representative was held to be sufficient to put the Government on notice of the bid mistake. The court noted that the telephone was a channel of communication permitted by the IFB, so "we do not think the [contracting] officer can wrap himself in a cloak of ignorance . . .". The court also held:

If persons seeking to do business with the Government are decently treated by it, there will be more of them and they will offer more favorable terms, while experiences such as the [Plaintiffs] have undergone, will, if common, cause many to take their business elsewhere.⁶⁷

Contrast *Ruggiero* with *Dakota Tribal Industries v. Untied States*.⁶⁸ In the latter case, the bidder – a small business contractor in the SBA’s Section 8(a) program – relied on a supplier’s quote for a material that did not meet the specifications. The court faulted the bidder for not verifying the supplier’s price, which was half that of the next-lowest price. The bidder countered that the price was a problem also apparent to the Government, which had received a breakdown of cost elements. Overall, however, the bid was 8% to 13% higher than previous bids on a similar contract.

Accordingly, the court ruled that Government had no reason to believe the bid contained a mistake. The court held the bidder was liable for the mistakes of its suppliers.⁶⁹ In conclusion, the court rebuked the bidder as follows: “[t]he contracting officer must seek to ensure that the bid is fair, but it is not required to act as ‘nursemaid’ for bidders.”⁷⁰

In addition, the courts have repeatedly held that “mere price disparity” is insufficient to put the Government on notice of a bid mistake.⁷¹ This rule, it seems, can be taken too far, for it is the rare situation that the Government at first knows more than that the prices seem out of line with each other. At the very least, the price disparity should start the verification process and the Government should share what it knows. If the bidders’ confirmation reveals no further issue, the verification duty is satisfied.⁷²

2. State Contracts

The rules for bid mistakes are generally the same in the state contract arena.⁷³ The Model Procurement Code permits both correction or withdrawal of bids, before or after contract award, under certain conditions.⁷⁴ Some states, however, permit only rescission of the contract and not reformation of the price, either by the equitable doctrine of “mistake” or by regulation.⁷⁵ In these states, the courts reason that the remedy of

reformation is not available because the mistake was not mutual and a price revision impairs the integrity of the bidding process. Further, the courts cannot re-write the contract for the parties.⁷⁶

In some states, however, no remedy at all is available to the bidder who makes a bid mistake. In these states, the public bidding statute requires the bidder to keep its bid open pending contract award and to forfeit its bid bond if it refuses to execute the contract. These statutory requirements, the courts have held, give no leeway in affording relief to the bidder,⁷⁷ even when the mistakes are obvious to the public owner. For example, in *Clark Construction*,⁷⁸ the bidder wrote in the figure for one bid item as \$368,000 but wrote out the words “three hundred and sixty-eight dollars.” The overall bid of \$1,119,609 was based on the \$368,000 sum. The bid instructions stated that written words controlled over figures. Applying this instruction, the public owner accepted a bid of \$816,977. The bidder refused to perform and sued for relief. Because of the statute, the court held it had no option but to forfeit the bid bond. In *J.D. Graham*,⁷⁹ the bidder proved a bid mistake of \$100,000 and notified the public owner within hours of bid opening, but was denied any relief.

3. Private Contracts

When bids are conducted between private parties, the common law rules of “mistake” provide the framework for analysis.⁸⁰ There can be no meeting of the minds where the offeree knew or should have known of the bid mistake. The offeree is not permitted “to snap up an offer that is too good to be true; no contract based on such an offer can then be enforced by the acceptor.”⁸¹ In fact, under such circumstances, the offeree is not hurt when the bidder rescinds its bid. “To be denied the privilege of taking advantage of another’s mistake is not to suffer damage.”⁸²

As in the world of public contracts, a general request for verification may not be enough. Where the other party suspects a particular error, non-specific inquiry -- such as, whether the bidder is “satisfied” with its bid -- is not enough to eliminate the suspicion; a perfunctory verification of this sort is simply doomed to fail.⁸³

C. Remedies Against the Subcontractor

“More people would learn from their mistakes if they weren’t so busy denying them.” — Harold J. Smith

General contractors almost always must rely on subcontractor quotes when assembling the general bid. On top of that, the general contractor’s bid usually must remain firm for a period of time and the promise to keep the bid open is secured by a bid bond; by contrast, the subcontractor seldom provides a bid bond, unless required by statute.⁸⁴ If the general contractor is awarded the project, and the subcontractor refuses to perform, the general contractor then must re-procure the work at a price inevitably higher than the original bid. As a result, the general contractor is saddled with the increased subcontracting cost before it even breaks ground.

Two legal theories have been advanced against subcontractors in these situations: breach of contract and promissory estoppel (also called detrimental reliance).

The general contractor frequently claims that the subcontractor is not free to withdraw because the parties have reached a binding contract. As discussed below, general contractors quickly learn, to their dismay, that traditional rules of contract law often fail to provide a remedy.

X. Bid Mistakes from the Standpoint of the Subcontractor

“If we practice an eye for an eye and a tooth for a tooth, soon the whole world will be blind and toothless.”—Gandhi

A. Breach of Contract

Merely receiving a subcontractor’s bid and relying on it does not, by itself, create a contract.⁸⁵ A subcontractor’s bid is an offer which the general contractor must accept to create a contract.⁸⁶ By informing the subcontractor that its bid was “low,” the general contractor does not accept the bid and create a binding contract.⁸⁷ Also, listing the subcontractor in the general bid does not create a contract or commitment between the general contractor and the subcontractor.⁸⁸ Finally, in the construction world, the “mirror image” rule requires that the acceptance be an exact mirror image of the offer. In many cases, the general contractor fails to accept the offer without modifying it in some way.⁸⁹

For example, in *Neshaminy Constructors, Inc. v. Concrete Building Systems, Inc.*,⁹⁰ the general contractor called the subcontractor after the bid opening to request that it break out a price for shop drawings and start that work before the owner made the prime contract award. Later, it sent a letter of intent that contained terms different or additional to the subcontractor’s proposal. The court held that the general contractor made a counteroffer, which acted as a rejection, terminating the original offer of the subcontractor. The subcontractor, therefore, was free to withdraw.

When there is a “battle of the forms” in a construction transaction, that is, when the general contractor and subcontractor exchange dueling form subcontracts, the most likely result is that no contract is formed.⁹¹

B. Promissory Estoppel/Detrimental Reliance

Because traditional principles of contract law often fall short in providing a remedy to general contractors, courts developed the doctrine of promissory estoppel.⁹²

Section 90 of the *Restatement (Second) of Contracts* provides as follows:

A promise which the promisor would reasonably expect to induce action or forbearance on the part of the promisee or 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.

In the construction bidding context, the general contractor's reasonable reliance on the bid of a subcontractor holds the subcontractor to its bid for a reasonable period of time. If the subcontractor refuses to perform, the general contractor may obtain damages equal to the difference between the subcontractor's bid and the amount paid to the replacement subcontractor. As a whole, the doctrine has the "practical effect of encouraging subcontractors to be cautious when formulating their bids . . . and satisfies the needs of the modern construction industry."⁹³

There are four elements to be provided for recovery:

- (1) a clear and definite offer;
- (2) a reasonable expectation that the offer will induce reliance in the other party;
- (3) actual and reasonable reliance by the offeree; and
- (4) a detriment, which can only be avoided by enforcement to the offer.⁹⁴

Each element is discussed below.

1. Clear and Definite Offer

First, the subcontractor's bid must be to perform a defined scope of work for a fixed price.⁹⁵ It must not be a mere estimate or an invitation to make an offer. A bid

which says it is informational only and that there is no obligation until a contract is executed does not qualify as a “firm offer”; it is not one that may be relied upon.⁹⁶ In addition, a subcontractor’s bid that is ambiguous as to the scope of work covered also does not qualify.⁹⁷

2. Reasonable Expectation of Reliance

Next, the general contractor must prove the subcontractor submitted its bid with the expectation that the contractor would rely on it. Today, it is generally understood that the subcontractor’s bid is submitted to induce a contract award.⁹⁸ In *Citiroof Corp. v. Tech Contracting Co., Inc.*,⁹⁹ the court noted that expectation that the general contractor will rely on the sub-bid may dissipate through time. In other words, the longer the general contractor waits to inform the subcontractor that it has relied on the bid, the less the subcontractor anticipates that its bid is likely to be accepted.

3. Actual, Reasonable Reliance

The general contractor’s reliance must be both actual and reasonable.¹⁰⁰ This is where the battle lines are most frequently drawn. It seems common sense that the general contractor must actually use the subcontractor’s bid price in preparing its bid to the owner.¹⁰¹ Some contractors, however, persist in pursuing claims even when another subcontractor’s price was used. These claims inevitably fail.¹⁰²

What happens if the general contractor “uses” the subcontractor’s bid but adjusts it in some way? In *Neshaminy Constructors*, the general contractor disagreed with the subcontractor over the costs of using a particular crane. The subcontractor valued the item at \$200,000. The general contractor thought no additional costs would be required. In its work papers, the general contractor “split the difference,” adding \$100,000. It thought the issue would be worked out later. The court noted that the general contractor

was not free to ignore the terms of the subcontractor's bid.¹⁰³ In *Alaska Bussell Electric Co.*, by contrast, the court upheld a jury verdict in favor of the general contractor where the electrical subcontractor bid \$477,498 but the general contractor used \$488,606 in its bid to the Government. The jury reduced the damages by the difference, or \$11,108.¹⁰⁴

The reasonableness of the reliance depends on several factors. The passage of time between the bid day and communication with the subcontractor may make reliance unreasonable.¹⁰⁵ In addition, as discussed below, the reasonableness of the general contractor's reliance is frequently evaluated in reference to the general contractor's bad behavior. Pre-bid, the bad behavior may involve "snapping up" a bid too good to be true—*i.e.*, a bid infected with a mistake. Post-bid, the bad behavior includes bid shopping and bid chopping.¹⁰⁶

C. Defenses of the Subcontractor

1. Snapping Up an Unreasonably Low Bid

Just as the general contractor may employ the equitable doctrine of mistake in dealing with the owner, so too the subcontractor may advance similar reasons why it is not reasonable to rely on its bid. A bid mistake is perhaps the most common scenario that leads to a promissory estoppel claim. The doctrine of promissory estoppel does not extend, however, to a subcontractor bid that the general contractor knew or should have known was materially erroneous.¹⁰⁷ As stated in *Drennan Paving v. Star*, "[a]s 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."¹⁰⁸

The bid verification duties of the general contractor depend upon the circumstances. In their treatise, Bruner & O'Connor suggest that, as a rule of thumb, a disparity of ten per cent or more in bid prices triggers the duty to verify.¹⁰⁹ A number of

cases, however, have permitted much larger differences to slide through, provided the overall circumstances do not raise a red flag.

In *Architectural Metal Supplies, Inc. v. Consolidated Systems, Inc.*, for example, the discrepancy of 56% between two bids to supply metal decking was not, by itself, sufficient to put the contractor on notice of a bid mistake.¹¹⁰ And in *Powers Const. Co., Inc. v. Salem Carpets, Inc.*,¹¹¹ the difference between the first two bids was more than double; the difference between the first and third bids was two and one half times. Testimony was adduced, however, from the general contractor that it is “not uncommon” to have differences between high and low bids of subcontractors that are “more than double.” A jury verdict in favor of the general contractor was affirmed on appeal. Likewise, in *Riley Bros. Constr., Inc. v. Shuck*,¹¹² the general contractor did not believe that a masonry subcontractor’s bid was too low, even though it was 24% lower than the second bid. The president testified that bids for such work may vary by 25% to 40%, due to a bidder’s schedule, supervision and crew skills. The court upheld judgment in favor of the general contractor.

2. You Call That Verification?

When the general contractor seeks verification, the verification must be adequate under the circumstances. A non-specific request to confirm a paving subcontractor’s bid that was 290% lower than the second bid and 350% lower than the third bid did not excuse the general contractor. Eight witnesses testified that they had never seen a disparity in paving bids that large.¹¹³ In another case, by contrast, the general contractor asked the roofing subcontractor to confirm its bid, after seeing a disparity of 50%. The subcontractor discovered one of two bid mistakes and raised its price slightly, leaving a disparity still of 40%. The court found that the general contractor’s reliance on the bid

was reasonable, because “it is not the responsibility of the general contractor to guarantee the accuracy of the subcontractor’s bid.”¹¹⁴

D. Injustice; Bad Contractor Behavior Post Bidding

Because promissory estoppel is an equitable doctrine, recovery to the general contractor may be denied, even if the other elements are proved, unless the general contractor shows that “injustice can only be avoided through enforcement of the promise.”¹¹⁵ “Injustice” is a relatively undefined element, which gives the courts broad discretion.¹¹⁶ Generally, unless the general contractor has “clean hands,” the doctrine of promissory estoppel is not available.

Courts, however, consistently reject claims where there is evidence that the general contractor engaged in bid shopping or bid chopping.¹¹⁷ Bid shopping is the practice in which the general contractor uses the lowest bid it receives to persuade other subcontractors to lower their bids or submit a bid lower than the “shopped bid.”¹¹⁸ Bid chopping (a.k.a., bid chiseling) occurs when the general contractor, post-bid, asks the subcontractor to lower its bid without reducing the scope of work.¹¹⁹ In both cases, although subcontractors regard them as unethical, the practices are fairly widespread. General contractors may not realize, however, that bid shopping or bid chopping will cause the court to reject a later claim of promissory estoppel, either on the ground that the contractor failed to rely on the bid or that the activity resulted in a counteroffer. Simply put, general contractors who expect to hold subcontractors to their bids, must likewise resist the temptation to chop or shop that bid.

ENDNOTES

¹ For detailed information, see Gammon & Allen, *Post Award Relief for Mistakes in Bids*, Briefing Papers No. 88-11 (October 1988). 8 Briefing Papers Collection 213; Feldman, *Government Contract Awards: Negotiation and Sealed Bidding*, Clark Bossian Callahan (1994); Bastianelli, et al., Editors, *Federal Government Construction Contracting*, ABA, 2003, Chapter 3, *Sealed Bidding*, by James F. Nagle and J. Todd Henry; and Tom Petouska, *Mistakes In Bid, Unilateral Mistakes*, Contracts Unlimited Inc., 2004-2007.

² The Federal Acquisition Regulation (FAR) and Federal case law provides the most detailed guidance on the procedures to be employed when dealing with mistakes in bids. Since these rules apply nationwide and because the rules of many states are patterned after the federal rules, we shall focus on this body of law.

³ See *Wender Presses, Inc. v. United States*, 343 F.2d 961 (Ct. Cl. 1972) (No enforceable contract can exist where the bidder seeking avoidance advises the Contracting Officer of a mistake before award, even after the bid opening.)

⁴ See *Black Diamond Energies, Inc.*, B-241370, 91-1 CPD ¶ 119.

⁵ See *Drataros Construction, Inc.*, Comp. Gen. B-254600, 94-1 CPD ¶ 1.

⁶ E.g., *Paragon Energy Corp. v. United States*, 645 F.2d 966 (Ct. Cl. 1981) *recons. denied*, 230 Ct. Cl. 884 (1982).

⁷ *R.T. Richards Construction Company*, Comp. Gen. B-258923, 95-1 CPD 103.

⁸ *Ralph Korte Construction Company, Inc.*, B-225734, 87-1 CPD ¶ 603.

⁹ *Government Micro Resources, Inc. v. Department of Treasury*, GSBCA 12364-TD, 94-2 BCA ¶ 26680.

¹⁰ 426 F.2d 314 (Ct. Cl. 1970)

¹¹ 426 F.2d at 317, paraphrasing *G.L. Christian & Assoc. v. U.S.*, 312 F.2d 418, 160 Ct. Cl. 1, *rehearing denied*, 320 F.2d 345, 160 Ct. Cl. 58, *cert. denied*, 375 U.S. 954, 84 S.Ct. 444 (1963)

¹² *Id.* at 318

¹³ (*Innovative Refrigeration Concepts*, B-242515, 91-1 CPD ¶ 332); *Zeta Construction Company, Inc.*, B-244672, 91-2 CPD ¶ 428.

¹⁴ *Government Micro-Resources, Inc. v. Department of the Treasury*, GSBCA 12364-TD, 94-2 BCA ¶ 26680.

¹⁵ *Rockwell International Corp.*, ASBCA 41095, 95-1 BCA ¶ 27459.

¹⁶ 420 F.2d 709 (Ct. Cl. 1970) at 335.

¹⁷ *Liebherr Crane Corp. v. United States*, 810 F.2d 1153 (Fed. Cir. 1987).

¹⁸ 232 F.3d 864 (Fed. Cir. 2000).

19 Id at 872, citing *Liebherr Crane Corp. v. United States*, 810 F.2d 1153, 1157 (Fed. Cir.
1987).

20 See *McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709, 710 (Fed. Cir. 1997).

21 ASBCA 41006, 91-3 BCA ¶ 24218 at 121, 125.

22 See *Northern NEF, Inc.*, ASBCA No. 44996, 94-3 BCA ¶ 27094.

23 *Jim Sena Construction Company*, IBCA 3761, *et al.*, 98-2 BCA ¶ 29891. But see *Foley
Company v. United States*, 36 Fed. Cir. 788 (1996).

24 *Triax Pacific, Inc.*, ASBCA No. 41891, 94-1 BCA ¶ 26380.

25 *Packard Const. Corp.*, ASBCA No. 45996, 94-1 BCA 26512.

26 381 F.3d 1369 (Fed. Cir., 2002)

27 381 F.3d at 1376 (emphasis in original)

28 See *CTA, Inc. v. U.S.*, 44 Fed. Cl. 684 (1999)

29 1 Cl. Ct. 231 (1982)

30 *Id.* at 231-32, citing ASPR 2-406.1

31 See *Government Micro-Resources, Inc. v. Department of Treasury*, GSBCA 12364-TD,
94-2 BCA ¶ 26680 (Bidder's price was 62 percent less than the government's lowest estimate, 31 percent
less than the supplier's schedule price, and 33 percent less than the other vendor's comparison quote.)

32 See *R.J. Sanders, Inc. v. United States*, 24 Cl. Ct. 288 (1991).

33 *Troise v. U.S.*, 21 Cl. Ct. 48, 63 (1990), citing *BCM v. U.S.*, 2 Cl. Ct. 602 (1983)

34 See *Walter Straga*, ASBCA 26134, 83-2 BCA ¶ 16611.

35 *Vrooman Constructors, Inc.*, Comp. Gen. B-226965.2, 87-1 CPD 606.

36 *R.J.S. Constructors, Inc.*, B-257457, 94-2 CPD ¶ 130.

37 53 Comp. Gen. 232 (B-179084) 1973.

38 See *H.A. Sack Company*, B-278359, 98-1 CPD 27.

39 *Contrak International Corp.*, B-237122.2, 90-1 CPD ¶ 481.

40 52 Comp. Gen. (B-177008) (1973).

41 *Cotton & Company, LLP*, Comp. Gen. B-282808, 99-2 CPD 48.

42 *R&B Rubber and Engineering, Inc.*, B-214299, 84-1 CPD ¶ 595.

43 *PHP Healthcare Corp.*, B-251799, 93-1 CPD ¶ 366.

⁴⁴ 74 Fed. Cl. 192 (2006).

⁴⁵ 132 F.3d 709 (Fed. Cir. 1997).

⁴⁶ *Id.* at 711.

⁴⁷ *United Food Services*, 65 Comp. Gen. 167 (B-218228.3), 85-2 CPD ¶ 727.

⁴⁸ See *Connecticut Laminating Company*, Comp. Gen. B-274949.2, 99-CBD 108.

⁴⁹ See *Contack International Corp.*, B-237122.2, 90-1 CPD ¶ 481.

⁵⁰ B-239710, 90-1 CPD ¶ 251.

⁵¹ *McDonald Welding and Machine Company, Inc.*, ASBCA No. 36284, 94-3 BCA 27181.

⁵² *American President Lines, LTD v. United States*, 821 F.2d 1571 (Fed. Cir. 1987).

⁵³ *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26901.

⁵⁴ *Ruggiero v. United States*, 190 Ct. Cl. 327, 420 F.2d 709, 713 (Ct. Cl. 1970).

⁵⁵ *Id.*

⁵⁶ *H.A. Sack Co., Inc.*, B-278359, 98-1 CPD ¶ 27 (1998).

⁵⁷ *Griffy's Landscape Maint., LLC v. United States*, 46 Fed. Cl. 257 (2000).

⁵⁸ E.g., *Information Int'l Assocs., Inc. v. United States*, 74 Fed. Cl. 192 (2006).

⁵⁹ *Ruggiero*, 420 F.2d 709.

⁶⁰ *Wickham Contracting Co., Inc. v. United States*, 212 Ct. Cl. 312, 546 F.2d 395 (1976).

⁶¹ *Id.*

⁶² *PHT Supply Corp. v. United States*, 71 Fed. Cl. 1, 21 (2006), citing *W.M. Schlosser Co., Inc.*, Comp Gen. Dec. B-254968, 93-2 CPD ¶ 201, 1993 WL 409530 (1993).

⁶³ *Aquila Water Fitness Cons. Sys., Ltd.*, B-286,488, 2001 CPD ¶ 4.

⁶⁴ *Shepard v. United States*, 95 Ct. Cl. 407 (1942); *Chernick v. United States*, 178 Ct. Cl. 498, 372 F.2d 492, 497 (1967).

⁶⁵ *H.A. Sack Co., Inc.*, B-278359, 96-1 CPD ¶ 43, 1998 WL 20,722.

⁶⁶ *Chernick v. United States*, 178 Ct. Cl. 498, 372 F.2d 492, 496 (1967).

⁶⁷ 420 F.2d at 716.

⁶⁸ 34 Fed. Cl. 593 (1995).

⁶⁹ *Id.* at 596, citing *Hankins Constr. v. United States*, 838 F.2d 1194 (Fed. Cir. 1988).

⁷⁰ *Id.* at 597, citing *Aydin Corp. v. United States*, 229 Ct. Cl. 309, 317, 669 F.2d 681, 687 (1982).

⁷¹ *Wender Presses Inc. v. United States*, 343 F.2d 961, 963 (Ct. Cl. 1965); *Connor Bros. Constr. Co. v. United States*, 65 Fed. Cl. 657, 691 (2005).

⁷² *E.g., McClure Elec. Constructors, Inc. v. Dalton*, 132 F.3d 709 (Fed. Cir. 1997).

⁷³ Bruner & O'Connor on Construction Law § 2:117 (2002).

⁷⁴ ABA Model Procurement Code § 3-202(6) (2000).

⁷⁵ *City of Baltimore v. DeLuca-Davis Const. Co.*, 210 Md. 518, 124 A.2d 557 (1956) (common law); *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. App. 44, 492 A.2d 281 (1985) (by regulation); *Dept. of Transp. v. Ronlee, Inc.*, 518 So. 2d 1326 (Fl. Dist. Ct. App. 1987).

⁷⁶ *DeLuca-Davis Const. Co.*, 124 A.2d at 560.

⁷⁷ *Clark Constr. Co., Inc. v. State Highway Dept.*, 451 So. 2d 298 (Ala. Civ. App. 1984); *J.D. Graham Const. Inc. v. Pryor Pub. Schools*, 854 P.2d 917 (Okla. Civ. App. 1993).

⁷⁸ 451 So. 2d 298.

⁷⁹ 854 P.2d 917.

⁸⁰ Restatement (Second) of Contracts §§ 151 to 158; Bruner & O'Connor on Construction Law § 2:117.

⁸¹ *Rushlight Auto. Sprinkler Co. v. Portland*, 189 Or. 194, 219 P.2d 732 (1950).

⁸² *Id.*

⁸³ *Ace Electric Co. v. Portland General Elect. Co.*, 55 Or. App. 382, 637 P.2d 1366 (1981).

⁸⁴ See Massachusetts General Laws, Chapter 199, Section 44B(2).

⁸⁵ *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 593 S.E.2d 170, 173 (S. C. Ct. App. 2004); *AROK Constr. Co. v. Indian Constr. Services*, 848 P.2d 870, 873 (Ariz. Ct. App. 1993); see generally, Kovars & Schollaert, "Truth & Consequences: Withdrawn Bids and Legal Remedies," 25 *Construction Lawyer* 5 (Summer 2006) ("Kovars & Schollaert Article").

⁸⁶ *Fletcher-Harlee Corp. v. Pote Concr. Contractors, Inc.*, 482 F.3d 247, 250 (3d Cir. 2007).

⁸⁷ *Leskie v. Haseltine*, 155 Pa. 98, 25 A. 886, 886-87 (Pa. 1893) (no contract created where general told sub it was the "lucky man" or low bidder); *Electro-Lab of Aiken Inc., supra*.

⁸⁸ *Neshaminy Constructors, Inc. v. Concrete Building Systems, Inc.*, E.D. Pa. 2007, 2007 WL 2728870.

⁸⁹ Under the Uniform Commercial Code § 2-207, by contrast, the "mirror image" rule has been abrogated. The parties may exchange forms containing different terms and still reach a contract agreement.

90 *Neshaminy Constructors, Inc. v. Concrete Building Systems, Inc., supra.*

91 *E.g., Victoria Air Conditioning, Inc. v. Lecco Constructions, Inc., 752 S.W.2d 625 (Tex. App. 1988).*

92 Some jurisdictions apply the same doctrine but call it “detrimental reliance.” See *Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc., 342 Md. 143, 674 A.2d 521 (1996).*

93 *Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co., 688 P.2d 576, 580 (Alaska 1984).*

94 Restatement (Second) of Contracts § 90; Kovars & Schollaert Article, note 85, *supra.*

95 *Pavel Enterprises*, note 48, *supra*, 674 A.2d at 533.

96 *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.* note 86, *supra.*

97 *Camosy, Inc. v. River Steel, Inc., 253 Ill. App. 570, 624 N.E.2d 894 (1993).*

98 *Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958).*

99 159 Md. App. 578, 860 A.2d 425, 432 (2004).

100 *Hankins Constr. Co. v. Reiman Corp., 511 N.W.2d 113, 117 (1994).*

101 *Pavel Enterprises, supra.*

102 *E.g., Lahr Constr. Corp. v. J. Kozel & Sons, Inc., 640 N.S.Y.2d 957, 960 (N.Y. Sup. Ct. 1996).*

103 *Neshaminy Constructors, Inc. v. Concrete Building Systems, Inc., supra.* See generally, Bruner & O’Connor on Construction Law § 2:109.

104 *Alaska Bussell Electric Co. v. Vern Hickel Constr. Co., supra.*

105 *Pavel Enterprises, Inc. v. A.S. Johnson Co., supra.*

106 Kovars & Schollaert Article, *supra.*

107 Kovars & Schollaert Article, *supra*, fn.56.

108 *Drennan v. Star Paving, supra.*

109 Bruner & O’Connor on Construction Law § 2:129.

110 58 F.3d 1227 (7th Cir. 1995).

111 283 S.C. 302, 322 S.E.2d 30 (S.C. App. 1984).

112 704 N.W.2d 197 (Minn. App. 2005).

113 *Tolboe Constr. Co. v. Staker Paving & Constr. Co., 682 P.2d 843 (Utah 1984).*

114 *Citiroof Corp. v. Tech Contracting Co., Inc., 159 Md. App. 578, 860 A.2d 425 (2004).*

¹¹⁵ *Preload Tech, Inc. v. A. B. & J. Const. Co., Inc.*, 696 F.2d 1080 (5th Cir. 1983);
Restatement (Second) Contracts § 90.

¹¹⁶ See Kovars & Schollaert Article, *supra*.

¹¹⁷ *E.g., Drennan v. Star Paving, supra; Pavel Enterprises v. A. S. Johnson Co., Inc., supra.*

¹¹⁸ Kovars & Schollaert Article, *supra*.

¹¹⁹ *Id.*