Legal Pipeline

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Public bidding and promissory estoppel

What constitutes 'reasonable reliance'?

First-year law students, all bright-eyed and bushy-tailed, have a tendency to cling to legal maxims or theories as they begin their quest through the twilight zone known as law school. It must have something to do with that "thirst for legal knowledge." Regardless of whether it's a fancy Latin phrase, such as "res ipsa loquitur," or the more mundane, "promissory estoppel," law students tend to overuse (and misuse) these terms.

This month, we attempt to straighten out any misguided, law student readers, or, more likely, inform the educated plumbing engineer about the proper use of promissory estoppel in the world of public bidding.

Definition of promissory estoppel

The roots of promissory estoppel go back to 1932, when the late Professor Samuel Williston developed the concept and ultimately included it in the "Restatement of Contracts." Section 90(1) of the Restatement 2d, entitled "Promise Reasonably Inducing Action or Forbearance," provides as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires."

With all of that mumbo jumbo in there, it's easy to see why law students take comfort in throwing around the concept of promissory estoppel. Stripped of the verbiage, however, promissory estoppel may result in a binding contract, if there is a promise on which someone reasonably relies to his or her detriment — notwithstanding the absence of any consideration, or bargained-for payment. The three key words in this definition are "promise," "reasonably" and "detriment"; unless all three are present, there is no promissory estoppel.

Detrimental reliance

Illustration 4 of the Restatement provides a clear and concise example: "A has been employed by B for 40 years. B promises to pay A a pension of $200 per month when A retires. A retires and forbears to work elsewhere for several years while B pays the pension. B's promise is binding." See Feinberg v. Pfeiffer Co., 322 S.W.2d 163 (Mo. Ct. App. 1959).

> The Superior Court of California found in favor of TEC, holding that Flintco's proposed subcontract and letter of intent constituted a counteroffer (a rejection of TEC's original offer) because it included material differences from the original TEC bid. As a result of the counteroffer, TEC had the right to withdraw its original bid. Flintco appealed to the Court of Appeals.

In Feinberg, the Court of Appeals of Missouri held that Ms. Feinberg's retirement in reliance on her company's promise of retirement pay created an enforceable contract under the doctrine of promissory estoppel. The court found that Ms. Feinberg's company made a promise to pay her $200 a month for life after she retired. Ms. Feinberg reasonably relied on receiving this money for seven years before her company attempted to reduce her monthly payment to $100. Moreover, she relied on receiving this retirement money to her detriment.

As the court noted, "It is a matter of common knowledge that it is virtually impossible for a woman of [63 years] to find satisfactory employment, much less a position comparable to that which [Ms. Feinberg] enjoyed at the time of her retirement." Thus, the court enforced Ms. Feinberg's original retirement contract, with Pfeiffer paying her $200 per month.

Bidding context

Now that you're an expert on promissory estoppel, what does it mean for plumbing contractors? While the concept could come up in any number of ways in commercial contracting, perhaps the most obvious and frequent way is in the context of public bidding. The recent case of Flintco Pacific Inc. v. TEC Management Consultants Inc., 1 Cal. App. 5th 727 (Cal. Ct. App. 2016) is instructive.

In Flintco, the defendant/subcontractor, TEC Management Consultants Inc., submitted a written bid to plaintiff/general contractor Flintco Pacific Inc. to perform glazing work on a college. The bid included

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terms and conditions that affected the bid price. Flintco used TEC's bid price as part of its own bid to the owner. Flintco was ultimately awarded the contract and sent TEC a letter of intent to enter into a subcontract, along with a standard form of subcontractor agreement.

When a plumbing subcontractor submits a bid to a general contractor, the latter has a right to rely on it when formulating a bid to the owner. However, a general contractor may not unilaterally change the terms of a plumbing subcontractor's bid and then rely on that "changed bid" in entering into a contract with the owner.

Both documents were materially different from TEC's bid. TEC refused to enter into the subcontract. Flintco used a different subcontractor to perform the glazing work on the project, and subsequently sued TEC based on promissory estoppel. Flintco sought the difference in price between what it paid the replacement subcontractor and what it was going to pay TEC for the glazing work as its damages.

The Superior Court of California found in favor of TEC, holding that Flintco's proposed subcontract and letter of intent constituted a counteroffer (a rejection of TEC's original offer) because it included material differences from the original TEC bid. As a result of the counteroffer, TEC had the right to withdraw its original bid. Flintco appealed to the Court of Appeals.

In beginning its analysis, the Court of Appeals laid out the elements of promissory estoppel: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance."

To prevail, Flintco was required to demonstrate that it had reasonably relied on TEC's bid to its detriment, and that injustice could be avoided only by enforcing TEC's promise to perform at the price included in its bid. The Superior Court held that TEC was unable to adduce these proofs and the Court of Appeals agreed.

Rejection of bid yields counteroffer

"The trial court found that TEC's bid contained conditions that were material to its bid price, and which if

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omitted, would have considerably increased the price. The court found therefore that Flintco's reliance on the bid price alone was not reasonable. There is substantial evidence in the record to support that finding."

The Court of Appeals concluded its decision with some important advice to general contractors:

When a general contractor uses a subcontractor's "offer in computing his own bid, he bound himself to perform in reliance on defendant's terms." Hence, "a general contractor is not free to … reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer."

Flintco's letter of intent, which was expressly made "contingent upon the following terms and conditions" that conflicted with TEC's offer, along with Flintco's standard-form subcontract, which as the trial court found, varied materially from the terms of TEC's bid, constituted a rejection of TEC's bid and a counteroffer, and terminated Flintco's power to accept TEC's original bid.

> Plumbing subcontractors would do well to heed the Court of Appeals' comments since they affect the parties' relative bargaining positions.

Plumbing subcontractors would also do well to heed the Court of Appeals' comments since they affect the parties' relative bargaining positions. When a plumbing subcontractor submits a bid to a general contractor, the latter has a right to rely on it when formulating a bid to the owner.

However, a general contractor may not unilaterally change the terms of a plumbing subcontractor's bid and then rely on that "changed bid" in entering into a contract with the owner. That is not reasonable reliance, and such conduct will defeat the general contractor's argument of promissory estoppel — an argument which most second-year law students know is frequently asserted, but not frequently successful. ■

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