1964

Once around the Flag Pole: Construction Bidding and Contracts at Formation

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Recommended Citation
New York University Law Review, Vol. 39, Issue 5 (November 1964), pp. 816-838

NOTES

ONCE AROUND THE FLAG POLE: CONSTRUCTION BIDDING AND CONTRACTS AT FORMATION

I

INTRODUCTION

The number of cases involving construction bidding has increased significantly in the last two years.[1] The cases reveal a factual similarity. A general contractor, competing for a construction contract, solicits bids from subcontractors to compute a total bid. After selecting the lowest subcontractor bid, he submits that bid as part of his total bid for the main construction contract. The general contractor is awarded the main contract, but before he can formally accept, the subcontractor withdraws his bid. The reason usually given for this withdrawal is that the subcontractor has made an error in his estimate, bidding too low. The general contractor, bound on the main contract by his total bid, is forced to contract with a higher bidding subcontractor. He sues the subcontractor for this additional cost. Courts generally find the mistake insubstantial and reason that the general contractor cannot be charged with knowledge that the bid was erroneous. Having overcome this obstacle, his success in the suit will depend upon whether the subcontractor was bound to perform at the submitted bid price.

The common law rule is that an offer can always be withdrawn before it is accepted.[2] On the given facts, therefore, some courts find no contract.[3] Recently, cases have held that if the general contractor justifiably relied to his detriment on the subcontract bid, the subcontractor's offer becomes firm.[4]

These decisions have invariably been reached without judicial reference to the commercial background, including the practices of the construction industry and the expectations of the parties in terms of the customs of the trade. Courts adhere to the view that business custom, usage, or course of dealing will not form a contract.[5] Factual inquiry is limited to determining whether the subcontractor-offeror received the consideration contemplated by his offer. The general contractor will claim he furnished sufficient consideration by using the subcontract bid. Uniformly, the courts reject this argument. Yet a

1. Six construction bidding cases have been found which reached the appellate level in the past two years, as compared to only twelve cases for the thirty years prior to 1952. See Shultz, The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry, 19 U. Chi. L. Rev. 237, 240 n.6 (1952) [hereinafter cited as Shultz].

2. Restatement, Contracts § 35 (1932).

3. E.g., James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933).

4. E.g., Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958).

5. Restatement, Contracts § 249, illustration 2 (1932), Robert Gordon, Inc., v. Ingersoll Rand Co., 117 F.2d 654 (7th Cir. 1941) (applied to construction bidding).

survey of construction-industry practice indicates that after the general contractor informs the subcontractor that he has used his bid, both parties consider themselves bound,[6] although formal acceptance, which comes only after award of the main contract, has not been made. Courts as well as commentators have been unable to find a common law contract theory sufficient to bind both parties.[7]

The nature of the law of consideration is thought to be the reason for the courts' refusal to find a contract.[8] The inflexibility of consideration is expressed by the rule of construction that an offer envisages only one mode of acceptance—either a return promise, or an act bargained for and given in exchange for the offeror's promise.[9] This rule is a formulation of the common law dichotomy between unilateral and bilateral contracts, acknowledged by the Restatement of Contracts as inherent in the nature of contracts.[10] The results of this dichotomy are illustrated in law school classrooms by a number of examples. In a common illustration, the offeror says: Climb the flagpole and I will give you X dollars. The offeree begins to climb, but, when he is halfway up, the offeror revokes his offer. Since the offer was for a unilateral contract, no contract was formed until the act was completed. Until that time the offeror retained his right of revocation. Faced with the inequities of this situation, the Restatement employs an estoppel principle to create a firm offer so that the offeror cannot revoke. But the firm offer binds only the offeror. The offeree, halfway up the flagpole, is free to seek a better offer.

This problem plagues the construction industry.[11] If the subcontractor is free to revoke his offer, the general contractor is likely to be hurt when he is, figuratively, halfway up the flagpole. Even if the subcontractor's offer is made firm by use of an estoppel principle, the general contractor, with his stronger bargaining power, is still free to look for a better offer. Thus, under either theory one of the parties is left without complete protection.

To handle the problem of the withdrawn bid, one writer has suggested the revitalization of the common law seal.[12] Legislative methods

6. Shultz at 261, 267. The survey was directed to general contractors and subcontractors in Indiana. 65 of the 80 general contractors canvassed felt bound to give the job to the subcontractor whose bid they had used. 75 of the 93 subcontractors canvassed felt bound to perform the contract when notified that the bid had been used, even if there were an unexpected rise in the price of materials.

7. See, e.g., Williams v. Favret, 161 F.2d 822 (5th Cir. 1947); 1 Corbin, Contracts § 24 n.11 (rev. ed. 1963).

8. Drennan v. Star Paving Co., 51 Cal. 2d 409, 414, 333 P.2d 757, 760 (1958); Ashley, Offers Calling for a Consideration Other Than a Counter Promise, 23 Harv. L. Rev. 159 (1910).

9. Restatement, Contracts § 52 (1932).

10. "(1) Consideration for a promise is (a) an act other than a promise, or . . . (d) a return promise, bargained for and given in exchange for the promise." Restatement, Contracts § 75 (1932).

11. Shultz at 239. See generally Schueller, Bid Depositories, 58 Mich. L. Rev. 497 (1960).

12. Keyes, Consideration Reconsidered—The Problem of the Withdrawn Bid, 10 Stan. L. Rev. 441, 470 (1958).

for making bids firm offers have been enacted.[13] But either solution has the same effect as the firm offer created by detrimental reliance on the withdrawn bid: each would protect the general contractor's expectations, but would fail to protect those of the subcontractor. From his study of the construction industry, Professor Shultz concluded that if both parties are not bound, neither should be bound.[14] But this suggestion, too, is unsatisfactory. The more trouble the general contractor and subcontractor have in binding each other, the more the awarding authority—the third party with an interest in the bidding—may be hurt, either by having to pay a higher price or by not getting the best product for his money.

Thus the construction industry, whose business practices are dependent upon the law of contracts, has been adversely affected by the operation of contract theory. The theoretical difficulties have created numerous practical problems. Recent events indicate that one result of not binding both parties is that members of the construction industry have been forced to circumvent the law and the ethical standards of their trade associations.[15] In addition, obligations created by justifiable detrimental reliance are difficult to determine in advance of litigation, thereby creating uncertainty which threatens the security of bidding transactions. Contract draftsmen, intending to effect a different result, are faced with almost insurmountable difficulties. Finally, the construction bidding cases have affected the interests—largely ignored by the courts—of the party inviting the general contractor's bid. This Note attempts to present a basis for resolving the problems manifested by the construction bidding cases, which is consistent with accepted contract theory.

II

Baird AND *Drennan:* PEAS OF A POD

The two leading cases involving the facts generic to construction bidding cases are *James Baird Co. v. Gimbel Bros.*[16] and *Drennan v. Star Paving Co.*,[17] the former decided by Judge Learned Hand, the latter by Chief Justice (then Justice) Roger Traynor. The two cases reach different results and are often viewed as thesis and antithesis.[18] The impact of *Baird* and *Drennan* is such that courts rarely decide construction bidding cases without considering them.

A. James Baird Co. v. Gimbel Bros.

Gimbel Brothers, bidding for a linoleum subcontract, had an employee compute the amount of linoleum required for the job. The

13. Uniform Commercial Code § 2-205.

14. Shultz at 282-85.

15. Compare H.R. 7168, 85th Cong., 1st Sess. § 1(b) (1957), with Suggestions on Bidding Ethics, Mechanical Contractor, Dec. 1963, p. 24.

16. 64 F.2d 344 (2d Cir. 1933).

17. 51 Cal. 2d 409, 333 P.2d 757 (1958).

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

employee underestimated the total yardage by about one-half the amount, but his mistake was not discovered until after Gimbels had sent its bid to twenty or thirty general contractors likely to bid for the main contract. Baird, a general contractor, received the bid on December twenty-eighth. On that day Gimbels discovered its mistake and telegraphed all the general contractors that it withdrew the bid and would substitute a new one at double the price. The withdrawal reached Baird on the twenty-eighth, subsequent to Baird's submission of a lump-sum bid based upon Gimbels' original offer. Baird's bid was accepted by the awarding authority on the thirtieth, one day before Baird received confirmation of Gimbels' withdrawal. Baird formally accepted Gimbels' offer on the second of January. Gimbels refused to perform, and Baird brought suit for damages. Baird contended that a contract was formed when it submitted the subcontractor's bid to the awarding authority, since this act was done before notice of revocation. The question thus presented was whether use of the subcontract bid prior to revocation constituted an acceptance.

Judge Hand acknowledged it was possible for the parties to make a contract where use of the subcontract bid would constitute an acceptance. "[T]he question is merely as to what was meant; that is, what is to be imputed to the words they used."[19] To determine this, the court looked specifically at the language of the offer: " 'If successful in being awarded this contract, it will be absolutely guaranteed, . . . and . . . we are offering these prices for reasonable' (sic) 'prompt acceptance after the general contract is awarded.' "[20] The offer was interpreted in two steps. The court first considered the meaning intended by the parties, as determined by judicial notice, and then applied the rule of construction that an offer contemplates a single mode of acceptance.[21]

Judge Hand said the offer contemplated communication of an acceptance after the contract award. He found that the parties did not bargain for the use of the bid. In fact, he asserted, use of the bid was a matter of complete indifference to Gimbels, and to consider its use an acceptance would distort the offer's language.[22] Judge Hand's argument was not complex. The offer made by Gimbels was a promise; a return promise was contemplated as the consideration to form a contract. The act of using the bid was not the envisaged mode of acceptance and therefore did not supply the consideration to form a contract.

The Firm Offer.—The language of Gimbels' offer "guaranteed" it

19. 64 F.2d at 346.

20. Id. at 345. The grammatical error was pointed out by Judge Hand. There would appear to be two possible ways to correct the error, either by considering "reasonable" as adverbial, or by placing a comma after reasonable so that the offer in essence would require a "reasonable and prompt acceptance." Judge Hand, committed to determining what was meant by the offer, only considered the former. Considering the offer as requesting a reasonable and prompt acceptance would result in a radically different interpretation. See text accompanying notes 62-65 infra.

21. Id. at 346.

22. Ibid.

would be held open; but no matter how strong the language, the common law has never permitted a firm offer without consideration. It was argued that the use of the bid by the general contractor furnished the consideration to keep the bid open, making the offer an option contract. But Judge Hand's finding that Gimbels did not care whether its bid was used meant that use of the bid was not bargained-for consideration and that therefore there was no consideration to form an option contract either. Judge Hand could find no reason to suppose that Gimbels intended to subject itself to the one-sided obligation caused by creating a firm offer. In this respect the court appeared to be taking judicial notice of the market situation and the bargaining power of the parties.

Reliance.—The general contractor, Baird, made a strong case for using the reliance doctrine—Section 90 of the Restatement. But Judge Hand's interpretation that the offer could only be accepted after the main contract award and therefore was subject to revocation until that time precluded use of the argument that the general contractor justifiably relied.[23] Moreover, the reliance doctrine, codified the year before by the Restatement, had never been applied to commercial transactions, and Judge Hand found it applicable only in charity cases, where unbargained-for consideration could be used to form a contract.

B. Drennan v. Star Paving Co.

In *Drennan v. Star Paving Co.*,[24] the defendant subcontractor submitted his bid to the general contractor on the same day that the general contractor's bid had to be submitted to the awarding authority. The defendant was the lowest bidder and the general contractor used his bid, submitting his name[25] as the paving subcontractor. The bids were opened on that day and the plaintiff's bid was the lowest.

The next morning, on his way to work, the plaintiff stopped at the subcontractor's office formally to accept the bid. He introduced himself and, before he could say anything more, was told that a mistake had been made on the bid and that Star Paving could not possibly do the work for the price it had bid. The plaintiff told Star Paving that it was bound on the main contract and would have to do the job for that price, but Star Paving refused to perform for the price bid. Plaintiff, forced to contract with a higher bidding subcontractor, brought an action against Star Paving for damages.

In *Drennan*, neither the negotiations of the parties nor the customs of the trade were discussed. The court simply found no evidence either that the general contractor's use of the bid was an acceptance of the bid conditioned on receipt of the main contract, or that the bid was irrevocable as given in exchange for the general contractor's use of the figures.[26]

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23. Accord, 1 Corbin, Contracts § 51 (rev. ed. 1963).

24. 51 Cal. 2d 409, 333 P.2d 757 (1958).

25. This was required by statute in California for public construction. Cal. Gov't Code §§ 4106-07 (West Supp. 1964).

26. 51 Cal. 2d at 413, 333 P.2d at 759.

C. *The Similarities: Restatement Alternatives*

The *Drennan* opinion merely acknowledged the *Baird* decision,[27] but that *Baird* vitally influenced *Drennan* is a reasonable inference from the nature of the court's conclusions—they appear to be a reiteration of those reached in *Baird*. Judge Hand foreclosed analysis of the bid offer by asserting that a bid is a promise and contemplates an exchange promise. The act of submitting the bid was not the envisaged mode of acceptance. The bargaining of the parties was thus viewed in terms of the unilateral-bilateral dichotomy with the bidding situation considered bilateral, contemplating the formation of a bilateral contract. That the *Drennan* court does not challenge the *Baird* reasoning is obvious from the court's analysis of the facts to determine if a contract could still be formed. The bargaining of the parties was first viewed in terms of the unilateral contract. In viewing the bid as an offer for an act, the use of the bid being the act, the court discussed the applicability of Section 45 of the Restatement.[28] This was a trial balloon in the attempt to find a contract. The modern view, the court indicated, is to find an implied promise that the offeror will not revoke the offer once the act is begun. But the court rejected the applicability of section 45 to these facts, deciding that the offer envisaged the formation of a bilateral contract, and that section 45 is operative only where the offer is for a unilateral contract. Rejection of section 45 was an acceptance of Judge Hand's analysis: the court was searching for an exchange of promises; an act for a promise would not do.

Although section 90 has the same effect as section 45, the court could use it, since, unlike section 45, it operates specifically in a bilateral context. The court felt that "reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract."[29] It found reliance, and then held that the firm offer thereby created was seasonably accepted.

While *Baird* rejected the reliance doctrine in commercial transactions, *Drennan* accepted it. The impact of these decisions on the recent cases has emphasized this polarity. A difference in result gives the impression that there was a difference in the premises of *Baird* and *Drennan*. Actually, *Drennan* needed the *Baird* analysis to support its position. One court, reviewing an appeal from summary judgment in favor of the general contractor, said: "And, as in *Baird*, the mere use of the bid was not an acceptance in law which gave rise to a con-

27. Id. at 415, 333 P.2d at 760.

28. The heading to § 45 is entitled: Revocation of Offer for Unilateral Contract; Effect of Part Performance or Tender. "The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer . . . ." Restatement, Contracts § 45, comment b (1932).

29. 51 Cal. 2d at 414, 333 P.2d at 759.

tract . . . ,"[30] and remanded the case to determine, in terms of the *Drennan* decision, whether there was substantial detriment due to justifiable reliance. Thus, reliance does not become an operative legal principle until it is accepted that the subcontractor's offer did not envisage use of the bid as an acceptance.

Baird and *Drennan* both started, therefore, with the same premises. Both courts worked within the unilateral-bilateral view of contract formation. Both, as well, assumed there is a reliance doctrine operative in the law of contracts. They disagreed only as to the doctrine's applicability. Finally, both courts relied entirely upon abstract reasoning and contractual language in reaching their decisions. Neither considered the meaning of the negotiations of the parties in terms of trade practice, or the expectations of the parties, or the possible effects of the alternative holdings on the construction industry.

III

INDUSTRY PRACTICE UNDER *Baird* AND *Drennan*

There are three parties to the construction contract: the awarding authority, the general contractor, and the subcontractor. The awarding authority initiates the competition among general contractors and among subcontractors in an attempt to obtain, through competitive bidding, the best product at the lowest price. The general contractors and subcontractors commit themselves to do a satisfactory job in exchange for a contemplated profit. These are the desired ends of the parties, against which the results of the theoretical approaches discussed above, should be tested.

A. Baird: *No Contract*

The holding in *Baird* leaves the general contractor free to accept or reject and the subcontractor free to revoke even after the main contract is awarded. Thus, the general contractor is free, after he has been awarded the main contract, to attempt to reduce the subcontractor's quoted price by shopping for lower bids.[31] A reduction of five per cent generally is easily obtained since there is a wide range in the prices quoted for many jobs.[32] While this power can be controlled by contract draftsmanship, in his study of the industry Professor Shultz found that only twenty of the eighty general contractors canvassed ever used bind-

30. N. Litterio & Co. v. Glassman Constr. Co., 319 F.2d 736, 739 (D.C. Cir. 1963).

31. Bid shopping is the term applied to the general contractor's practice of canvassing subcontractors for lower bids. Bid peddling, its counterpart, occurs when subcontractors approach general contractors after the contract award and offer lower bids. See Christiansen v. Mechanical Contractor's Bid Depository, 5 Trade Reg. Rep. (1964 Trade Cas.) ¶ 71137 (D.C. Utah June 3, 1964).

32. Bids may vary as much as 50%. In Richards Constr. Co. v. Air Conditioning Co., 318 F.2d 410 (9th Cir. 1963), the general contractor received one bid for zinc sheeting for $173,395, another for $83,277, and a third for $48,733. The architect had estimated the work at $16,000. A subcontractor's trade association revealed that 10% is not a high price cut. See Shultz at 269 n.95.

ing devices.[33] Of those twenty only six bound themselves contractually to the subcontractor. This seems entirely reasonable, since it is to the advantage of the general contractor not to be bound after the main contract is awarded. His bargaining position has become ideal—he has captured the market. The only commitment that the general contractor has under *Baird* is to do the total job at a given price; he is encouraged to bid shop for prices lower than those which have determined his total contract price. Any lower prices are windfall profits. This market situation was discussed at Senate hearings concerning federal construction bills.[34] The subcontractors testified that before the award of the main contract, the general contractor and the subcontractor need each other equally; after the main contract award, the general contractor controls the market and can dictate terms.[35] This information is corroborated by the Shultz study.[36]

A subcontractor, even when on a substantially equal footing with a general contractor, is aware that the general contractor, when awarded the main contract, will be induced to try to obtain a lower price for the subcontract job. The subcontractor will react by trying to retain part of his bargaining power. Expecting that there will be bid shopping, he may pad his bid to be able to make reductions in price during the course of further negotiation.

The effect of these practices on the awarding authority can only be adverse. The price that he must pay will have been determined by competition among general contractors, but the total bids may have been inflated because of padded subcontract bids. Alternatively, if the subcontract bids are not padded and the general contractor is able to effect a reduction in the subcontract price, the awarding authority may feel the result in substandard work or materials[37] because the subcontractor has skimped on materials to make a profit. The bidding system backfires.

Subcontractors are unhappy about bid shopping and bid peddling.[38] The subcontractor wants to be low bidder, but at the same

33. Shultz at 262. The devices used were contract option and bid bond. It is perhaps noteworthy that the survey asked if they *ever* considered binding the subcontractor; the results, therefore, may not accurately reflect the current general practice in the trade.

34. Hearings on S. 1644 Before a Subcommittee of the Committee on the Judiciary, 84th Cong., 1st Sess. (1955). See Schueller, supra note 11, at 500-05, for a discussion of many of the conclusions of the open hearings concerning federal construction bills before Congress.

35. Hearings on S. 1644, supra note 34, at 206.

36. Shultz at 284-85.

37. See, Report of the Subcommittee on "Or Equal Clause" of The Building Industry Practices Committee of the New York Building Congress, Inc., April 1962. The committee indicates that use of the "or equal clause" in specifying materials leads to bid shopping, and reputable bidders are put to unfair disadvantage by marginal operators. The committee recommends that the contract make specific the material to be used.

38. See Mechanical Contractor, Dec. 1963, pp. 21-33. The section on bidding ethics begins with a fable. Balthasar wished to make a pilgrimage to Mecca.

"What would be a fair price for conveyance on such a journey?" The

time he must keep himself from being squeezed. He will try to submit his bid at the last possible moment before the general contractor must submit his total bid; this is done to hedge against any last minute pre-award shopping by the general contractor. But this practice leads to errors in bids, as the *Drennan* facts indicate.

The subcontractor's post-award alternatives are limited. He can, by draftsmanship, bind the general contractor by contract. To do this, however, the subcontractor must have a very strong position in the market—the general contractor must need the subcontractor more than the subcontractor needs him. Few subcontractors have this bargaining power. Professor Shultz asked subcontractors if they had ever considered binding the general contractor before the award, by getting him to sign a contract conditional on receipt of the job, by putting up a bid bond, or by some other device. Only fifteen of the ninety-two canvassed subcontractors had ever used any of these methods.[39] The subcontractors, it was reported, believed they could not compel general contractors to follow the rules for bidding proposed by trade associations. They felt that even in a tight market they lacked the bargaining power to bind the general contractor.[40]

This is a different view of the construction industry from that presented in the generic cases. In those cases, the general contractor is the plaintiff, hurt by a subcontractor's mistake. The general contractor appears to be the vulnerable party who needs protection. Actually, industry practice reveals it is the general contractor who controls the bargaining. The mistake cases are probably unrepresentative of the problems in the field; yet, it is from these generic facts that the law has been made for resolving the entire gamut of contractual problems arising in the construction industry.

The Dynamics of the Marketplace.—The dynamics of the market situation is illustrated by *Air Tech. Corp. v. General Elec. Co.*,[41] where the subcontractor was the plaintiff. Air Technology Corporation (ATC) submitted a proposal, expensive to develop, which included a design for electromagnetic sensors to be used to determine the direction and yield of nuclear detonations. This proposal was instrumental in General Electric's (GE) obtaining the prime contract from the Air Force.[42] At the time the proposals for the sensors were being submitted, GE needed

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jackasses counseled among themselves and replied, "one bale of hay and three bags of dates." Balthasar said, "That is a fair price. I wish to make this journey but will not pay this price. Is there any among you who will be willing to do it for less?" And lo! four and twenty jackasses stepped forth as one, each with a lower bid. And there followed great commotion, each trying to bid lower than the other until the biggest jackass of them all came forth with a price of one bag of dates. Balthasar said, "you fool, do you not know you cannot subsist let alone make a profit?" The Jackass replied, "It is true but I wanted the order." Since that day all jackasses have been called fools and all price cutters have been called jackasses . . . .

39. Shultz at 270.

40. Ibid.

41. 199 N.E.2d 538 (Mass. 1964).

42. Id. at 543.

ATC because the proposals were expensive and ATC had the know-how which would probably satisfy the Air Force.[43] ATC was a "member of the team" while GE contemplated a cost-plus-fixed-fee contract, but GE was awarded the prime contract on a cost-plus-incentive-fee basis; thus, by cutting costs, GE could gain additional profit. GE had the prime contract, and since ATC's performance could be duplicated from its proposal, it became more profitable for GE not to be bound. Accordingly, GE informed ATC that it did not consider itself bound. This case is not a perfect example of the normal market situation, because GE's contract terms changed. But the contract terms had become such that by shaving money from the "target price" GE could increase its profit. ATC, invaluable before the award of the prime contract, lost its bargaining power and was asked to compete with other subcontractors —a situation identical to that created by the bid shopping which occurs in the normal case. ATC was put to great expense to make its bid, but traditionally the offeror takes a chance and, under the rules in *Baird* and *Drennan*, is not offered any protection. In this case, however, the court found that a contract had been formed, conditioned on the prime contract's award, because GE had named ATC as a "team member."

Result: The Bid Depository.—For subcontractors to bargain effectively within the framework of the *Baird* and *Drennan* rules some method had to be found to bind the general contractor at an earlier point in time. The only technique available to subcontractors was to achieve a bargaining position strong enough to be able to withhold quotes from general contractors who were shopping around and to discourage other subcontractors from peddling bids. This required collective strength and organization; hence, the bid depository.

Basically a bid depository is a facility, usually operated by a trade association, created to collect bids from subcontractors and make them available to general contractors.[44] The subcontractors use the rules of the depository to capitalize on their combined bargaining strength. The rules are in the form of by-laws, and attempt to prevent bid shopping and bid peddling. Depositories set deadlines when bids must be let. They do not give bids to general contractors who bid shop, and they impose penalties upon noncomforming members who peddle bids. The gain in subcontractor bargaining power which depositories obtain, however, may be at the expense of free competition. In *Christiansen v. Mechanical Contractor's Bid Depository*,[45] Rule V of the Mechanical Contractor's Bid Depository was ruled a per se violation of the Sherman Act, because of the explicit understanding that the general contractors would use only bids received from the depository. The depository argued that its purpose

43. In fact, one of the remedies sought by ATC was damages for the appropriation of trade secrets—the proposed designs for the sensors. The court rejected this contention because ATC had made the proposal available to a number of general contractors.

44. Schueller, supra note 11, at 495.

45. 5 Trade Reg. Rep. (1964 Trade Cas.) ¶ 71137, at 79491 (D.C. Utah June 3, 1964). An appeal has been filed. Letter from attorney for appellant to New York University Law Review, Sept. 21, 1964.

was to prevent bid shopping and bid peddling rather than to eliminate competition, and that it eliminated obnoxious effects upon the awarding authority, general contractor and subcontractor. The court answered that while the rules of the association guaranteed the integrity of the bidding system, the system itself was exclusionary; only general contractors who dealt through the bid depository could participate.[46] This feature restrained competition.

Rule V was changed by the depository in April 1963 to permit the letting of bids to nondepository members, but the court found that the system continued to be exclusionary. "Indeed," the court remarked, "continued observance of at least the spirit of rule V seems the *sine qua non* of the defendant's entire method . . . of controlling bidding through the depository in an endeavor to eliminate bid peddling and shopping."[47]

The bid depository is symptomatic of the problems in the industry. The consequence of the *Baird* rule, fostering post-award competition, is that the subcontractors vie for strong bargaining positions. The competition fostered does little for the parties involved. By forcing the subcontractor to pad his bids, post-award competition makes phony the parties pre-award activities, and the awarding authority gains nothing. Finally, any possibility of benefit from post-award competition is completely outweighed by its tendency to result in excessive general contractor power and in the subcontractor monopolies which arise in response to this power.

B. Drennan: *The Firm Offer*

The *Drennan* holding results in an even greater aggravation of the market situation. Normally, the general contractor holds the bargaining power at the time he is awarded the main contract, but he still has a contract to perform. To do this, he needs the subcontractors, so his control over the market depends upon their availability. The market may be a tight one in which a single subcontractor has control, or there may be active competition for subcontractors because a number of general contractors have undertaken similar projects. Under the *Baird* holding, therefore, the general contractor, once he is awarded the main contract, takes the market as he finds it. The *Drennan* holding changes this situation completely by assuring the general contractor a firm offer and complete control of the market, thus enabling him to negotiate from strength. In a competitive market he can bid shop in the interim between the submission of his bid and the award of the main contract; in a tight market, he can meet his commitments by forcing the subcontractor to perform. It is true that the firm offer is lost if the general contractor begins to shop around or if he demands a lower price from the subcontractor. But the detriment caused by thus losing the firm

46. 5 Trade Reg. Rep. at 79491.

47. Id. at 79492. One commentator indicates that no depositories are large enough to be effective. The General Contractor's View Point, Mechanical Contractor, Dec. 1963, p. 27. If depositories were any larger, of course, they would be even more susceptible to attack on antitrust grounds.

offer is insubstantial. Bid shopping and bid peddling continue unabated, as indicated by the existence of bid depositories in California,[48] where the *Drennan* rule was propounded, and despite the probable recognition by the construction industry in states such as Utah[49] that a decision favoring the California rule is likely.[50]

Bid shopping indicates that the general contractor is sometimes willing to give up the firm offer established by his reliance. In practice, the general contractor probably knows the market situation when he receives his first bids. Since the market will not change drastically from day to day, the chance of improper assessment is slight. With a firm offer, the market becomes completely stabilized for the general contractor. Even the more powerful subcontractor will find it difficult to draft around a firm offer created by detrimental reliance, because the reliance doctrine is not part of the bargaining situation but is operative as a matter of law. Thus, the subcontractor, to maintain his bargaining power, must still pad his bids so that he can lower his prices for the benefit of the general contractor. The awarding authority is therefore in no better position under the *Drennan* rule than he is under *Baird*.

Negotiation Under Drennan.—The reliance doctrine has added a measure of inflexibility to the negotiations of the general contractor and the subcontractor. In the construction industry, the most important contract term is the price, which is usually negotiated orally, and determines the contract. It can be fixed on the basis of job specifications alone. But there are other terms which require further bargaining, and which are usually settled after the main contract award.

In *N. Litterio & Co. v. Glassman Constr. Co.*,[51] where the reliance doctrine was considered, the court explored this area of further bargaining. *Litterio* pointed out that the reliance doctrine is operative in the area of offer and acceptance, a rigid area in the common law. If the acceptance differs from the offer it is deemed, under the common law, a counter offer.[52] It follows that the reliance doctrine should not be operative in such a case because if the acceptance differs there was no reliance on the offer as made. *Litterio* indicated that in the construction trade application of the reliance doctrine is justified although an acceptance differs, so long as the terms changed were relatively insignificant.[53] The most recent case considering this problem, however, held the reliance doctrine inapplicable.[54] As a counter offeror, the plaintiff had no right

48. See generally Schueller, supra note 11.

49. See Christiansen v. Mechanical Contractor's Bid Depository, 5 Trade Reg. Rep. (1964 Trade Cas.) ¶71137 (D.C. Utah June 3, 1964).

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

51. 319 F.2d 736 (D.C. Cir. 1963).

52. Restatement, Contracts § 38 (1932).

53. 319 F.2d at 739 n.5. The terms the general contractor requested were: (1) sole discretion to withhold subcontractors' funds for not complying with contract terms, (2) a liquidated damages clause, and (3) an option to make joint progress payments to the subcontractor and his supplier.

54. Brook v. Oberlander, 199 N.E.2d 613 (Ill. 1964).

to rely on the defendant's bid. This holding seems to indicate the course the courts will take.[55]

The argument that the reliance doctrine creates an inflexible bargaining context can be countered by *Richards Constr. Co. v. Air Conditioning Co.*,[56] where the court found that, since reliance obligations were difficult to determine in advance of litigation, a subcontractor's forbearance to assert a good faith claim that there was no obligation arising from the general contractor's alleged reliance would be sufficient consideration to make binding a contractual modification. This theory could provide the flexibility necessary to allow the parties to bargain, but the holding is self-limiting in that it requires special facts to make a claim that would provide consideration for a contractual modification. If the uncertainty of reliance obligations could provide a standard defense, it would only do so for the subcontractor. As the offeror, however, he normally would have no use for this defense.

But the holding in *Richards* is disconcerting in light of the court's assertion that the parties were "ruthless in the pursuit of profit" and therefore not trustworthy.[57] It could become a practice for subcontractors to make mistakes intentionally, bidding very low in a competitive market. Once the offer was accepted, the uncertainty of a reliance obligation would provide consideration for a modification. The subcontractor would gain the advantage of having eliminated his competitors from the field, and would be able, in effect, to bid again, with knowledge of the other offers made. The general contractor would be committed contractually to the low figure and any modification would lower his profit. He would be forced to squeeze the awarding authority, or another subcontractor, to maintain his profit. Bidding practices thus might be corrupted by the uncertainty created by the reliance doctrine.

C. Proposed Solutions

Separate Contracts.—It has been suggested that separate contracts between the awarding authority and subcontractors, bypassing the general contractor, will eliminate many of the bad practices in the industry and benefit the awarding authority. The general contractor, however, is an important and permanent fixture in the construction industry. The American Institute of Architects gives a number of warnings to architects contemplating bypassing the general contractor.[58] The architect may find that subcontractors will submit higher bids to him than they would to a general contractor, whose skill they know will enable them to work more efficiently and profitably. The Institute also warned that separate contracts should only be attempted where the architect is a capable administrator and has his office well organized. It

55. Strict construction has even been applied to purportedly liberal legislative provisions. See, e.g., Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

56. 318 F.2d 410 (9th Cir. 1963), affirming 200 F. Supp. 167 (D. Hawaii 1961).

57. 200 F. Supp. at 170.

58. Handbook of Architectural Practice, III, p. 7.04 (1958).

cautioned that the architect's ability to screen out poor subcontractors is no better than his ability to screen out poor general contractors, and there are many more subcontractors. An investigation of New York City school buildings, constructed under separate contracts as required by statute,[59] resulted in recommendations that general contractors be employed to supervise construction in order to prevent overlapping work assignments and jurisdictional disputes.[60]

Bid Listing.—Subcontractors suggest bid listing as a means of combatting the difficulties in the industry. This would require the general contractor to list the names of his subcontractors with his bid. But the utility of bid listing alone seems doubtful. Bid listing in *Drennan* failed to prevent Star Paving from withdrawing its bid. The operation of the reliance principle in conjunction with bid listing may, however, be an effective means of curbing bid shopping and bid peddling, because the general contractor will be committed as soon as the award is made. But the difficulties created by the reliance doctrine in proof and in uncertainty of obligation, and the fact that the general contractor is not contractually bound by listing his subcontractors, indicates that even this solution is inadequate.

IV

AN ALTERNATIVE: THE FULCRUM-POINT APPROACH

A. The Uniform Commercial Code

The Uniform Commercial Code is the model for the analytical approach taken by this Note. Professor Llewellyn, the principal draftsman of the Code's sales provisions, was aware that if the Code accepted one line of cases in the common law, it might have to reject another. He remarked that no one can consider the common law of contracts as "a unit without doing violence to some cases or some of the received categories, or both."[61] What Professor Llewellyn considered the best of the common law of contracts was used to frame the sections relating to the formation of sales contracts. Thus, while the Code is a new distillate, it rests upon the basic materials of the common law, and it was designed to handle problems similar to those arising in *Baird.*

The Code rejects the unilateral-bilateral dichotomy at formation of contracts and provides new, clearly delineated rules for construing offers. Section 2-204, dealing with the formation of contracts generally, allows a contract to be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract. This makes explicit the practice of common law courts to find implied-in-fact contracts. Section 2-204(2) indicates that even though the moment of agreement is undetermined, if there is an agree-

59. N.Y. State Finance Law § 135 (McKinney Supp. 1963).

60. New York State Commission of Investigation, An Investigation of the New York City School Construction Program 209 (1962).

61. Llewellyn, Our Case-Law of Contracts, Offer and Acceptance (pt. 1), 48 Yale L.J. 1 (1939).

ment the parties are bound. These two provisions focus on the conduct of the parties, allowing the court to inquire into the meaning of such conduct.

Section 2-206(a) provides that "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." Read together with section 2-204, this section demands that courts avoid viewing the relationship of the parties within the narrow framework of the unilateral-bilateral dichotomy. The Code thus rejects the theory that only a single mode of acceptance is normally envisaged by an offer, adopting a more flexible view of consideration. The Code would change the interpretation of the *Baird* offer. The rule of construction used by the *Baird* court forced Judge Hand to interpret the offer as allowing acceptance only by communication of acceptance after the award. Any other interpretation of the offer, Judge Hand stated, would wrench the language of the offer. But would it? It would appear that Judge Hand's interpretation was much too literal. Professor Llewellyn asserts that certain presumptions can be made about offers in a bargaining situation: "[A] business offer is made . . . in the hope of getting a deal closed . . . and of making it reasonably easy to close, so far as *manner* of acceptance goes."[62] For the offer to be deemed acceptable only by communication after the award, would mean that the offeror, to his own disadvantage, would actually be postponing the time when the offer could be accepted. To thus extend the time to accept gives the offeree, in a competitive situation, time to shop around for a lower bid, thereby decreasing the competitive status of the bid. It would appear from the *Baird* analysis that this raises the question "whether a deal, a final closing, is being invited, and even urged," and as Llewellyn suggests, the "question goes to whether we have a definitive offer at all."[63] Gimbels took the time and expense to compute its bid. The offer was sent to twenty or thirty general contractors to make more likely its use by the general contractor who would win the prime contract. It would seem that this was a definitive business offer.

Where a business offer is made, Llewellyn asserts, "horse sense gets up an explicit rule of construction that any reasonable way of expressing agreement will be effective, in absence of violent negation."[64] Was the *Baird* offer so qualified by the request for a communication of an acceptance that it negated the use of the bid as an acceptance? Judge Hand acknowledged that "it may indeed be argued that this . . . language contemplated no more than early notice that the offer had been accepted, the actual acceptance being the bid . . . ."[65] It may be that the qualification that the acceptance be communicated reasonably promptly after the award was designed to prevent bid shopping.

62. Llewellyn, Our Case-Law of Contract: Offer and Acceptance (pt. 2), 48 Yale L.J. 779, 788 (1939).

63. Ibid.

64. Ibid.

65. 64 F.2d at 346.

Gimbels is a subcontractor and knows the practices in the trade. Rather than postponing the time for acceptance, it may have been merely establishing a deadline for communication of the acceptance. This is a significant distinction which reflects business understanding. It would make the word "guaranteed" in the offer meaningful. Under the Code, then, use of the subcontract bid by the general contractor could be a reasonable acceptance, forming a contract conditional on receipt of the main contract by the general contractor.

The Code modifies the common law by allowing the offeror to make a firm offer without consideration.[66] Professor Shultz seems to assume that this firm-offer provision is the only provision of the Code operative when an offer is "guaranteed," as in *Baird*, and he therefore rejects the Code as a possible solution.[67] The evidence he gathered indicates that the subcontractor is the weaker of the two bargaining parties, and he concludes that the firm-offer provision would only add to this imbalance. He comments that while the firm offer may be applicable to other market areas, it hinders the bargaining of the parties in the construction industry. His estimation of what the firm offer will do to the negotiations of the parties is correct; it would create an imbalance similar to that caused by the firm offer created by the reliance doctrine: the general contractor—the party with the bargaining power—would gain absolute control of the market.

Professor Shultz is incorrect, however, in his belief that the firm-offer provision must operate alone. It is true that a comment to section 2-205 fits the *Baird* offer in so far as that offer was "guaranteed." But to use one comment as the sole criterion for interpretation is to ignore the Code's stated, primary purpose: to give effect to the *deliberate intention* of a merchant to make a firm offer binding.[68] The facts surrounding the formation of contracts in the construction industry indicate that no subcontractor would deliberately weaken his bargaining position by creating a firm offer. As Judge Hand said (and Professor Shultz agreed), "there is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation."[69] In the face of this bargaining context, Professor Shultz apparently must assume that the Code would give more weight to form than to substance, that the offer on its face would be more important than the parties' intentions based on commercial dealing. This seems incorrect. A court applying the Code to a *Baird* offer would have to inquire whether it was the deliberate intention of the merchant to make a firm offer, and this inquiry normally would result in rejection of the firm offer.

More fundamentally, however, the underlying premise that the operation of the firm-offer section prevents the operation of the section allowing an offer to be accepted in any reasonable manner seems invalid.

66. Uniform Commercial Code § 2-205.
67. Schultz at 285.
68. Uniform Commercial Code § 2-205, comment 2. (Emphasis added.)
69. 64 F.2d at 346.

There is, in fact, no logical barrier to the proposition that a prompt acceptance may follow a firm offer—that both sections may operate concurrently. Under this reading of the Code, when use of the bid constitutes an acceptance of the bid, both parties are bound and the question whether the offer was firm becomes moot.

The Code has no section equivalent to Section 90 of the Restatement, and needs none. If the act of the offeree in starting up the flag pole is a reasonable acceptance then both parties are bound. This is a different view of the law of consideration than that taken by the Restatement. It is submitted, however, that the Code merely codifies the common law, and therefore, that the rules of construction offered by the Code can be used in solving the common law contract problems presented by these bidding cases. *Adams v. Lindsell*,[70] a well-known common law case, presents a basis for the Code's rule.

B. The Common Law Roots: Consideration

A Seminal Case.—Adams v. Lindsell was an action for damages for the nondelivery of wool according to agreement. The defendants, dealers in wool, wrote the plaintiffs on September 2, offering "eight hundred tods of wether fleeces . . . receiving your answer in course of post." The letter was misdirected and not received by the plaintiffs until 7:00 p.m., September 5. On that evening plaintiff wrote an answer agreeing to accept the wool on the terms proposed. The answer, by course of post, was not received by the defendants until September 9. On September 8, however, not having received the expected answer, the defendant sold the wool to another. The offeror cited the case of *Cooke v. Oxley*[71] to show that it was possible to revoke his offer merely by changing his mind. The court rejected this argument, holding that a contract was formed when the offeree mailed the letter of acceptance.

Adams is especially relevant in that its facts are not unlike those of *Baird* and *Drennan*. All involved negotiations to form a contract to be performed in the future; and the most important question before each court was the time the offeree was to be bound. In *Adams*, however, the court formulated a mode of acceptance which was adequate although it varied from the offer's terms. The court never inquired into the consideration contemplated by the offer, as the *Baird* court clearly did, and, of course, it could not have relied upon promissory estoppel, the basis of *Drennan*, since it was not at that time an available contract theory. Although *Adams* is generally accepted,[72] it apparently has not been cited or considered by any court deciding a case involving construction bidding.[73]

What were the operative legal principles before the *Adams* court

70. 1 Barn. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818).

71. 3 T.R. 653, 100 Eng. Rep. 785 (K.B. 1790).

72. Contra, Rhode Island Tool Co. v. United States, 128 F. Supp. 417 (Ct. Cl. 1955).

73. At least one writer has recognized the similarity. Sharp, Promises, Mistake, and Reciprocity, 19 U. Chi. L. Rev. 286, 288 (1952).

and how were they weighed? In *Adams* the court had to balance the rule that "a man is the master of his offer" with the principle, concurrently operative at contract formation, that there must be mutuality of exchange in a bargain.[74] The resolution in *Adams* rests upon two historic decisions rendered by Lord Mansfield, *Kingston v. Preston*[75] and *Boone v. Eyre*,[76] cases involving constructive conditions that became operative at the time of performance. The problem in *Adams* was contract formation, a time at which constructive conditions are not considered operative.

In *Boone*, the court held that substantial performance was sufficient consideration to bind the parties, and thus to preserve the mutuality of exchange. In *Kingston*, there had been a nominal exchange of promises, which was considered sufficient consideration to form a contract. One promise had been independent, the other dependent. By holding the order of performance to be concurrent, contrary to the promises exchanged, the court indicated that the exchange of performances was the real consideration in the bargain. This view of consideration emphasizes mutuality of exchange and the power of courts to restructure bargains.

Adams was decided in accordance with Lord Mansfield's holdings. The *Adams* court did not vitiate the concept of mutuality of exchange at contract formation; rather it held that the offeror was bound by the letter when it was dispatched. The court apparently weighted the mutuality principle, binding both parties, more heavily than the principle of exact consideration. If the latter had been considered more important, the agreement would not have been effective until the letter was received by the offeror. The effect of the court's holding was to shorten the period in which the offeror could revoke.[77] This protected the exchange contemplated by the offeror by preventing the offeree from speculating on the market during the time lag; it in turn enabled the offeree to rely upon the contract from the moment he mailed the letter. The letter might be said to have implied the exchange promise, but the important thing is what the court did, not the fiction used to explain its holding.

Adams *and* Drennan *Compared.*—In *Drennan*, the court was also dealing with the time factor. One of the *Drennan* court's alternatives was, of course, to bind the parties when the general contractor submitted the subcontract bid to the awarding authority. This would have been equivalent to binding the parties at the time of dispatch under *Adams*—both are unequivocal acts, signaling the offeree's reliance. The second alternative was to bind the parties when an acceptance was communicated to the offeror, equivalent to the rule that acceptance is

74. See Oliphant, Mutuality of Obligation in Bilateral Contracts at Law, 25 Colum. L. Rev. 705 (1925). Compare Corbin, Non-Binding Promises as Consideration, 26 Colum. L. Rev. 550, 557 n.18 (1926); Llewellyn, supra note 61, at 795 n.23.

75. 2 Douglas 689, 99 Eng. Rep. 437 (K.B. 1773).

76. 1 H. Bl. 273, 126 Eng. Rep. 160 n.(a) (K.B. 1777).

77. MacNeil, Time of Acceptance: Too Many Problems for a Single Rule, 112 U. Pa. L. Rev. 947, 953 (1964).

not effective until receipt. California generally follows the dispatch rule, but in this case chose the time of receipt.

Perhaps the answer for *Drennan*'s failure to refer to *Adams* is that such a reference was unnecessary to resolve equitably the facts of that case. The court saved the general contractor from a difficult situation by making the offer firm at the point of reliance. That promissory estoppel binds only the offeror, thereby vitiating the doctrine of mutuality of exchange, may have seemed insignificant, since only the offeror had to be bound. But the realities of the relative bargaining positions of the parties in the industry reveal the need to bind the offeree as well. The *Adams* approach is significant in that it achieves this end while promissory estoppel does not.

Adams has proved to be a viable case. While the appropriateness of the dispatch rule for certain situations has been questioned, the underlying principle of mutuality of exchange has not. The facts of the construction bidding cases fit neatly into the *Adams* formula, and the rule which results creates certainty for the parties and benefits the industry. The case seems ample common law precedent for the Code's rule that an offer can be accepted in any reasonable manner.[78]

C. The Fulcrum Point In Negotiations: Agreement

Once agreement is reached, the rule is *pacta sunt servanda*, the contract must be performed. The parties, therefore, are not to be hastily burdened with the legal consequences. To insure this, the law demands, in many instances, a certain degree of formality. Professor Fuller has an excellent formula: "The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction

78. See Restatement (Second), Contracts § 31 (Tent. Draft No. 1, 1964), which proposes a significant change from the present Restatement in the interpretation of an offer. "In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses." This is stronger than the present § 31 which merely raises the presumption that an offer invites a bilateral contract. Significantly, comment c to § 31 refers to the Uniform Commercial Code, Section 2-206(1)(b), where "an order or other offer to buy goods for prompt or current shipment normally invites acceptance either by a prompt promise to ship or by current shipment." This would indicate that the new draft of the Restatement considers an offer as inviting a reasonable acceptance.

The unilateral-bilateral dichotomy, however, has not altogether disappeared. The tentative draft recognizes the unilateral-contract offer as indicated by § 45(1): "Where an offer invites an offeree to accept by rendering performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it."

In creating a presumption of a reasonable mode of acceptance it would appear that even when the offer specifically requests performance, both parties should be bound. The tentative draft, however, appears to support the position taken by this Note concerning the common law rule of construction of offers as inviting reasonable acceptance. The proposed draft has been completed only up to § 74, and therefore a definition of consideration has not yet been proposed. It appears, however, that a more flexible position will be taken in keeping with the references to the Code.

arises."[79] A commercial situation has its own style, its own formality, which courts must discover properly to ascertain the need, in a given situation, for legal formality.

The underlying issue in the construction bidding cases is not whether exact consideration is present, but at which point in time legal consequences should be attached to the negotiations of the parties: When has a reasonable acceptance been made? This is the fulcrum point in the bargain. It cannot be ascertained merely by testing for the presence of certain legal formalities. To determine the fulcrum point courts must obtain sufficient information about the bargaining relationship of the parties, for only in this way can they judge the extent to which formality is superfluous.

Adams in overruling *Cooke*, held it is the court which selects the fulcrum point of agreement. This rule seems to have been arrived at with full awareness of the market's realities. Fixing agreement at a point earlier than the time of receipt of acceptance prevented the offeree from taking unfair advantage of changes in the market. At the same time, he was protected from the moment the acceptance was posted and could rely upon the deal.

The *Adams* view supports Professor Corbin's analysis of the offer "to convey my land to you in return for your moving to Maine," and his conclusion that if the offeror tried to revoke, the court would establish the point of acceptance prior to the time of attempted revocation.[80] He quotes Justice Holmes' argument that "if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation."[81] Here, again, the *court* determines the fulcrum point of agreement.

The courts are not without guidance in facing this question. They have had extensive experience with contracts implied-in-fact and constructive contracts. They know that the context of negotiations may be accorded greater weight than the alleged subjective intent of the parties. Given the proper bargaining relationship, courts will make contracts. Choosing the fulcrum point is analogous to making a constructive contract, and is certainly no more difficult. Still, a factual inquiry to determine an industry rule poses serious problems. Such an inquiry is more difficult than the application of rules of law. But if an inquiry is attempted, care and intelligence may lead a court to adopt the commercially correct position; without asking the necessary questions proper resolutions will be reached purely by chance.

D. The Fulcrum Point in the Construction Industry: Use of the Subcontractor's Bid

The point at which a reasonable acceptance is made—the fulcrum point—seems, in the construction industry, to be the time the general contractor submits his bid. The fulcrum point must always be indige-

79. Fuller, Consideration and Form, 41 Colum. L. Rev. 798, 805 (1941).

80. Corbin, The Formation of a Unilateral Contract, 27 Yale L.J. 382, 384 n.7 (1918).

81. Martin v. Meles, 179 Mass. 114, 118, 60 N.E. 397, 399 (1901).

nous to the bargaining relationship of the parties. Thus, it should be arrived at after an examination of the factual context, and should be tailored to accomodate that factual context. One manner of determining when the parties should be bound, is to discover when the parties consider themselves bound. In construction bidding, the parties consider themselves bound when the general contractor uses the subcontractor's bid.[82]

An analysis of the effects which this proposed fulcrum point would have upon bargaining in the construction industry reveals its commercial aptness. The rule would restrict bargaining to the pre-award stage, where the parties have essentially equal bargaining power. Both parties are, of course, free to draft a different contract, binding themselves at a later point, but such a change would normally be the product of bargaining between equally powerful parties. Further, the rule would create certainty in the industry concerning the point of contract formation: the parties will know what to expect and know the price they will have to pay to draft a different rule.

Of course, binding the parties when the general contractor uses the subcontract bid greatly benefits the subcontractor since his expectations are protected and the general contractor loses the monopoly he had in the market. But that the proposed rule would also greatly benefit the general contractor is easily proved. Most reported construction bidding cases involve a general contractor arguing that the rule in the industry should be that both parties are bound before the award of the main contract. This argument was made in both the *Baird* and *Drennan* cases. The reason the general contractors argue for this rule is to prevent unscrupulous general contractors from underbidding, hoping to make a profit from the subcontractors and their suppliers.[83] A reputable general contractor cannot compete in such a market, and if he tries to compete, there is the danger that cut-throat competition will substantially affect the quality of the ultimate product.

Binding the parties before the prime contract award determines the price term before the award. This benefits the awarding authority, and was considered a desirable enough result to be proposed in the preamble to the proposed Federal Construction Procedures Act.[84] Fixing the price terms before the prime award removes the need for bid shopping and bid peddling. As a result, attempts to increase profits by lowering the quality of the materials used for the job will not be induced, since the parties will be able to predetermine a margin of profit. The awarding authority, thus, is more likely to get what he purchases. Elimination of destructive post-award competition by binding the parties at the time the bid is used will eliminate one of the major reasons for bid depositories and the evils attendant to organized power. Competition—bid shopping and bid peddling—will still occur during the pre-award period, enabling the general contractor to obtain and submit the lowest possible bid.

82. Supra note 6.
83. See Note, 42 Ill. L. Rev. 259 (1947).
84. H.R. 7168, 85th Cong., 1st Sess. (1957).

A contract formed at the proposed fulcrum point would not limit the flexibility of bargaining negotiations. The common law allows a contract to be formed with open terms. If it is industry practice to negotiate after the price term is determined and the contract awarded, the parties will be able to do so, limited only by a good-faith obligation to negotiate reasonable terms for the open provisions.[85] The Code has taken a similar position; its rules of construction allow for a fulcrum-point approach to contract formation.[86]

It has been argued that where the awarding authority requests alternative bids for different types of materials or different types of construction, the general contractor must submit numerous bids to the awarding authority and thus cannot commit himself to one subcontractor. The awarding authority may want alternative bids for a shingle roof, or a tile roof, or a tar roof, and this may require the general contractor to submit the bids of a number of different subcontractors. Alternative bidding, however, has come to be discouraged because it is too expensive,[87] which can be seen from the number of different estimates which may be required. Further, there is no substantive reason for distinguishing the alternative-bidding case from the normal case. In both, the parties agree to be bound at the time the general contractor uses the subcontractor's bid, conditional upon the general contractor being awarded the main contract. The number of subcontract alternatives should not matter. The general contractor is bound to the subcontractor whose bid was material in obtaining the award.

Despite its commercial usefulness, the proposed rule must be judicially workable, and to be workable it must have sufficient formality. The commercial context provides some of the needed formality, but it may be objected that establishing the fulcrum point at the time suggested is unworkable because it will be difficult to prove which bid the general contractor used, and hence to prove that the parties were bound. This is simply not true on public works projects in a number of states where the general contractor must list the names of subcontractors whose bids were used.[88] Furthermore the problem is not that extensive in the industry generally. Over half the general contractors canvassed by Professor Shultz said they notified the subcontractor before the award that his figure had been used,[89] indicating that the general contractor wants to gain the subcontractor's commitment. It is only in the remaining cases that a problem of proof exists.

If all general contractors were required to list the names of the subcontractors whose bids they used, the problem would be solved. The decision to bind the parties at the time the bid is used will itself create

85. Air Tech. Corp. v. General Elec. Co., 199 N.E.2d 538, 548 (Mass. 1964).

86. Uniform Commercial Code §§ 2-305(1), 2-311(1).

87. Report of the Subcommittee on Alternative Estimates of the Building Industry Practices Committee of the New York Building Cong., Inc. (1957).

88. See, e.g., Cal. Gov't Code §§ 4106-07 (West Supp. 1964); Mass. Gen. Laws Ann. ch. 149, § 44(f) (Supp. 1964).

89. Schultz at 259.

the impetus for even more widespread adoption of bid-listing practices. Further, it is to the benefit of the awarding authority to have prices between general contractor and subcontractor finalized before the main contract award. The *Handbook of the American Institute of Architects*[90] warns architects to exercise care in selecting a general contractor; irresponsible general contractors discount the subcontractors' bids in the hope that by bid shopping they will obtain lower prices. "Such contractors have little interest in the work and their selection increases the burden of the architect by drawing him into difficulties with incompetent subcontractors who are operating at a loss."[91] By the architect requiring the general contractor to list his subcontractors, the underlying contract between general contractor and subcontractor will make the general contractor responsible. It is to be expected that a practice that eases the architect's burden, and is simple to implement, will readily be adopted when mere listing provides proof of the underlying contract. Thus, the American Institute of Architects might incorporate bid listing into their *Handbook* as required practice if courts evidence a willingness to bind the parties at the time the bid is used.

This desirable result could effectively be accomplished for government construction contracts by legislation; but legislation is not the only alternative. A government agency on its own initiative has required bid listing.[92] The government also is interested in getting the best product for the money paid, and here too, binding the parties when the subcontract bid is used will create an impetus for the adoption of bid-listing procedures.

V

Conclusion

The alternatives before a common law court deciding a case involving construction bidding are not simply acceptance or rejection of the reliance principle. The reliance principle merely serves to fill the gap left by the unilateral-bilateral dichotomy analysis of contract formation. Another alternative exists: the fulcrum-point approach. The explicit rule of construction derived from common law precedent should be that any reasonable manner of acceptance will bind both parties.

In the construction bidding cases, the fulcrum point is when the general contractor uses the subcontract bid as part of his total bid. Binding both parties at this point would protect the reliance each places in the other, would eliminate destructive, unethical, and monopolistic practices, and would tend to assure the awarding authority the product he contemplated.

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90. American Institute of Architects, Handbook of Architectural Practice, III, p. 7.02 (1958).

91. Id. at III, p. 7.04.

92. 39 Dec. of Comptroller Gen. 247, 249 (1959).