

2011

Traynor (*Drennan*) v. Hand (*Baird*): Much Ado About (Almost) Nothing

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Recommended Citation

Victor P. Goldberg, *Traynor (Drennan) v. Hand (Baird): Much Ado About (Almost) Nothing*, JOURNAL OF LEGAL ANALYSIS, VOL. 3, P. 239, 2011; COLUMBIA LAW & ECONOMICS WORKING PAPER No. 397 (2011).
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Working Paper No. 397

March 25, 2011

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Traynor (*Drennan*) v Hand (*Baird*): Much Ado About (Almost) Nothing

Victor P. Goldberg

The contrasting opinions of Learned Hand (*Baird v. Gimbel*)¹ and Roger Traynor (*Drennan v. Star Paving*)² are a longstanding feature in Contracts casebooks. Over 40 years ago, Professor Harry Jones noted: “[T]his is the judicial big league. Learned Hand on one side, for his court, Chief Justice Traynor for his court on the other. You can’t do much better than that. I would suggest, without lack of respect, that is somewhat like comparing a Joe Dimaggio of the generation immediately past with a Willie Mays of the present generation.”³ We could perhaps update the baseball references, but the core sentiment of Professor Jones’ remark remains intact. The central issue in the two cases was the revocability of an offer. Hand held that an offeror was free to revoke prior to acceptance, while Traynor held that the offer was irrevocable so long as the offeree had relied on it. Traynor’s decision was well received, since contracts scholarship at that time was pushing to expand the domain of promissory estoppel.⁴ The fact that Traynor’s opinion is prominently featured in most Contracts casebooks suggests that some really important contract principle had been promulgated.⁵ Indeed, it was the basis for a whole new section of the Restatements, Section 87(2).

¹ 64 F.2d 344.

² 333 P.2d 757.

³ Charles D. Kelso, Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry Jones. 24 J. of Legal Education 606, 623 (1971).

⁴ Cite. Gilmore?

⁵ I looked at the 17 contracts casebooks on my shelf; only two failed to cite either case. *Drennan* was a main case in 11 and *Baird* in six.

Six casebooks used both *Baird* and *Drennan*, respectively, as a main case: CONTRACT AND RELATED OBLIGATION 462–64, 464–68 (Robert S. Summers & Robert A. Hilman eds., 4th ed. 2001); CONTRACTS 742–45, 745–49 (Randy E. Barnett ed., 4th ed. 2008); CONTRACTS 395–98, 399–403 (John P. Dawson et al eds., 8th ed. 2003); CONTRACTS 253–4, 249–53 (James F. Hogg et al eds., 2008) PROBLEMS IN CONTRACT LAW 190–92, 193–97 (Charles L. Knapp et al eds., 5th ed. 2003); STUDIES IN CONTRACT LAW 388–90; 392–95 (Ian Ayres & Richard E. Speidel eds., 7th ed. 2008).

Five casebooks used only *Drennan* as a main case. Of those five books, three omitted discussion of *Baird* altogether: BASIC CONTRACT LAW 448–52 (Lon L. Fuller & Melvin Aron Eisenberg eds., 8th ed. 2006); CONTRACT LAW AND PRACTICE 304–7 (Gerald E. Berendt et al eds., 2d ed. 2009); PRINCIPLES OF CONTRACT LAW 189–92 (Steven J. Burton ed., 2001). Two casebooks cited *Drennan* as a main case and discussed *Baird* in notes: CONTRACT LAW AND ITS APPLICATION 598–603 (Arthur Rosett & Daniel J. Bussel eds., 6th ed. 1999) (briefly excerpting *Baird* in notes at 524); CONTRACTS 222–27 (E. Allan Farnsworth et al eds., 7th ed. 2008) (discussing *Baird* in notes at 222).

Four casebooks cited both cases in notes and/or through other cases: CONTRACTS 363–66 (Christina L. Kunz & Carol L. Chomsky eds., 2010) (discussing both cases through *Pavel Enterprises, Inc. v. A.S. Johnson Co.*, 674 A.2d 521 (Md. 1996)); CONTRACTS 595–6, 605, 606, 798 (Stewart Macaulay et al eds., 2d ed. 2003); CONTRACTS 1276–80 (Ian R. MacNeil & Paul J. Gudel eds., 3d ed. 2001) (discussing *Drennan* in notes and both cases via *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 190 N.W.2d 71 (Minn. 1971)); CONTRACT LAW & THEORY 237–43 (Robert E. Scott & Jody S. Kraus eds., 4th ed. 2007) (discussing both cases through *Pavel Enterprises, Inc. v. A.S. Johnson Co.*, 674 A.2d 521 (Md. 1996) and in notes).

The specific context of the two opinions was a dispute between a general contractor and a subcontractor. When a subcontractor informed a contractor that it had submitted a mistaken bid before the contractor had accepted it, Hand held that the bid was an offer and the sub was free to revoke its offer. A quarter century later Traynor, faced with the same problem, made an estoppel argument: so long as the contractor was relying upon the sub's bid, the offer was irrevocable. Implicit in the decision's favorable reception is the notion that the *Drennan* rule generalizes beyond its narrow context.

In fact, it doesn't. Examination of every decision citing *Drennan* or *Baird*, yields a number of significant facts. First, while *Drennan* has prevailed in most jurisdictions, application of the reliance qualification has been, at best, problematic. Second, *Drennan* doesn't travel well. Aside from the general contractor versus subcontractor context, very few opinions rely on *Drennan*. Third, its spawn, Section 87(2), has been a dud. Like *Drennan*, it is rarely cited outside the GC-sub context; but, unlike *Drennan*, it is rarely cited even in that context. Fourth, and most importantly, *Drennan*'s context has been ignored. Nearly all *Drennan*-type GC-sub cases involve a *public* construction project. The fact that the issue rarely seems to get litigated when the project is being done for private owners is the big result. Private owners have figured out how to cope with the problem, whereas public owners, saddled with regulation of the bidding process, have been less successful.

Drennan and *Baird*, it should be emphasized, are not free-standing contract disputes, a fact that judges and contracts scholars seem to ignore. They are embedded in regulation of public construction, both of the owner-GC and GC-sub relationships. The case law, by and large, ignores the regulatory context, implicitly treating all the cases as if the winner of a competitive sealed bid gives the owner an irrevocable option to use it at the bid price. Moreover, the law either ignores regulation of the GC-sub relationship or treats the regulations as unrelated to the contract issues. Thus, we have the peculiar phenomenon of a supposedly general contract doctrine that applies only in a specific context, but which ignores the features of that context.

That the problem is largely confined to public competitive bidding suggests two important conclusions. First, while contract principles might make it difficult for contractors on public projects to vary the irrevocability of subcontractor bids (offers), there is no reason to rely on the common law. Governments could determine whether some or all subcontractor bids should be irrevocable as part of the overall regulatory scheme. Of course, given that the regulations are the product of a political process, whether governments will do that intelligently is an open question. Second, analyses purporting to analyze the efficiency of the two rules are largely beside the point.⁶

Only two casebooks failed to cite either case: CONTRACTS (George W. Kuney & Robert M. Lloyd eds., 2006); THE MODERN LAW OF CONTRACTS (Bruce W. Frier & James J. White eds., 2d ed. 2008).

⁶ See, e.g., Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 Yale L.J. 1249 (1996); Ofer Grosskopf & Barak Medina, *Rationalizing Drennan: On Irrevocable Offers, Bid Shopping and Binding Range*, 3 Rev. L. & Econ. 231 (2007); and

Without an understanding of the nature of the public regulations, we cannot say anything about the efficiency of either rule. If we want to know the “efficient” rules, then we should look at how private owners resolve the problem. And on this the case law is unhelpful.

The *Drennan* rule is asymmetric. That is, while the sub’s bid is irrevocable, the GC is not bound. At least that is what one might think if one looked only at contract decisions. But the picture on the ground is more complicated. The GC’s freedom is constrained both by legal regulations and extra-contractual mechanisms, specifically bid depositories. For decades subs have complained bitterly about the GC’s ability to renegotiate the price after the winning bid had been announced. Their complaints about the “evils” of bid shopping, chopping, and chiseling are a recurring theme in legislation, commentary, and opinions. My impression is that contracts professors have by and large bought into the notion that such behavior is inappropriate, not the sort of thing that respectable businessmen would do. However, once we recognize that these are the public bidding counterpart to the haggling that takes place in the private contracting, these lose at least some of their negative connotations. The fact that the behavior appears to be common in both the public and private construction projects has implications for the analysis that will be developed below.

The structure of the paper is as follows. Section I summarizes *Baird* and *Drennan*.⁷ Section II provides a brief description of the public competitive bidding process for construction projects. It pays particular attention to the so-called evils of bid shopping. Section III analyzes the GC versus sub cases. Section IV concerns the reverse cases in which the sub is plaintiff. It emphasizes the role of government regulation and collective action in cabining the common law solution. In Section V, we turn to the limited role of *Drennan* and Section 87(2) outside the GC-sub context. Section VI provides a conclusion.

I. The Core Cases

A. Baird v. Gimbel

The Pennsylvania Department of Highways put the contract for a new building out to bid using a sealed bid process. Gimbel, the large New York department store, submitted bids to over twenty general contractors, including Baird, to supply the linoleum. Baird submitted the low bid and was given the contract. The Gimbel estimator had erred by understating the amount of linoleum necessary for the task. When it realized its error, it promptly telegraphed all the GC’s, including Baird. However, it was too late—Baird had

Richard Craswell, *offer, Acceptance, and Efficient Reliance*. 48 Stan. L. Rev. 481, 498-499, 532-533 (1995-96).

⁷ For a detailed discussion of the two cases, including an examination of the briefs and records, see Alfred S. Konefsky, *Freedom And Interdependence In Twentieth-Century Contract Law: Traynor And Hand And Promissory Estoppel* U. Cin. L. Rev. 1169.

already submitted its bid. Gimbel refused to perform and Baird, insisting that it had a valid contract, sued for breach.

Hand held that Gimbel had made an offer, but had withdrawn it before Baird had accepted. Hand rejected the new-fangled notion of promissory estoppel. He likewise rejected the notion that Baird had received an option “if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere. There is no reason to believe that the defendant meant to subject itself to such a one-sided obligation.”⁸

If the parties wanted to make the offer irrevocable, Hand noted, they could have done so explicitly: “The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.”⁹ There was no need to imply that the offer was irrevocable since it could have been done explicitly. He left unstated how they could practically have contracted over this, a point to which we shall return in Section IV. Hand’s bottom line was simply that an offer is revocable until the offeree accepts. The offeree’s reliance would not create an enforceable obligation.

B. Drennan v. Star Paving

The essential facts of Drennan have been drilled into law students for decades; I will only briefly summarize them here. I will, however, add one fact which Traynor left out of the opinion.

The GC, Drennan, was bidding on the Monte Vista School Job in the Lancaster school district. The subcontractor, Star Paving, submitted its bid by telephone the day the GC’s bid was due. The GC submitted its bid to the authority, naming Star as the contractor (as required by statute). Drennan’s bid was the low bid and it was, therefore, chosen for the project. Before Drennan could say to the sub “I accept,” the sub announced that it had made a mistake and couldn’t (and wouldn’t) do the job for the quoted price. Drennan found a substitute for about 50% more, completed the job, and sued for the difference. Following the courts below, Traynor found that the GC’s reliance made the sub’s bid irrevocable.¹⁰ “Given . . . [that the GC] is bound by his own

⁸ Baird v. Gimbel, 64 F.2d 344, 346 (2d. Cir. 1933).

⁹ Baird v. Gimbel, 64 F.2d 344, 346 (2d. Cir. 1933).

¹⁰ Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958). His reasoning was an amalgam of Restatements 45 and 90:

Thus section 45 of the Restatement of Contracts provides: ‘If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.’ In explanation, comment b states that 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, and that if tender is made it will be accepted.

bid, it is only fair that [the GC] should have at least an opportunity to accept [the sub's] bid after the general contract has been awarded to him."¹¹ However, he added a qualification not in the lower courts' opinions: "It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer."¹² Such behavior would indicate a lack of reliance and would let the sub off the hook. The subsequent case law, as we shall see in Section III, shows that implementing this qualification is not so easy. Traynor concludes by asserting that it is appropriate to assign the risk of the sub's mistake to the sub: "As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."¹³

While Traynor alluded to the statutory restraints on the GC (it was bound by its bid) he does not recognize any other statutory restrictions on the public bidding process. There were significant statutory constraints on the GC-sub relationship defined by California's "naming" statute:

No general contractor whose bid is accepted shall, *without the consent of the awarding authority*, either:

- (a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.
- (b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.
- (c) Sublet or subcontract any portion of the work in excess of one-half (1/2) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.
- (d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written contract, when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor.¹⁴

What's going on? This statute is designed to give substantial protection to subs. If the GC named a particular sub, the GC is stuck with that sub, unless the awarding authority grants permission to change. If another sub came along with a better deal, the

Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see s 90). (At 759-760)

¹¹ Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958).

¹² Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958).

¹³ Drennan v. Star Paving Co., 333 P.2d 757, 761 (Cal. 1958).

¹⁴ Reproduced in Southern California Acoustics Co. v. C. V. Holder, Inc. 71 Cal.2d 719, 456 P.2d 975, 79 Cal.Rptr. 319 (1969). (emphasis added)

GC and the authority could figure out a way to take advantage of the deal, so the sub's protection would only be partial. The statute appears to be silent on the specific issue: the GC's freedom to walk away is somewhat limited, but the statute says nothing about the sub's freedom. Traynor's opinion provides some limits on that freedom without noting that it is part of an overall regulatory scheme. In the next case, we will see why that matters.

C. Son of Drennan

About a decade later, Traynor had another GC-sub dispute on his plate.¹⁵ Here he dealt with the reverse problem, a sub complaining that although he was low bidder, the GC (Holder) replaced him with another. Holder, the winning low bidder for the general contract told the school district that it had inadvertently listed this sub rather than its preferred sub and it asked permission to change; the school district consented, and the disappointed sub sued for damages. The sub claimed that it had relied on the presumption that it had been selected, the reliance consisting of refraining to bid on other jobs in order to remain within its bonding limits. The trial court granted the GC's motion to dismiss. Traynor, in agreeing with the lower court on contract grounds, came up with the usual asymmetric result—the GC is not bound.¹⁶ The GC did not make a promise; ergo, there could be no promissory estoppel.

But he's not done. In the years between *Drennan* and this case, California had amended the afore-mentioned naming statute. Now the GC needed not only the *authority's* consent, but also the *sub's* as well.

The amendments made by the 1963 Subletting and Subcontracting Fair Practices Act stated the purposes of the statute in a preamble and completely revised the section dealing with substitution of subcontractors The purpose of the amended statute is not limited . . . to providing the awarding authority with an opportunity to approve substitute subcontractors. Its purpose is also to protect the public and subcontractors from the evils attendant upon the practices of bid shopping and bid peddling subsequent to the award of the prime contract for a public facility. Thus [the revised statute] clearly limits the right of the prime contractor to make substitutions and the discretion of the awarding authority to consent to substitutions . . . Unless a listed subcontractor 'becomes insolvent or fails or refuses to perform a written contract for the work or fails or refuses to meet the bond requirements of the prime contractor,' the prime contractor may not substitute another subcontractor for the listed subcontractor and the awarding authority may not consent to such a substitution until the contract

¹⁵ Southern California Acoustics Co. v. C. V. Holder, Inc. 71 Cal.2d 719, 456 P.2d 975, 79 Cal.Rptr. 319 (1969).

¹⁶ See the discussion in Section IV.

is presented to the listed subcontractor and he, after having had a reasonable opportunity to do so, fails or refuses to execute the written contract.¹⁷

Leaving aside the rationale for the revision, the effect is clear. The original legislation gave subs limited protection—the GC needed only the authority’s approval to replace the named sub. The 1963 amendments meant that the named sub could not be replaced without its acquiescence (with some qualifications). That was enough for Traynor to overrule Holder’s demurrer. “Accordingly, under the facts as pleaded in this case, Holder had no right to substitute another subcontractor in place of plaintiff.”¹⁸ The sub loses on its *breach of contract* claim, but its *breach of a statutory duty* claim survives.

It is not clear to me why Traynor puts things into two discrete boxes. When people are contracting in the shadow of the statute, there is no reason to disassociate the contract from its context. He could easily have reframed the statute in contract language: the GC in any situation covered by the statute would be making an irrevocable offer to all listed subs. By submitting a bid, the sub gives a conditional acceptance of the offer. If the sub’s bid is listed (whether it is lowest or not) and if the GC is awarded the contract, then the GC is bound to use the sub. There are additional qualifications, as Traynor noted. But the net effect is to turn *Drennan* on its head—the GC is bound, but the sub is not.

My concern is not with the precise reasoning of this decision. I want to draw three morals from this case. First, the GC-sub relationship for public works is typically regulated by statute. Second, the statutes typically are sub-friendly. Third, the notion that contract principles can dictate outcomes independent of the statutory regulations is incorrect.

This decision provides a hint of the irony in *Drennan* and its ilk; the point will be developed more below. The statutes tend to favor the subs; moreover, the judicial rhetoric complements the statutes, invoking the evils of bid shopping and concerns about injustice. The natural trajectory of this mix of statutes and rhetoric would, I should have thought, have yielded a string of contract decisions favoring the subs. Yet the reality is the opposite of that. The post-*Drennan* cases generally favor the GC. One might surmise that what we observe is the result of courts compensating for the statutory imbalance favoring the subs. However, nothing in the language in the decisions even hints at that. The decisions either ignore the statutes or, like Traynor in this case, treat them as if they were from another planet.

II. Construction Bidding

In the typical *Drennan*-type case the general contractor submits a sealed bid to the owner who must choose the lowest responsible bidder.¹⁹ After the owner determines the

¹⁷ Southern California Acoustics Co. v. C. V. Holder, Inc., 456 P.2d 975, 980-81 (1969). See CAL. GOV. CODE § 4107 (West 1943) (repealed 1986).

¹⁸ Southern California Acoustics Co. v. C. V. Holder, Inc., 456 P.2d 975, 981 (1969).

¹⁹ Responsible has two meanings. First, is it responsive—did it comply with the conditions imposed by the

lowest responsible bid, that bidder is bound, but the owner is not; it maintains the right to abandon the project. With some exceptions, the GC is strictly bound to its bid price;²⁰ the claim that the GC cannot renegotiate its price with the owner often shows up in the decisions.²¹

I will provide a little more flesh to the bidding process below. But first, we should recognize the identity of the “owner.” Typically, it is a governmental entity. Most government construction projects require competitive sealed bids.²² The procedures are typically spelled out in statutes and these statutes vary over jurisdictions, subject matter, and time. Private owners are much less likely to use a sealed bid competition. The private owner is concerned with price, quality of performance, and duration; it will choose the procurement mechanism that is expected to best balance these factors. Seldom will that be a sealed bid process.

The public owner has to consider these factors as well, but has one additional concern—corruption.

The purpose of requiring governmental entities to open the contracts process to public bidding is to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition. . . . Because of the potential for abuse arising from deviations from strict adherence to standards which promote these public benefits, the letting of public contracts universally receives close judicial scrutiny and contracts awarded without strict compliance with bidding requirements will be set aside. This preventative approach is applied even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the entity money. The importance of maintaining integrity in government and the ease with which policy goals underlying the requirement for open competitive bidding may be surreptitiously undercut, mandate strict compliance with bidding requirements.²³

owner (including statutes)? Second, is the bidder up to the task, technically and financially? Not all competitive bidding processes award the project to the lowest bidder. In a dispute over a cable television system, the court said: “In *American Totalisator*, the bid documents required that the ‘lowest responsible bidder’ be awarded the contract; thus, the Court would not permit an applicant to lower its bid after examining a competitor’s bid. In the instant case, however, the RFP does *not* provide that the lowest responsible bidder will be selected. Rather, because of the advanced state-of-the-art of cable television, the Ordinance and the RFP stress an examination to reveal ‘the most qualified applicants.’ Although the amount of the bid is to be considered in reviewing these proposals, it is by no means the only criterion in this particular selection process.” *McCloskey v. Independence Cablevision Corp.* 74 Pa.Cmwlth. 435,442, 460 A.2d 1205, 1208. The cited case is *American Totalisator Co. v. Seligman*, 489 Pa. 568, 577, 414 A.2d 1037, 1041 (1980).

²⁰ David B. Harrison, J.D. “Right of bidder for state or municipal contract to rescind bid on ground that bid was based upon his own mistake or that of his employee” 2 A.L.R.4th 991 (Originally published in 1980).

²¹ Cite cases.

²² “Nearly all construction procurement with public money requires competitive bidding.” Richter and Mitchell (p 69)

²³ *MCM Const., Inc. v. City & County of San Francisco* 66 Cal.App.4th 359, 78 Cal.Rptr.2d 44, 98 Cal.

The sealed bid process has the apparent virtue of reducing sweetheart deals between elected officials or bureaucrats and the construction firms. So, to police corruption governments must rely on a procurement system that is less efficient than that which is available to the private sector.²⁴ To anticipate Section III B, that is why the case law is so heavily tilted toward government projects.

The generic process of putting together the GC's bid has been described in a number of cases.²⁵ The owner puts the project out to bid and establishes a firm deadline (e.g., October 9 at 2 p.m.) for bid submission. The GC's request bids for pieces of the project from subs, and each sub submits a bid (usually the same bid) to some (or all) the GC's. The subs submit their bids as close to the deadline as possible both to prevent the GC from shopping their bids and to incorporate the most up-to-date information. The GC uses those bids as inputs in determining how much it would bid. If its bid happens to be the lowest responsible bid, compliant with the owner's conditions, the GC will have a fixed price contract with the owner and a batch of offers from the subs. In effect, the GC gives the owner an irrevocable option. The GC is committed, but the owner need not go forward. If it does choose to go forward, it will be bound to use this general contractor. The sub might attempt to back out before the GC accepts its offer, as in *Drennan* and *Baird*. Or the GC might negotiate with the sub or its competitors to get a better deal.

There are a number of variations on this generic story. In the minority of cases that mention the price for the entire project, the sub's bid typically accounted for less than two percent of the total. However, there were a handful of extreme outliers. In *Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc.*,²⁶ for instance, the sub's bid was for more than half the project.²⁷ The sub's bid might be oral or written.²⁸ The GC might simply request

Daily Op. Serv. 6828, 98 Daily Journal D.A.R. 9329. "Louisiana's Public Bid Law was enacted to secure free and unrestricted competition among bidders, to protect taxpayers from contracts entered into by public officials who are motivated by favoritism and fraud, and to avoid contracts for exorbitant and extortionate prices." Percy J. Matherne Contractor, Inc. v. Grinnell Fire Protection Systems Co. 915 F.Supp. 818, 107 Ed. Law Rep. 665.

²⁴ A different form of corruption sometimes appears—bid rigging. From *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) through the highway bid rigging cases, collusive bidding has been a recurring tale.

²⁵ "Despite the rise of alternative project delivery systems and related changes to procurement methodologies, competitive, sealed bidding remains a mainstay in the award of construction contracts, particularly on public projects. Competitive bidding creates extraordinary time and price pressures on the bidders' side of the process. General contractors, subcontractors, and suppliers at each level are straining to get the right price in at just the right time, while still meeting the owner's bidding deadline. It is a pressure cooker environment fraught with opportunities for mistake and miscommunication." Neal J. Sweeney and Geoffrey Dendy, *Holding Subcontractors To Their Bids/Edition II*, Construction Briefings, September 1999.

²⁶ 674 A.2d 521.

²⁷ In *C. H. Leavell & Co. v. Grafe & Associates, Inc.* 414 P.2d 873, the sub's bid accounted for about one-third of the GC's bid.

²⁸ Oral offers from the subs raise the statute of frauds issue and how it interacts with promissory estoppel. Some courts hold that the statute of frauds does not preclude finding an irrevocable offer; see *B & W Glass, Inc. v. Weather Shield Mfg., Inc.* 829 P.2d 809; *Janke Const. Co. v. Vulcan Materials Co.*, 386 F.Supp. 687, *aff'd*, 527 F.2d 772 (7 Cir. 1976); *Loranger Const. Corp. v. E. F. Hauserman Co.*, 374 N.E.2d 306

bids or it might interact with the potential subs prior to the closing date. The scope of subs' bids might not be directly comparable.²⁹ The number of subs might be large, but there are some instances in which there is only one sub bidding. The sub might submit bids to only some of the GCs and it might not submit the same bids to each. The time between the bids being revealed and the owner entering into a contract with the GC could drag on for months. These factors, as well as others, will have a differential impact on the attractiveness of irrevocability. However, there is no indication in the case law that the courts pay any attention to the differences.

If the sub's bid were treated as an irrevocable offer, the GC would have a valuable option. The value increases with the length of time and the variance of the sub's costs, in particular, its opportunity costs. If the expected value of the option to the GC were greater than the expected cost to the sub of providing it, the parties would have an incentive to agree to make the option irrevocable. Both the value to the GC and the cost to the sub depend on the context. There is no reason to believe that a one size fits all rule would work. The plasticity of both "reliance" and "injustice" allows the *Drennan* rule to tailor the rule to the situation. However, since neither concept is linked to the costs and benefits of the option, any success would be fortuitous.

A. Bid Shopping and Related "Evils"

In its dealings with the subs, the GC could attempt to bargain down the price. For generations, subcontractors have complained about the GC's post-bid attempts to renegotiate the price. The GC's flexibility is characterized in unflattering terms as bid shopping, bid chopping, bid peddling, and chiseling. It is evil or immoral, so they say. California, as noted above (at fn xxx) has legislation restricting the GC's option, as do many other jurisdictions. The preamble to the California statute is instructive:

The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils.³⁰

One commentator has presented a lengthier litany of the evils associated with the GC's post-bid flexibility:

Bid shopping and peddling have long been recognized as unethical

(Mass. Court of Appeals, 1978). Others do, especially if the defendant is a supplier of goods; see *Tiffany Inc. v. W. M. K. Transit Mix, Inc.*, 493 P.2d 1220; *Ivey's Plumbing & Elec. Co., Inc. v. Petrochem Maintenance, Inc.* 463 F.Supp. 543, 26 UCC Rep.Serv. 621 D.C.Miss., 1978; *C. R. Fedrick, Inc. v. Borg-Warner Corp.* 552 F.2d 852; *C. G. Campbell & Son, Inc. v. Comdeq Corp.* 586 S.W.2d 40.

²⁹ Almost a quarter of the cases involved some dispute over the scope of the obligation. In some instances a sub would bid a price for one piece of the job contingent upon its being named to perform another piece. For example, ____

³⁰ CAL. GOV. CODE § 4101 (West 1943) (repealed 1986).

by construction trade organizations. These ‘unethical,’ but common practices have several detrimental results. First, as bid shopping becomes common within a particular trade, the subcontractors will pad their initial bids in order to make further reductions during post-award negotiations. This artificial inflation of subcontractor's offers makes the bid process less effective. Second, subcontractors who are forced into post-award negotiations with the general often must reduce their sub-bids in order to avoid losing the award. Thus, they will be faced with a Hobson's choice between doing the job at a loss or doing a less than adequate job. Third, bid shopping and peddling tend to increase the risk of loss of the time and money used in preparing a bid. This occurs because generals and subcontractors who engage in these practices use, without expense, the bid estimates prepared by others. Fourth, it is often impossible for a general to obtain bids far enough in advance to have sufficient time to properly prepare his own bid because of the practice, common among many subcontractors, of holding sub-bids until the last possible moment in order to avoid pre-award bid shopping by the general. Fifth, many subcontractors refuse to submit bids for jobs on which they expect bid shopping. As a result, competition is reduced, and, consequently, construction prices are increased. Sixth, any price reductions gained through the use of post-award bid shopping by the general will be of no benefit to the awarding authority, to whom these price reductions would normally accrue as a result of open competition before the award of the prime contract. Free competition in an open market is therefore perverted because of the use of post-award bid shopping.³¹

Most of the “evil” rhetoric, both on the pre-bid and post-bid level, is overblown, if not just wrong. Note first that the sixth point assumes that GC’s would not anticipate in their bids the gains from shopping. It focuses on the ex post, ignoring the ex ante. If, however, a GC expects that he can knock ten percent off the lowest sub bid, his bid for the project will reflect that, in which case the gains would accrue to the awarding authority. If it doesn’t reflect that saving, the GC is unlikely to win that bid.

Consider the pre-bid context. A sub’s concern about bid shopping is its fear that the GC would take its bid and use it as the basis for inducing some other sub to quote a lower price. In effect, the second sub would rely on the first’s bid, thus avoiding the

³¹ Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L.REV. 389, 394-96. (cited in *Pavel*). In 1995 the American Subcontractors Association, and the American Specialty Contractors issued a joint statement: “Bid shopping or bid peddling are abhorrent business practices that threaten the integrity of the competitive bidding system that serves the construction industry and the economy so well. The bid amount of one competitor should not be divulged to another before the award of the subcontract or order, nor should it be used by the contractor to secure a lower proposal from another bidder on that project (bid shopping). Neither should the subcontractor or supplier request information from the contractor regarding any subbid in order to submit a lower proposal on that project (bid peddling).” Nancy J. White, Theodore R. Bolema, FEDERAL ANTITRUST LAW IMPLICATIONS OF BID SHOPPING, *Construction Lawyer*, Winter, 2004, p.37.

costs of bid preparation. This would be a classic free rider problem. However, there is no evidence that courts really care or that these costs are substantial enough to matter. Of the more than 60 *Drennan*-style cases, only one even mentions bidding costs, and there is no indication that the costs had any impact on the court's analysis or disposition of the case.³² In one case in which a sub sued the GC, the sub argued that it would have been willing to incur bidding costs only if the GC would promise that it would use the sub, conditional on the GC getting the job.³³ Otherwise, the case law pretty much ignores the magnitude of the sub's pre-bid costs.

If bid preparation costs are expected to be high, the possibility of free-riding might present a problem.³⁴ Each sub would have an incentive to wait for others to incur the costs. If they all wait, the quality of the cost estimates is compromised. One case mentioned a bidding strategy that could arguably be construed as an attempt to thwart free-riding. "The trial produced evidence that the practice of initially submitting high bids and then submitting lower bids in the final minutes before deadline is common among subcontractors in a competitive bidding situation and is done to confuse the competition in the event the subcontractor's bid amounts become known to other bidding subcontractors."³⁵ However, even where the bid preparation costs might be high and bidders do not obfuscate, free-riding is not likely to be a much of a problem. The free-riding second sub would be subject to the "winner's curse."³⁶ That is, since the first sub would have better information, the second sub would win the contract only when the first sub believed it could not profit by further cutting its price. Over time, free-riding would be a losing proposition.

Bid chopping and shopping sounds bad (and chiseling sounds even worse). But consider a typical private sector construction project. The owner could play the GC's off

³² "A team of Grafe-Weeks estimators and engineers, under the direction and supervision of Robert Bergstrom, worked for several weeks prior to the bidding day to arrive at a proposed bid on the subcontract." *C. H. Leavell & Co. v. Grafe & Associates, Inc.* 90 Idaho 502, 414 P.2d 873. The subcontract bid was for about \$3.4 million (1961 dollars), so it is unlikely that the bidding costs were significant. In a case in which a sub sued for being denied a contract, the court found that the bid preparation costs were one to two per cent of the bid. *Associated Plumbing Contractors of Marin, Sonoma and Mendocino Counties, Inc. v. F. W. Spencer & Son, Inc.* 213 Cal.App.2d 1, 28 Cal.Rptr. 425. In a sub-sues GC-case preceding *Drennan*, the sub claimed pre-bid expenses of \$210 on a \$22,000 bid. *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.* 301 P.2d 759 (1956).

³³ "ECM alleged in its complaint that it initially refused Maeda's solicitation to bid and only subsequently bid because Maeda promised that if ECM undertook the time and expense to prepare and submit an electrical subcontractor's bid, Maeda would award ECM the subcontract if its bid were the lowest." *Electrical Const. & Maintenance Co., Inc. v. Maeda Pacific Corp.* 764 F.2d 619.

³⁴ We cannot generalize about the significance of bid preparation costs, but it turns out that they are often very low. Take as an example the costs of a general contractor as a portion of the bid price. The contract was for construction of tunnels and a station for the Los Angeles Metropolitan Transportation Authority (MTA); the low bid was \$68,912,089 and the costs of one of the bidders for preparing and submitting a bid were \$44,869, or 0.06%. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* 1 P.3d 63).

³⁵ *Montgomery Industries Intern, Inc. v. Thomas Const. Co., Inc.* 620 F.2d 91.

³⁶ If the second sub's cost structure differs from the first's, the informative value of the initial bid is less. If the second sub could submit a bid \$1 less than the first sub, and the first sub could not revise its bid, then the free riding strategy could work.

against each other and the GC's, in turn, could play the subs off against each other. A sub would have to decide whether incurring the estimation costs would be worth bearing and, if so, how aggressively it should compete. If the chosen GC did not have a conditional contract with a sub, it would be free to negotiate with all the subs—that is, to shop. It's called haggling. Post-bid shopping by the GC following its success in a sealed bid auction would be no different from the haggling that take place in private construction projects. The arguments against post-bid shopping should apply equally to the freely negotiated construction contracts as well. Or, to turn that around, if we think that the negotiated contract market is working tolerably well, then perhaps the evils of shopping are overstated. There is no reason to believe that quality in non-sealed bid construction would be impaired (the "Hobson's choice") by shopping.

I am not arguing that "the market" works perfectly. For half a century the irrevocability a la *Drennan* model has been available to private parties. If it were truly superior, it is hard to imagine that the parties have been unable to figure it out. After all, the general contractors and subcontractors are typically active in both the public and private projects. There should not be any learning impediment to their adopting a more efficient mode. My point is a modest one. Outside the sealed bid, public contract world, the parties do have to deal with bid-shopping, and they somehow manage to do so.

Nor am I suggesting that all the arguments against the evils of shopping are bogus. But it is clear that courts have been quite willing to accept the anti-shopping rhetoric without much thought. Their willingness to accept it, however, appears to be context-sensitive. Compare the following two characterizations of shopping. The first concerns a naming statute; the second concerns an antitrust claim against a "bid depository."³⁷

Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job. . . . The statute is designed to prevent only bid shopping and peddling that takes place after the award of the prime contract. The underlying reasons are clear. Subsequent to the award of the prime contract at a set price, the prime contractor may seek to drive down his own cost, and concomitantly increase his profit, by soliciting bids lower than those used in computing his prime bid. When successful this practice places a profit squeeze on subcontractors, impairing their incentive and ability to perform to their best, and possibly precipitating bankruptcy in a weak subcontracting firm. . . . Bid peddling and shopping prior to the award of the prime contract foster the same evils, but at least have the effect of passing the reduced costs on to the public in the form of lower prime contract bids.³⁸

* * *

³⁷ See Section IV C.

³⁸ *Southern California Acoustics Co. v. C. V. Holder, Inc.* 456 P.2d 975.

Plaintiffs' complaint states that the purpose of the Depository was to inhibit 'bid peddling' which refers to the disclosure, for the purpose of obtaining a more favorable bid, by a general contractor of one subcontractor's bid to a competing subcontractor prior to award and the practice of 'bid shopping' which refers to such disclosure for the same purpose after an award has been made to a general contractor. Plaintiffs contend that defendant engaged in 'bid peddling' by soliciting lower subbids outside the Depository for the floor covering and painting work. Instead of being a vice, however, it is readily apparent that the practice defined as 'bid peddling' is illustrative of open price competition in its purest form. To the extent that general contractors disclose the lowest subbids to competing subcontractors and thereby induce the subcontractors to make still lower subbids, the general contractors are able to offer lower prime bids to the awarding authority. The awarding authority, the taxpayers in the case of public projects and consumers in other instances, are the true beneficiaries. To obtain the lowest possible bid is the object of competitive bidding.³⁹

It is not uncommon for a court at one time and place to view things differently from a court at another time and place. What is unusual about the two preceding paragraphs is that they come from the same court, a mere twenty months apart. Both are en banc unanimous decisions of the California Supreme Court. Five of the six judges are the same—the only change is the replacement of Roger Traynor by Donald Wright. The difference, it appears, is not in the facts. Nor would the single change in membership produce such a change. Rather it depends on whether the judges are wearing their legislative interpretation hats (the legislature says it is bad, therefore, it is bad) or their antitrust hats (price competition is good).

III. The Case Law

A. Public Contracts

Since *Drennan* was decided in 1958, it has been cited in 80% of the cases in which GC's are suing subs, whereas *Baird* has been cited in less than 30%.⁴⁰ Courts explicitly adopted *Baird* in only two cases, both prior to 1966.⁴¹ Decades after *Drennan*, in *Home Electric Co. of Lenoir, Inc. v. Hall and Underdown Heating and Air Conditioning Company*⁴² the North Carolina Court of Appeals adopted the *Baird* rule, refusing to find a

³⁹ *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Const. Co.* 4 Cal.3d 354, 482 P.2d 226, 93 Cal.Rptr. 602, 1971 Trade Cases P 73,524. Counsel for the winning side was William Orrick who had previously been Assistant Attorney General in Charge of the Antitrust Division and who had published a paper three years earlier on bid depositories and antitrust. See Orrick, *Trade Associations are Boycott-Prone: Bid Depositories as a Case Study*, 19 *Hastings L.J.* 505 1967-1968.

⁴⁰ I have included cases in which a GC or sub sues a supplier.

⁴¹ *Southeastern Sales & Service Co. v. T. T. Watson, Inc.*, 172 So.2d 239; and *Tatsch v. Hamilton-Erickson Mfg. Co.*, 418 P.2d 187.

⁴² 86 N. C. App. 540.

contract or to apply promissory estoppel to a dispute; however, it cited neither *Baird* nor *Drennan*. It turned the “injustice” rhetoric of the pro-*Drennan* cases and commentary on its head.

Allowing a cause of action based on promissory estoppel in construction bidding also creates the potential for injustice. It forces the subcontractor to be bound if the general contractor uses his bid, even though the general contractor is not obligated to award the job to that subcontractor. The general contractor is still free to shop around between the time he receives the subcontractor's bid and the time he needs the goods or services, to see if he can obtain them at a lower price.

Using the doctrine in this context is also inequitable in that it allows the general contractor to sue the subcontractor if the subcontractor is unable to perform after the contractor has used his bid, but before he has formally accepted the subcontractor's offer. The subcontractor, however, is powerless and has no grounds on which to sue the contractor if the contractor refuses to use the subcontractor for the actual work.⁴³

The court went on to assert, as Hand did, that if GC's don't like it, they can contract for irrevocability: “Finally, general contractors can avoid this problem entirely by securing a contract with the subcontractor at the outset, conditioned on a successful bid. Contractors should be responsible for protecting themselves without having to resort to the use of promissory estoppel for relief.”⁴⁴

Drennan and promissory estoppel have carried the day. Even so, the GC still has lost around one-quarter of the time. In a handful of cases, the court finds that the sub's bid did not amount to an offer. There was no promise; it was only a quotation or an estimate. Or, if the sub's bid “expressly stated or clearly implied that it was revocable at any time before acceptance,”⁴⁵ then the GC could not claim to have relied upon its irrevocability. Both of these are exemplified in *Fletcher-Harlee v. Pote*. The court said: “Fletcher-Harlee's solicitation letter stipulated that bids must be held open for a minimum of 60 days and that subcontractors must agree to be accountable for the prices and proposals submitted. In response, Pote Concrete Contractors, Inc. submitted a written price quotation for providing the concrete for the project. Pote's ‘bid,’ however, did not conform to Fletcher-Harlee's terms; rather, it stipulated that its price quotation was for informational purposes only, did not constitute a ‘firm offer,’ and should not be relied on.”⁴⁶ The court found for the sub, noting that “[t]he disclaimer language was in normal print in the last paragraph of Pote's one-page submission letter. Fletcher-Harlee does not

⁴³ 86 N. C. App. 540, 545.

⁴⁴ 86 N. C. App. 540, 545.

⁴⁵ *Drennan v. Star Paving Co.*, 333 P.2d 757, 759 (Cal. 1958).

⁴⁶ *Fletcher-Harlee Corp. v. Pote Contractors*, 482 F.3d 247 (3d Cir. 2007). The decision cited neither *Drennan* nor *Baird*; *Drennan*, was, however, cited in plaintiff's brief. Brief of Plaintiff-Appellant, *Fletcher-Harlee Corp. v. Pote Contractors*, 482 F.3d 247 (3d Cir. Mar. 27, 2006) (No. 06-2199).

argue that it was worded or presented in a deceptive manner.”⁴⁷ I am always suspicious when a court uses that sort of language. Does it mean that the GC was aware of the language and did not complain? Or, more likely, they were unaware, but failed to make the argument? If the bidding process was as frantic as it is often portrayed, it is doubtful that someone at the GC’s office bothered to read the disclaimer before submitting its bid.

The court distinguished *Lyon Metal Products, Inc. v. Hagerman Const. Corp.*⁴⁸ which refused to enforce a similar disclaimer: “The bid was on a Lyon's quotation form. On the bottom of the form, in small print, the following limitation is found: ‘This quotation is subject to final acceptance and approval by our home office at Aurora, Illinois and the further condition contained on the reverse side hereof.’ On the reverse side, in smaller print yet, eight conditions are found. One of these has relevance to this appeal: ‘This quotation may be withdrawn and is subject to change without notice after 15 days from date of quotation.’ The specifications for the project, which Lyon admittedly read, required that bids remain open for 120 days.”⁴⁹ In both instances, I suspect, the sub was attempting an end run around the GC’s determination of a period of irrevocability and was counting on the GC’s not reading the fine print when putting together its bid. The courts seem to believe that the success of this ploy should hinge on the size of the print and the location of the disclaimer.

The big wild card, however, is reliance. That, coupled with the injustice proviso, gives courts tremendous discretion. If the GC did not reasonably rely on the bid, wrote Traynor, his claim would fail: “Of course, if plaintiff had reason to believe that defendant's bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it.”⁵⁰ He added: “a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer.”⁵¹ If in the post-bid period the GC were to attempt to get better terms (or if GC’s typically do so), then a court might well conclude that it did not reasonably rely on the sub’s bid. There are three major problem areas: (1) the GC should have known the bid was in error; (2) the GC proposed new terms; (3) GC’s in general, or this specific GC, are known to shop the bid, and/or the GC shopped the bid in this instance. Any of these might be enough to defeat reliance. I’ll consider these in turn.

1. Known Error

In *Drennan*, Traynor concluded that the GC should not have inferred an error “since there was usually a variance of 160 per cent between the highest and lowest bids

⁴⁷ 482 F.3d 247, 250 n.2.

⁴⁸ 391 N.E.2d 1152.

⁴⁹ 391 N.E. 2d 1152, 1153.

⁵⁰ *Drennan v. Star Paving Co.*, 333 P.2d 757, 761 (Cal. 1958).

⁵¹ *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958).

for paving in the desert around Lancaster.”⁵² What the GC should have known is a fact question, and in a few instances courts have found against the GC. A court found a 125% difference acceptable on the basis of testimony by the GC that it is “not uncommon” to have differences between the low and high bids submitted by subcontractors that are “more than double.”⁵³ Bid differences on which courts found reliance unreasonable ranged from 35%⁵⁴ 40%,⁵⁵ 50%,⁵⁶ up to 290%.⁵⁷

2. Counteroffer

“It is undisputed that the customary practice in the construction industry is for the general contractor who is awarded a contract to enter into a written contract with the subcontractor, which written contract embraces far more than the price which the subcontractor has bid by telephone. The additional matters would include such things, as whether the subcontractor would furnish a bond, who would provide for insurance, how payments would be made and many other matters.”⁵⁸ If a court were to deem these terms a material alteration of the sub’s offer, it could treat the proffered written contract as a counteroffer. If the sub then were to reject the counteroffer, the GC would not be able to resurrect the original offer and the sub would be off the hook.

Of the fifteen cases in which the sub proffered the counteroffer defense, the court accepted it in six, rejected it in seven and remanded⁵⁹ in two. The courts in some instances listed the non-conforming clauses and labeled them as either material or non-material, although in most instances it is hard to tell how the court came to that conclusion. For example, in one of the cases holding for the sub, the court recognized two clauses (among the seven) that made the GC’s written contract a counteroffer: “The sub-contract prohibited the sub-contractor from continuing to employ any person

⁵² Drennan v. Star Paving Co., 333 P.2d 757, 761 (Cal. 1958).

⁵³ Powers Const. Co., Inc. v. Salem Carpets, Inc. 322 S.E.2d 30

⁵⁴ Union Tank Car Co. v. Wheat Bros. 387 P.2d 1000.

⁵⁵ I & R Mechanical, Inc. v. Hazelton Mfg. Co 817 N.E.2d 799.

⁵⁶ S. N. Nielsen Co. v. National Heat & Power Co., Inc. 337 N.E.2d 387; Maurice Elec. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp. 632 F.Supp. 1082 D.D.C., 1986.

⁵⁷ Tolboe Const. Co. v. Staker Paving & Const. Co. 682 P.2d 843. “In an effort to prove that a large discrepancy between subcontract bids, such as that existing here, is highly unusual and is, moreover, indicative of error, defendant elicited testimony from eight individuals, all of whom had extensive experience in the asphalt paving and general construction industries, in respect to whether they had ever seen a discrepancy in subcontract bids as large as that shown here. All eight witnesses, including Kent Tolboe, president of plaintiff Tolboe Construction Company, and Joe Hansen, plaintiff’s estimator, testified that they had never seen a disparity in bids for asphalt paving as large as the one existing in this dispute. Defendant further notes that the largest discrepancy seen by any of those witnesses was 100 percent, and the low bid in that particular instance was rejected.” At 846.

⁵⁸ Saliba-Kringlen Corp. v. Allen Engineering Co. 92 Cal.Rptr. 799.

⁵⁹ “Here, it appears Lambert may have intended to be bound prior to the execution of a written agreement, while Houston may have intended to be bound only by a written agreement. However, because the AIA subcontract differed from Houston’s bid on a number of terms, this could indicate that Lambert did not intend to contract on Houston’s terms. Because different inferences are possible regarding the parties’ intent, summary judgment was inappropriate.” Richard E. Lambert, Ltd. v. Houston Const. Co., Inc. Not Reported in P.3d, 2009 WL 2031920 (Ariz.App. Div. 1) The second case, N. Litterio & Co. v. Glassman Const. Co. 319 F.2d 736, will be considered below at note ____.

deemed by the owner, architect or contractor to be a nuisance or a detriment to the job. . . [and] the sub-contract authorized the architect to discharge any workman committing a nuisance upon certain parts of the premises.”⁶⁰ It is hard to imagine that these would be deal-breakers. There are instances of proof by adjective, labeling the new terms as onerous.⁶¹ In rejecting a GC’s claim, a trial judge concluded that the non-price terms were too important: “I’ve read this subcontract in its entirety and it contains so many agreements which in my opinion are absolutely essential to the performance of this job; that it would be, in my opinion, extremely unlikely that either Nielsen or National intended themselves to be contractually bound to each other until this particular written subcontract form had been completed and signed by both parties. There are many matters that go far beyond the bid price.”⁶²

One tack for rejecting the counteroffer defense is simply to say that the non-conforming clauses are not material.⁶³ A second is to recognize that the sub regrets its original offer and is raising the issue opportunistically. For example, in *N. Litterio & Co. v. Glassman Const. Co.*⁶⁴ the sub’s president admitted that his refusal to go forward was based on price and had nothing to do with the additional terms:

When the prime contract was awarded to it Glassman sent Litterio a written proposed subcontract for the brick and masonry work to be done for the amount of Litterio's bid. The proposal contained various terms which, so far as the record shows, had not theretofore been the basis of any communication between the parties, including a provision that it was not valid unless signed and returned within ten days. . . . Having become convinced that its bid was too low, Litterio let the ten days elapse without executing and returning the proposed subcontract. In the proceedings in the District Court the President of Litterio deposed, and the District Court found, that Litterio would have accepted the contract except for the error in estimating the cost of the work. The refusal to go ahead, in other words, was based on the price, not on other provisions in the proposed contract.⁶⁵

Nonetheless, since promissory estoppel is ordinarily a question of fact, the court remanded so that the case might go to trial.

3. Bid Shopping

⁶⁰ Hedden v. Lupinsky 405 Pa. 609, 176 A.2d 406.

⁶¹ Hawkins Const. Co. v. Reiman Corp. 245 Neb. 131, 511 N.W.2d 113 (“appellant relied on appellee’s expected acquiescence to certain nonstandard additional conditions which could be considered onerous”). Lahr Const. Corp. v. J. Kozel & Son, Inc. 168 Misc.2d 759, 640 N.Y.S.2d 957 (“[He]tried in his letter to extract new and onerous terms from Kozel that he knew from prior experience would not be accepted.”)

⁶² S. N. Nielsen Co. v. National Heat & Power Co., Inc. 32 Ill.App.3d 941, 337 N.E.2d 387. The Appellate Court decided against the GC on another ground, holding that the sub’s error was so obvious, the GC could not reasonably rely on it.

⁶³ Debron Corp. v. National Homes Const. Corp. 493 F.2d 352 (eleven terms); Crook v. Mortenson-Neal 727 P.2d 297 (seven terms).

⁶⁴ 319 F.2d 736.

⁶⁵ 319 F. 2d 736, 739.

Adding new, more onerous, terms can be characterized as a form of chiseling—chopping the bid. In most of the cases, however, it appears that the additional terms were simply language included in a GC’s form contract and that there was no attempt to rebargain, but that is not always clear from the court’s presentation of the facts. When the rebargaining is explicitly about price, the chiseling issue is more squarely framed. There are two interrelated questions regarding GC’s attempting to renegotiate the price. First, is it meaningful to say that a GC relied on a sub’s bid if renegotiation in this market or by this GC is common? And, second, should a GC that has attempted to renegotiate this particular contract be allowed to claim that it had reasonably relied. If chiseling were endemic, one would expect reliance on a bid to be unreasonable. Only a handful of opinions raised the question. They do suggest that post-bid renegotiation is common, but that might just be a reflection on a small, nonrepresentative sample.⁶⁶ In two instances the court recognized that shopping was common, but that there was no evidence of it in the specific case. In a Minnesota case, the court noted that the sub contended “that ‘bid shopping’ and ‘bid chopping’ are so common to the Twin Cities area construction industry that prime contractors and subcontractors do not expect to be bound by prices submitted by the subcontractors to the prime contractors and that defendant was therefore not bound on its bid on the ventilation work because further and final negotiations would take place at a later time.”⁶⁷ However, since there was no evidence that the GC had shopped this bid, the court found for the GC, holding that its reliance was reasonable.⁶⁸

For a most peculiar twist on the reliance argument consider this:

The facts of this case demonstrate precisely in what way the general contractor relied upon the bids of prospective subcontractors. As already indicated, the general contractor entered into several subcontracts at less than the original bid price, sometimes with the original bidder and sometimes not. In at least one case, the general contractor entered into a subcontract with someone who did not make the low bid, but at the exact price of the low bid. But in no case did the general contractor ever enter into a contract with a subcontractor or supplier at a price higher than the low bid. It is thus quite clear from the record that unless the general contractor negotiated a contract with another subcontractor or supplier at or below the low bid, the contract was made with the low bidder. Therefore it is obvious that the general contractor relied upon the low bids in the sense that those bids provided a protective ceiling on the cost of work to be contracted out to subcontractors and of supplies to be obtained from materialmen.⁶⁹

That is, the GC could shop the bid at will, so long as it ended up with a price at or below the sub’s bid. If it failed to do better, it could still hold the sub to its bid. That hardly

⁶⁶ By looking only at litigated cases, I have a selection bias problem.

⁶⁷ Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc. 190 N.W.2d 71.

⁶⁸ See also Loranger Const. Corp. v. E. F. Hauserman Co. 384 N.E.2d 176.

⁶⁹ Saliba-Kringlen Corp. v. Allen Engineering Co. 92 Cal.Rptr. 799.

seems consistent with Traynor's reasoning in *Drennan*, but it does exemplify the plasticity of the reasonable reliance concept.⁷⁰

More in line with *Drennan*, two opinions found that bid shopping precluded a finding of reliance.

In accordance with industry practice of shopping for the lowest possible price after the bid selection, I & R determined to contact other dealers in an effort to secure the lowest possible price for the boilers.

* * *

In concluding that there was no reliance, the trial judge found that I & R expressly reserved the right to shop among suppliers after the subcontract was awarded, and found that I & R admitted that it was actively seeking a better price, that reserving the right to shop the suppliers after a subcontractor is awarded a bid is standard practice in the industry, and that I & R did not intend to be bound by Hazelton's facsimile quote.⁷¹

In a second opinion finding no reliance, the court said: "In fact, it is Complete General's customary practice to contact other subcontractors to determine whether they are willing to reduce their bids before Complete General awards a subcontract, a tactic commonly referred to as bid-shopping."⁷²

Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc.,⁷³ perhaps the oddest of the bid shopping cases, came to the right result, but the reasoning was bizarre. The subcontract itself was for about 60% of the entire project.⁷⁴ The sub, Johnson, made an error in calculating its bid; it did not inform Pavel (also called PEI) because PEI was not the low bidder. However, after the low bidder was disqualified PEI received the contract. It then sent the following fax to Johnson and its competitors:

We herewith respectfully request that you review your bid on the above referenced project that was bid on 8/05/93. PEI has been notified that we will be awarded the project as J.J. Kirilin, Inc. [the original low bidder] has been found to be nonresponsive on the solicitation. We anticipate award on or around the first of September and therefor request that you supply the following information.

1. Please break out your cost for the "POWERS" supplied control work as we will be subcontracting directly to "POWERS".

⁷⁰ It is not quite as crazy as it seems. If a primary public concern is that favoritism would lead to higher prices, this would restrict post-bid behavior resulting in a higher price to a favored sub. However, this is a pretty awkward way of making that point. For an economic analysis that treats the sub's irrevocable offer as a cap, see Grosskopf & Medina, note ____, p. 238.

⁷¹ *I & R Mechanical, Inc. v. Hazelton Mfg. Co* 817 N.E.2d 799.

⁷² *Complete Gen. Constr. Co. v. Kard Welding, Inc* 911 N.E.2d 959.

⁷³ 674 A.2d 521.

⁷⁴ Commentary on GC-sub disputes usually notes a power imbalance between large GC's and small subs. Here, at least, the situation is reversed. Ironically, the low bidder was disqualified because it did not qualify as a small business while Pavel did.

2. Please resubmit your quote deleting the above referenced item.

We ask this in an effort to allow all prospective bidders to compete on an even playing field.

A few days later PEI informed Johnson that it had accepted Johnson's bid. Johnson responded by saying that it had discovered a mistake in that bid, but had not informed PEI because it had assumed that PEI had not won the contract.⁷⁵ Johnson declined to perform. One month later, PEI was formally awarded the contract; it brought in a second sub at a higher price and sued Johnson for the difference.

This should have been an easy case under *Drennan*. The first point involved a change of scope and the second made clear that there would be a new round of bidding. A holding for PEI would mean that in the new bid for a differently configured project Johnson would be bound by its previous bid. Somehow, the court, while holding for Johnson, found the reliance question to be "indisputably a close call."⁷⁶ The court then added a second reason for denying PEI. Even if it found that PEI had accepted Johnson's offer, that offer was subject to a condition precedent that PEI be awarded the contract. "Prior to the occurrence of the condition precedent, Johnson was free to withdraw."⁷⁷ On this reading, Johnson was free to revoke any time prior to the government formally awarding the contract to PEI, and since the formal award came nearly one month after Johnson revoked, it wins. Given that there often is a temporal gap between the determination of the winning bidder and that bidder entering into a formal contract with the owner, this line of argument would undercut the reliance rationale. The GC would remain bound to the owner, but in the interim period between the closing of the bid and the awarding of the primary contract, the sub would be free to walk.

What to make of all this? The *Drennan* standard has all the warts that Robert Scott and his various co-authors have cataloged for years.⁷⁸ The GC's reliance is a fact question, but there is not much theory to frame those facts. That does not necessarily make it wrong. *Drennan* is only a default rule and if it were completely out of touch, then we should expect parties to contract away from it. There does not seem to be much evidence for that for *public* projects. There was a hint in the preceding discussion that contracting away from *Drennan* might not be a simple matter. Even if the bid document were to say that a sub's bid would be irrevocable for sixty days, a sub might in its bid negate that by including language limiting the period of irrevocability to a matter of days

⁷⁵ The opinion does not state whether Johnson had submitted the same bid to the disqualified GC. Nor does it say why Johnson could claim that it had not heard of the original winner's disqualification after it had received PEI's fax.

⁷⁶ 674 A.2d 521, 533.

⁷⁷ 674 A.2d 521, 533. In another use of the condition precedent ploy, the court found that a clause making the appointment of the sub subject to the approval of the architect and owner was a condition precedent. "It is undisputed that at the time National withdrew its bid, the architect had not granted its approval." *S. N. Nielsen Co. v. National Heat & Power Co., Inc.* 32 Ill.App.3d 941, 337 N.E.2d 387 Ill.App. 1975.

⁷⁸ Citations.

or hours. In Section IV, I will return to the question of ex ante contracting.

B. Non-Government Construction Contracts

Three facts about the cases involving non-governmental owners stand out. First, there are so few of them. The paucity of cases involving private projects suggests that in that context the parties have succeeded in contracting away from *Drennan*. Second, the fairness justification—GC’s are legally bound to their bid with the public owner and so, therefore, should the subs be bound—doesn’t carry over to the private context.⁷⁹ Third, with but one exception, the courts were entirely indifferent to the identity of the owner. Non-governmental owners showed up in about ten percent of the cases. Some were large retailers engaged in major construction projects—Macy’s,⁸⁰ Walmart,⁸¹ and Home Depot.⁸² In none does the court describe how the owner chose the GC; the implication is that it was a sealed bid process, but there is no reason to believe that to be true. Nor is there any reason to believe that the GC had given the owner an irrevocable option. The judicial indifference is illustrated by the fact that in a few of the decisions, the identity of the owner remained entirely unknown. In only one case did the court appear to consider the difference between a public and private owner and in that case, it is fair to say, the discussion was muddled.

We recognize that in public bidding cases the bidding process is governed by statute and that the legislative objectives of obtaining the lowest prices and establishing an honest and open procedure for competition for public contracts . . . are furthered by allowing the award of reasonable bid preparation costs for “the failure to give fair consideration to a bidder in accordance with the statutory procedure.” To the extent that the decisions are based on an implied contract or on promissory estoppel, however, those bases for recovery may be equally applicable to private solicitations for bids. There is surely no policy which would be served by allowing solicitors of bids in the private sector to ignore the conditions they themselves set and ask others to rely upon.⁸³

There are two problems with that statement. First, there is no reason to believe that the bases for recovery would be “equally applicable.” The court does not consider what, if anything, might distinguish the public and private cases. Second, it is not clear from the remainder of the discussion that the owner was in fact a private entity. This might have been mere dicta. The statement is followed by a footnote: “See, in another bidding context in the private sector, *Drennan v. Star Paving Co.*, 51 Cal.2d 409, 333 P.2d 757 (1958).” Since the owner in *Drennan* was, of course, a local school district, one cannot

⁷⁹ Not all GC’s are so constrained; the legal constraints depend on the jurisdiction and the subject matter.

⁸⁰ *James King & Son, Inc. v. De Santis Const. No. 2 Corp.* 413 N.Y.S.2d 78.

⁸¹ *MDH Builders, Inc. v. Nabholz Const. Corp.* 17 S.W.3d 97.

⁸² *Double AA Builders, Ltd. v. Grand State Const. L.L.C.* 114 P.3d 835.

⁸³ *New England Insulation Co. v. General Dynamics Corp.* 522 N.E.2d 997. In another case in which a sub successfully sued a supplier, the court noted “there was evidence that the Turner Construction Company did not, necessarily, have to award the contract to the lowest bidder.” *Traco, Inc., a Three Rivers Aluminum Co. v. Arrow Glass Co., Inc.* 814 S.W.2d 186 Tex.App.-San Antonio, 1991. For an illustration of a court holding

be confident that the owner in this case was in fact private. So, the only case suggesting that there might be some difference between the public and private owner manages to put *Drennan* in the wrong box.

Private owners do not have a direct interest in the GC-sub relationship. Unless they have reasons for using a particular sub, they will be content with the GC's evaluation of the subs and its means of choosing them. Major construction projects nowadays are run by construction managers (a fancy name for general contractor) and the contracts typically have a guaranteed maximum price (GMP). That is, they are partially cost-based with the GMP establishing a ceiling. The contracts allow for adaptation by including a mechanism for making, and pricing, change orders.⁸⁴ Their concern would be the price, the quality and the speed with which the project can be completed. To the extent that a private owner is able, it will convey to the GC its tradeoffs between these. Because they are so rarely litigated, the case law provides no insights into the process, and since one size does not fit all, one cannot generalize from the anecdotal material available. Still, it appears that the typical pattern is that owners negotiate with GCs who simultaneously negotiate with subs, without firm commitments from the subs until the end. That is, the GC engages in haggling with both the owner and the subs with the subs either providing estimates or irrevocable options with a short fuse.

IV. The Case law: Sub v GC

If a sub submits the lowest bid, would the GC be estopped from selecting another contractor? Where there are no other constraints on the GC's discretion than contract law, the subs have invariably lost. Traynor's *Southern California Acoustics* decision (discussed above in Section I. C.) is an accurate statement of the default rule. General contractors rely on subs, but subs, it is said, do not rely on general contractors. The default rule is not, however, where the action is. In some instances subs have argued that they had successfully contracted for the contingent right to perform. More significant are the extra-contractual constraints on the bidding process. In particular, many jurisdictions have adopted statutory restrictions on the GC-sub relationship and in some instances subs have set up private mechanisms—bid registries or depositories—to regulate the relationship. The driving force behind these extra-contractual constraints is the sub's concern with the so-called evils of bid shopping.

A. The Default Rule

The case for the asymmetric treatment of subs was made in *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*⁸⁵ The sub, it wrote, does not rely on the general contractor:

A subcontractor submits bids to all or most of the general contractors that

⁸⁴ I am aware of at least one complex construction project in which the GMP was not finally set until the project was completed.

⁸⁵ 330 N.W.2d 693.

it knows are bidding on a project. The subcontractor receives invitations to bid from some generals and submits bids to others without invitation. The time and expense involved in preparing the bid is not segregated to any particular general. The total cost is part of the overhead of doing business. The same bid is submitted to each general. Thus, whether or not any particular general wins the contract is of little or no concern to the subcontractor.⁸⁶

The court noted further that, because of the way bids are typically prepared, the sub and GC are under very different pressures: “The subcontractors have the luxury of preparing their bids on their own timetable, subject only to the deadline for submitting their bids to the general contractors. The same bid goes to all the general contractors and covers the same work. The generals, on the other hand, are dealing with all the various construction aspects of the project and with numerous potential subcontractors.” The GC, as noted above, gives the owner an irrevocable option.⁸⁷

Moreover, binding the GC would limit its flexibility. Specifically, since the GC “was forced to juggle the subcontracts in order to comply with the MBE regulations,”⁸⁸ the GC had to replace at least one named sub with a minority-owned firm. Although the court does not spell this out, the flexibility gives the GC a second round to meet statutory constraints. Rather than trying to put together the appropriate mix of minority and small business concerns (and any other mandated types) in their initial bid, the winning GC can, in effect, hold a separate post-bid competition between them. MBE firms from different categories would compete against each other—minority electrical subcontractors would compete with tile subcontractors, cement subcontractors, and others. Regardless of whether one finds any or all of these arguments compelling, *Holman* is an accurate statement of the law. More precisely, of contract law, for, as we shall see, much of the action is outside the scope of contract law.

In a few decisions the courts refused to find a contract invoking arguments that would have led to denial of a GC claim against the sub. Without raising any reliance issues, two courts invoked the mirror image rule when declining to find a contract:

In the absence of agreement to essential terms, such as bonding, penalty

⁸⁶ 330 N.W. 2d 693, 698.

⁸⁷ Statutes typically limit the GC’s ability to renegotiate the price with the government agency. Some states give the GC some leeway, allowing the GC to revise or drop out without penalty if it could show that its bid was mistaken. “In Florida a general contractor may obtain equitable relief from a bid containing a unilateral mistake.” *Southeastern Sales & Service Co. v. T. T. Watson, Inc.* 172 So.2d 239, 242 Fla.App., 1965. California granted some relief if the bidder had made a clerical error. In *Diède Const., Inc. v. Monterey Mechanical Co.* 125 Cal.App.4th 380, 22 Cal.Rptr.3d 763, 04 Cal. Daily Op. Serv. 11,360, 2004 Daily Journal D.A.R. 15,303 Cal.App. 1 Dist.,2004 the sub argued that because it had made a clerical error, the GC’s mitigation should have required that it request relief from the government. The court rejected the argument holding that for the statutory exceptions to apply, the error had to be committed by the GC, not by the sub.

⁸⁸330 N.W. 2d 693, 699. MBE stands for Minority Business Enterprise.

provisions, manner of payment, and work progress completion dates, it can readily be seen that the plaintiff and the defendant must have intended to set out those particulars (and others) in the written contract which was to be executed at a later date. (*Plumbing Shop, Inc. v. Pitts*)⁸⁹

The depositions here also show that even if plaintiff's dollar amount had been acceptable to defendant, other material provisions of a written contract, including conditions and bonding terms, would have had to be agreed upon. The bid submitted by plaintiff in this case was not capable of being acted upon without reference to these matters so could not be considered complete in any event. (*O. C. Kinney, Inc. v. Paul Hardeman, Inc.*)⁹⁰

It is not clear that these courts would have found a lack of an agreement had the suit been brought by the GC.⁹¹ A court might have concluded, as in III A 2, that there was no contract, but that a GC could recover under promissory estoppel. Neither court considered an estoppel theory.

Suppose that prior to the bid the GC had agreed that if it were the low bidder and it had used the sub's bid in preparing its own, then it would use the sub for the project. In *Electrical Const. & Maintenance Co., Inc. v. Maeda Pacific Corp.*⁹² the sub alleged an oral agreement claiming that it was "unwilling to bid unless [the GC] agreed to award [it] the subcontract if it were the lowest bidder on the subcontract and [the GC] were the successful bidder on the prime contract."⁹³ In reversing the dismissal of the sub's claim, the court held that there was consideration for the GC's promise, namely the sub's submission of a bid. Whether there actually was such an oral agreement was a fact question to be determined on remand.

One sub alleged that it had agreed to give the GC "protection," that is, submit inflated bids to all the GC's competitors, and in return, the GC promised to give it the deal if the GC were the low bidder.⁹⁴ The trial court held that there was no contract and

⁸⁹ 67 Wash.2d 514, 408 P.2d 382

⁹⁰ 151 Colo. 571, 379 P.2d 628.

⁹¹ Another case relied on extensive negotiations rather than on the content of the written agreements. "This case bristles with indicia of negotiation. In the very first instance of contact between the parties after the offer was made, MCS proposed an arrangement considerably different than that which was submitted by Gunderson. From that point on, all further contact between the litigants came to nothing more than offers and counter-offers. MCS certainly manifested an intention to enter into a contract with Gunderson at some time in the future, and MCS may very well have taken advantage of Gunderson, but contract with Gunderson it did not." *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Engineering Corp.* 305 F.2d 659. That court quoted an earlier decision affirming the mirror image rule: "The principle which demands of an offeree precise and literal compliance with the requirements of the offer is generally and in Washington thought to be both fundamental and inflexible. Nothing else or less can be an acceptance; the power created by an offer is a strictly limited one, to be exercised only within the confines of the offeror's request." At 663, n.8.

⁹² 764 F.2d 619 C.A.9 (Guam),1985.

⁹³ 764 F.2d 619, 620.

⁹⁴ *Premier Elec. Const. Co. v. Miller-Davis Co.* 422 F.2d 1132, 1970 Trade Cases P 73,186 C.A.III. 1970.

even if a contract had been formed, it would have been illegal. On appeal the court did not have to deal with the latter question, holding that no contract had been formed. In *New England Insulation Co. v. General Dynamics Corp.*⁹⁵ the GC promised that bids would be retained in a locked file and only opened after the bid closing date. However, in a kickback scheme, some of its officers revealed the content of one sub's bid to another which then won the bid. Overturning a dismissal, the court held that "an invitation to bid upon certain conditions followed by the submission of a bid on those conditions creates an implied contract obligating the bid solicitor to those conditions."⁹⁶

Notwithstanding these exceptions, the asymmetric treatment of the sub's claims remains the dominant contract law outcome. Sub's have attempted to overcome this asymmetry by group action, either through legislation or through private organizations like bid depositories.

B. Statutes

In *Southern California Acoustic*, Traynor presented two generations of California "naming" statutes.⁹⁷ The earlier statute simply required the GC to list all subs with more than 0.5 percent of the total cost. To replace the named sub, the GC would have to get permission from the owner. If a GC were to offer the owner a better price-quality deal, nothing in the statute would prevent the owner from approving the substitution. So, while the statute gave the sub some assurance, it did not protect it from post-bid shopping. The revised statute, as noted above at note ___, made replacement of the named sub more difficult.

The extent of protection varies between jurisdictions and even within jurisdictions as the rules can differ for different agencies or different types of projects. A Kentucky decision illustrates a weak naming statute:

The requirement for listing is set out in the "Instruction to Bidders" and "General Conditions" issued to all prospective general contractors, which documents state that the name of each proposed subcontractor shall be submitted with the proposal and that no subcontractor may be employed or substituted without the approval of the Department of Finance, Division of Contracting & Administration. The sole evidence herein relating to this procedure is that the requirement has the purpose of assisting the Division in its evaluation of bids, and other portions of the above documents specifically provide that no contractual relationship shall arise between the Division and the subcontractor by submission of its name by the general contractor.⁹⁸

Despite a dissent decrying bid shopping, the court held that the statute did not give rise to

⁹⁵ 26 Mass.App.Ct. 28, 522 N.E.2d 997 Mass.App.Ct.,1988.

⁹⁶ At 31 & 999.

⁹⁷ See text at ___. These are variously called "naming" or "listing" statutes.

⁹⁸ *Finney Co., Inc. v. Monarch Const. Co., Inc.* 670 S.W.2d 857, 858 Ky.,1984.

a contractual relationship.

The basic question confronting this court is whether the incorporation of the name and amount of bid of a subcontractor by a general or prime contractor in its bid to the owner constitutes an acceptance which would create a contractual relationship between the general contractor and the subcontractor should the general contractor become the successful bidder. Our answer is that in the absence of a contrary statute, it does not. We are unable to find a single case to the contrary.⁹⁹

Other jurisdictions give the sub a lot more protection. The second generation California statute discussed above¹⁰⁰ is one example. *Hoel-Steffen Const. Co. v. U. S.*,¹⁰¹ a case concerning a federal naming clause provides a nice illustration of the type of clause and the difficulty one might have in avoiding the obligation to use the named sub, even when both parties would like to. The naming clause permitted a change of subcontractors only if the contracting officer [CO] approved. It stated that the contractor must list its subcontractors and may make a change only with the CO's consent in accordance with paragraph 17.10 of the subcontractor's listing clause which states:

No substitutions for the individuals or firms named will be permitted except in *unusual situations* and then only upon the submission in writing to the Contracting Officer of a complete justification therefor and receipt of the Contracting Officer's written approval. The Contractor shall not be entitled to any increase in the contract price if substitution is authorized. However, the contract price shall be reduced if the Contractor's cost of performing the work is decreased as a result of approval of the subcontractor's substitution. In the event the Contracting Officer finds that substitution is not justified, the Contractor's failure or refusal to proceed with the work by or through the named subcontractor shall be grounds for termination of the contract under the provisions of Clause 5 of the General Provisions.¹⁰²

The Procurement Regulations provided a non-exhaustive list of nine factors (including bankruptcy, loss of license, failure to furnish a performance bond) that would define an unusual situation. In putting together its bid, the low bidder made an error. It requested that it be replaced by another bidder and stated that it would pay the difference. (Its costs would have exceeded its bid price by around \$200,000 and the alternative sub would have performed the job for only \$46,000 more.) However, the contracting officer declined to find the circumstances unusual and refused; the sub then performed the job and sued the government claiming, successfully, that the contracting officer's decision was arbitrary and capricious. The court recognized that a principal purpose of the

⁹⁹ *Finney Co., Inc. v. Monarch Const. Co., Inc.* 670 S.W.2d 857, 859 Ky.,1984.

¹⁰⁰ At ____.

¹⁰¹ 231 Ct.Cl. 128, 684 F.2d 843, 30 Cont.Cas.Fed. (CCH) P 70,268.

¹⁰² *Hoel-Steffen Const. Co. v. U. S.* 231 Ct.Cl. 128, 684 F.2d 843, 30 Cont.Cas.Fed. (CCH) P 70,268 (emphasis added).

regulation was to prevent bid shopping, and, since there was no shopping here, the contracting officer should have permitted the substitution.¹⁰³

In the course of interpreting a Nevada listing statute, a federal court relied on the legislature's purpose and similar statutes in other states.¹⁰⁴ The statute required that general contractors bidding on public works projects list the major subcontractors and circumscribed the grounds upon which the subs could be removed.¹⁰⁵ The sub could be replaced if the awarding authority objected to the sub. "Absent an objection by the awarding authority, a listed subcontractor may be replaced only with the approval of the awarding authority, which approval may be granted only on [certain] grounds."¹⁰⁶ The one contested ground was the refusal of the sub to execute a written contract "*with the same terms that all other subcontractors on the project were offered.*"¹⁰⁷ A literal reading of that language, said the court, would lead to an absurdity—electrical subcontractors would have to agree to the same terms as cement subcontractors and so forth. The court interpreted this to mean that the contract terms had to be in "reasonable conformity."¹⁰⁸ It also looked to what other states had done to deal with the "evils of bid-shopping": "But the court need not construe in a vacuum: At the time the Nevada Legislature enacted S.B. 474, numerous other states had adopted subcontractor listing statutes; indeed it seems from the considerable similarity of language among these statutes to be likely that Nevada copied its listing statute from that of another state."¹⁰⁹

The court noted similar statutes in Delaware, Alaska, Connecticut, California, and New Mexico. It granted the sub a preliminary injunction, rejecting the GC's attempt to replace it with the one other bidder. It noted, with disapproval, the testimony of the state's contracting officer that the state had no obligation to investigate the grounds for removal asserted by the GC.¹¹⁰ The defendant took an even more extreme position: "Mr. Ron Krump, testified that he believed the statute imposed absolutely no limits on post-award negotiations between a winning general contractor and its listed subcontractors. In Krump's view, the terms of the subcontract bid, and the fact that a general contractor makes use of the sub-bid in its own prime bid, have no relevance to, and do not in any way restrict the scope of, post-award negotiations."¹¹¹ In determining that the sub's behavior in the post-bid negotiations was reasonable, the court cited the testimony of the sub: "listed subs should be prepared to negotiate subcontract terms which depart from the terms of a sub's bid by as much as five per cent of the total sub-bid price."¹¹² Thus, even

¹⁰³ At 849.

¹⁰⁴ Clark Pacific v. Krump Const., Inc. 942 F.Supp. 1324 D.Nev., 1996.

¹⁰⁵ "The drive to enact state statutes requiring listing of subcontractors on public works project, and limiting the grounds for post-award substitution of listed subcontractors, came about at least in part because of pressure from subcontractors' trade associations, . . . The Nevada State Senate approved S.B. 474 by a vote of 20-1-0; the Nevada State Assembly approved the bill by a vote of 42-0-0." At ____.

¹⁰⁶ At 1340.

¹⁰⁷ At 1340. (emphasis added by court)

¹⁰⁸ At 1342.

¹⁰⁹ At 1341

¹¹⁰ At 1351-52. Note the similarity with the contracting officer's interpretation in *Hoel-Steffen*. (at note ____)

¹¹¹ At 1344.

¹¹² At 1345.

in a state with tight restrictions on bid shopping, the sub testified that it was the norm, within a certain range. Because the GC was insisting on terms outside that range, the court held for the sub.

In the Nevada case, the court granted a preliminary injunction, delaying the beginning of construction. A similar defense by the GC was rejected in a case under the Massachusetts listing statute.¹¹³ The GC argued that the statute allowed it to reject a sub without giving any reason. It replaced the sub and the job was performed by a competitor. The first sub sued and the trial court awarded it the costs of bid preparation. On appeal, the court deemed this inadequate for deterrence and awarded anticipated profits.¹¹⁴

While some courts have interpreted the statutes to apply to any post-bid attempts to negotiate, others have held that negotiating with the chosen sub was okay.

Under New York Public Bid Law, which is essentially the same as Louisiana's, the courts have distinguished between post-bid negotiations with the original low bidder and negotiations with others, which could lead to the hiring of a contractor other than the original low bidder. . . . These courts have reasoned that post-bid negotiations with the announced lowest bidder are not inconsistent with the policy of avoiding favoritism; negotiating with any other bidder, on the other hand, directly contravenes the policy.¹¹⁵

It is not clear whether this distinction matters very much. After all, if the GC has no outside alternative and is bound to owner, it's bargaining leverage is limited at best.

Two California decisions illustrate variations on the listing statutes. The former ups the ante, the latter suggests one way of gaming the law. In *MCM Const., Inc. v. City & County of San Francisco*,¹¹⁶ the plaintiff GC was disqualified as non-responsive because it failed to list all subcontractors and the dollar amounts for each accounting for more than one-half of one percent of the total, and to indicate which of the firms, if any, were Minority Business Enterprise (MBE) and Woman-owned Business Enterprise (WBE). The disappointed sub argued to no avail that the city could not impose conditions over and above those embodied in the state listing statute. Although the court

¹¹³Roblin Hope Industries, Inc. v. J. A. Sullivan Corp. 6 Mass.App.Ct. 481, 377 N.E.2d 962 Mass.App.,1978..

¹¹⁴ Recovery for lost profits is unusual. *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* 23 Cal.4th 305, 1 P.3d 63, 96 Cal.Rptr.2d 747, 00 Cal. Daily Op. Serv. 4657, 2000 Daily Journal D.A.R. 6173 Cal.,2000. ("Indeed, while a few courts have stated in dicta that lost profits are a proper measure of damages when bad faith is demonstrated, only two cases have been brought to our attention in which lost profits were, as in this case, actually awarded to a disappointed bidder.")

¹¹⁵ *Percy J. Matherne Contractor, Inc. v. Grinnell Fire Protection Systems Co.* 915 F.Supp. 818, 107 Ed. Law Rep. 665 E.D.La.,1995.

¹¹⁶ 66 Cal.App.4th 359, 78 Cal.Rptr.2d 44, 98 Cal. Daily Op. Serv. 6828, 98 Daily Journal D.A.R. 9329 Cal.App. 1 Dist.,1998.

did not put it this way, San Francisco could if it so chose, pay more for construction to satisfy other social goals.

In *Thompson Pacific Const., Inc. v. Los Angeles Unified School Dist.*¹¹⁷ the GC, Thompson, took advantage of an exception in the statute. The GC could reject the sub if, after a reasonable time, the sub refuses to enter into a written contract at the price specified in the sub's bid. The school district claimed, almost certainly correctly, that Thompson

had violated the Act by listing with its prime contractor bid "placeholder" subcontractors (that is, subcontractors who had not submitted a bid for the work for which they were listed) or "captive" subcontractors (owned and controlled by Thompson). After Thompson was awarded the prime contract, the District argued, Thompson sought to find the lowest price it could from other subcontractors, and then requested permission to substitute the newly-found subcontractor with the placeholder or captive subcontractor on the grounds that the listed subcontractor had failed or refused to sign a subcontract.¹¹⁸

If all the subs refuse to sign the contract, then Thompson would be free to negotiate each subcontract unconstrained by the statute—that is, to shop, just as if this were a non-government project. Thompson argued that these were not placeholders and it just happened that each of the subs was offered the work but declined. The key to making this ploy work is the willingness of the District to accept the substitution. It could have refused the replacement and if Thompson failed to put together a team, from the listed subs, it could have replaced Thompson. Or it could have fined him for violating the Act. "When Thompson requested substitutions of six of its listed subcontractors, the District clearly had the authority to investigate the reasons for the substitutions, to determine whether Thompson had violated the Act, and to cancel the contract or impose penalties if it found such a violation. The District declined to exercise this authority, for the perfectly sound reason that no listed subcontractor objected to the proposed substitutions."¹¹⁹ So, the strategy is not without risks.¹²⁰ Notice, however, that by "accepting" bogus bids Thompson was, in effect, incorporating into its bid its own judgment as to the costs of the six subcontracts. In at least this instance a GC had more confidence in its judgment (and ex post bargaining ability) than in the price discovery of the sealed bid process.

C. Bid Depositories

The GC-sub relationship is further constrained by the use of bid depositories. Subcontractor trade associations have established depositories throughout the country.

¹¹⁷ Not Reported in Cal.Rptr.3d, 2010 WL 298279 (Cal.App. 2 Dist.) Cal.App. 2 Dist.,2010.

¹¹⁸ At 2.

¹¹⁹ At 5.

¹²⁰ An additional risk is that the opinion is unpublished and, under California's rules, cannot be cited, so it has no precedential value.

These have often run afoul of the antitrust laws, but they continue to exist in one form or another. The basic structure has been characterized in this way by one commentator:

A 'locked box' procedure is the most common method of depository operation. Subcontractors wishing to bid to one or more general contractors on a certain job submit bids in sealed envelopes to the depository. An envelope containing a bid addressed to each general contractor to whom the subcontractor wishes to bid is placed in the 'locked box,' and another envelope containing a copy of that bid is addressed to the depository itself and similarly deposited in the box or another secure receptacle. There will be a cut-off point, typically 4 hours or so before the prime bid opening time (i.e., the time by which all bids must be submitted to the owner or awarding authority), and after that cut-off point (or depository closing time) is reached, no more bids may be received, and none received may be amended or withdrawn.

Promptly at the depository closing time, the locked box is opened, and the envelopes contained therein are dispensed to the general contractors to whom addressed. Each general contractor then prepares his own bid to the owner or awarding authority based upon the subbids received and his estimates of his own work costs.¹²¹

If all the subs in a trade are required to place their bids through the depository, and if the rules preclude any sub's revising its bid, then there would be no room for post-bid chiseling. The process identifies the low bidder and all the others are estopped from altering theirs. From the point of view of the subs, this would kill two birds with one stone. The locked box maintains confidentiality for the bid so that there could be no pre-bid free riding and the restriction on amending or withdrawing bids means that there could be no post-bid shopping.

However, a depository that bound all subs in a trade to use it and be bound by its rules would violate the antitrust laws. So, subcontractors have tried to accomplish almost the same thing with rules that are less stringent. Some succeed, many don't. George H. Schueller produced a compilation of federal antitrust prosecutions from the late 1930's to the late 1950's.¹²² Despite a significant California Supreme Court ruling in 1971 that a bid depository's rules were illegal *per se*, depositories continue to survive in modified forms.¹²³ If GC's could only use subs that submitted bids to the depository, that would be

¹²¹ Orrick, Trade Associations Are Boycott-Prone-Bid Depositories As A Case Study (1968) 19 Hastings L.J. 505, 520.) Orrick was counsel for the defendant subcontractor in *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* 4 Cal.3d 354, 482 P.2d 226, 93 Cal.Rptr. 602, 1971 Trade Cases P 73,524 Cal. 1971, in which the court held the depository rules to be a *per se* violation of the Sherman Act.

¹²² Bid Depositories, 58 Mich. L. Rev. 497 1959-1960. For a decision upholding a depository, see *Associated Plumbing Contractors of Marin, Sonoma and Mendocino Counties, Inc. v. F. W. Spencer & Son, Inc.* 213 Cal.App.2d 1, 28 Cal.Rptr. 425 Cal.App. 1963.

¹²³ *Oakland-Alameda County Builders' Exchange v. F. P. Lathrop Constr. Co.* 4 Cal.3d 354, 482 P.2d 226, 93 Cal.Rptr. 602, 1971 Trade Cases P 73,524 Cal. 1971.

a clear violation. Various means of enforcing the use of the depository short of formal requirements have been deployed and some have weathered the antitrust challenge.

My concern here is not with the subtleties of antitrust compliance. Rather, it is to underscore the point that the sub's bid takes place within specific contexts. Under a depository system, the sub's bid would almost always be irrevocable; promissory estoppel would be irrelevant. If the depository rules were relaxed enough to grant sub's some freedom to withdraw, a *Drennan*-type rule would impose an additional restriction on that freedom. In effect, by invoking injustice, the court could enhance the anti-competitive effects of the depository, contrary to the purpose of relaxing the depository's rules.

D. Summing Up

So, while the contract doctrine holds that the sub's bid is irrevocable (subject to reliance/injustice), but the GC is not bound, the doctrine is often trumped by pro-subcontractor statutes or by extra-contractual mechanisms (like bid depositories). Subs complain about the evils and immorality of shopping, but absent such restrictions, it seems clear that post-bid negotiation would be common. Indeed, even with many of those restrictions in place, post-bid negotiation appears to be common. I am quite confident that the negotiation would be so common that it would not adversely affect the reputations of GC's or subs that engaged in it. After all, the subs and GC's also work on projects for private owners in which the subcontracts are negotiated. Since haggling is the norm in that context, it is unlikely that the same behavior would be anathema in the public competitive bidding context.

Suppose that neither regulations nor depositories constrained post-bid negotiations. That is the implicit assumption of most of the post-*Drennan* cases. A second implicit assumption is that the parties are incapable of figuring it out for themselves. While Learned Hand had suggested that the parties could deal with this by pre-bid contracting,¹²⁴ much of the case law treats this as impractical because it would require multiple contingent contracts with subs. Recall that in two cases discussed above at notes ___ - ___, the GC's solicitation stated that the bids be irrevocable for a period of time, but that the sub's form stated that the bid could not be relied on; and in one of the cases, the ploy worked. I would think that this problem could be resolved either by tweaking contract doctrine or by designing the sealed bid regulations so that GC's could establish in the bid requests the extent to which the sub's bid would be irrevocable. If in its solicitation of bids the GC could state that a condition for having a bid considered was that the sub accept its terms and that submission of a bid constituted acceptance of the GC's terms, the multiple contract problem would be resolved—if the courts would honor the clause. The GC would be offering a unilateral contract that the sub would accept by submitting a bid. That should be sufficient to avoid the mirror image problem in which the sub submits a bid conditional on a different set of terms.

¹²⁴ See text at note _____. He rejected finding a contract by implication since, he claimed, the parties were perfectly capable of contracting explicitly if they so chose.

Assuming that the courts could avoid this ploy, the GC could determine unilaterally whether the sub's bid would be irrevocable and whether it would have the freedom to shop post-bid.¹²⁵ If it so desired, it could give itself a pure option—the sub offer is irrevocable, GC is free to shop. As noted above, the option is valuable for the GC, and costly for the sub to provide. The GC must recognize that ultimately it must pay for the option—the more one-sided the arrangement, the more it must pay. If the terms favor the GC too much, subs might refuse to bid or submit bids that convey little information. I suspect that in many (most?) contexts, GC's would find that an irrevocable option, even one modified by the *Drennan* rule would give them more protection than they needed and they would opt for less. That is, if parties were free to bargain over the issue (no statutory constraints, no worry about enforceability) they would most likely arrive at the *Baird* solution.

V. Beyond Construction

A. Drennan

Once we get beyond the GC v sub and sub v GC cases (or when one of them is suing a supplier), there's not much left of *Drennan*.¹²⁶ Only three cases outside the construction context did much to extend *Drennan*'s reach. In *Aronowicz v. Nalley's, Inc.*,¹²⁷ Nalley's, a food distributor, encouraged plaintiffs to develop a sliced meat business (Major), describing in some detail the future relationship between the parties. Nalley's would be the exclusive distributor in Los Angeles and Orange County. Major spent over \$100,000 getting the business up and running.

On June 16, 1965, Gardiner [the local Nalley's manager] wrote to an executive in Nalley's home offices in the state of Washington. . . . He described the product and its packaging in favorable terms. He stated that Nalley's would increase the sales of its own products in its Los Angeles District by \$100,000 a year by adding the Major line, converting now unprofitable retail accounts to profitable ones. He went into detail about the financial benefits to defendant and stated that he personally and the sales organization were enthusiastic.

¹²⁵ If the unilateral contract argument fails, states could legislate it, if they so chose. The model for such legislation already exists: UCC §2-205. Of course, the fact that legislatures have not done so suggests that the public choice problem is not so easily overcome.

¹²⁶ It shows up in the well-known case of *Hoffman v. Red Owl Stores, Inc* 133 N.W.2d 267 as part of a list of cases supporting the proposition that relief has been granted for promissory estoppel. In another case, the court distinguished *Drennan* in finding that a conditional commitment letter from a lender did not give rise to a claim of promissory estoppel. (*Laks v. Coast Fed. Sav. & Loan Assn.* 60 Cal.App.3d 885, 131 Cal.Rptr. 836 Cal.App. 1976). In *Steiner v. Thexton*, 163 Cal.App.4th 359, 77 Cal.Rptr.3d 632, 08 Cal. Daily Op. Serv. 6517, 2008 Daily Journal D.A.R. 7778 Cal.App. 3 Dist.,2008, *Drennan* played a tangential role. When the seller of property refused to convey, the court found there was no contract (the agreement was illusory) and also rejected a promissory estoppel claim. The court distinguished *Drennan* by noting that in this case only one party, the buyer, had a right to revocation.

¹²⁷ 30 Cal.App.3d 27, 106 Cal.Rptr. 424,1973-1 Trade Cases P 74,365 Cal.App. 1972.

Apparently Washington thought otherwise. Whatever the reason, on June 22, 1965 Gardiner telephoned Duncan and stated that defendant was not going to distribute Major's products. He gave no reason. . . .

Disaster resulted to Major. Immediate efforts were made to secure other distribution, handicapped by the fact that in light of the Nalley's distributorship Major had not developed a sales organization as such, and owned no trucks in which to distribute by itself. . . . Although some sales were made through a food broker, and a few other sources, the business faltered. In little more than six months it was through. . . . With no market for its products Major defaulted on its various commitments to equipments suppliers and others. Machinery was foreclosed and repossessed. The individual plaintiffs and others were sued by a bank on guarantees which they had executed, eventually settling the claims.¹²⁸

The court held for the plaintiff, blurring the theories of liability. It did not find it necessary to decide whether liability arose under contract or under promissory estoppel. Perhaps, it said, an exchange of letters established a bilateral agreement. Or maybe Nalley's letter might have been an offer to enter into a unilateral contract which was accepted when Major built its plant. Or, citing Restatement Section 45 and *Drennan*, it could have found a subsidiary promise not to revoke its offer. The court does not explain why it is a good idea to encourage investment of substantial funds in a business when the survival of that business hinges on a not-yet consummated distribution arrangement.

*Strata Production Co. v. Mercury Exploration Co.*¹²⁹ concerned the enforceability of a "farmout" agreement for oil. "A farmout agreement is an assignment of a lease and drilling rights by a lease-owner not interested in drilling to another operator interested in drilling. The primary characteristic of a farmout agreement is that the assignee is obligated to drill one or more wells on the assigned acreage as a prerequisite to the completion of the assignment."¹³⁰ Strata entered into farmout agreements on three adjacent properties. One of the agreements was with Mercury which would convey 100% of the "working interest" to Strata.¹³¹ The agreement gave Strata the option, but not the obligation, to drill a test well within 120 days. If it failed to do so, the agreement

¹²⁸ At 429-30. The court upheld the damages verdict although there was at least some reason to question how the jury got there. "This juror told counsel that the million dollar verdict was based upon the assumption that there were about 100 shareholders of Major and one million dollars seemed about right for that number of shareholders; the juror further said that if the jury had known there were fewer shareholders the verdict would have been less. Aside from the fact that counsel's declaration is the rankest kind of hearsay, the matter recited does not at all show that a verdict was reached by chance." (At 432) In fact, there were only two shareholders.

¹²⁹ 121 N.M. 622, 916 P.2d 822, 133 Oil & Gas Rep. 85, 1996 -NMSC- 016 N.M.,1996.

¹³⁰ At 825.

¹³¹ "The working interest is the right to exploit the oil and gas in the leased land. Working interest owners are entitled to a proportionate share of profits from the oil extraction but are responsible for paying the costs of that extraction. A grant of 100% of the working interest gives the lessee the exclusive right to exploit the minerals in the land." (At 825) There was also a problem with the "net revenue interest," but to simplify the discussion we can ignore that.

would terminate. Strata paid nothing for the option. Mercury warranted that it owned the entire working interest, when, in fact, it did not. Strata went ahead with the drilling and sued Mercury for its damages—the revenues lost because it did not have the entire working interest.

Mercury argued that this was only a unilateral contract and could be accepted only by performance. Prior to performance it was revocable. Because Strata learned of the error before it began drilling on this tract, Mercury argued, Mercury was free to revoke. Under Restatement Second §45, partial performance by Strata would have made the unilateral agreement enforceable, but Strata’s drilling on this tract would have been too late. The court distinguished the partial performance theory from promissory estoppel, in which the action or forbearance rendering the offer irrevocable need not be the initiation of performance under the contract. The court cited *Drennan*, as well as Restatement Sections 90 and 87(2), in arguing that the elements of promissory estoppel made Mercury’s offer irrevocable. Strata’s action in reliance upon the offer, the court held, was to commence drilling on one of the adjacent tracts. The rationale for this was that the tracts were from the same geologic formation and evidence from one test drilling would indicate the likely productivity of the Mercury tract; drilling a wildcat well was risky and expensive (over \$600,000) and it might not have been undertaken but for the Mercury farmout. Hence, “Strata’s reliance served as a consideration substitute for the option contract, which in turn made the underlying unilateral contract irrevocable and unmodifiable for the time allotted by the option.”¹³² This is the clearest extension of the *Drennan* rule outside the construction context.

*Roel Const. Co., Inc. v. Fladeboe Automotive Group, Inc.*¹³³ involved a construction contract, but it presented a very different problem and *Drennan* played a very different role. The owner was a private firm and the procurement mechanism was far from a competitive sealed bid. The contract was for the construction of an automobile showroom and the dispute was between the dealership and the general contractor (Roel). “The parties entered into a form contract requiring the contractor to perform the work for its cost plus a contractor’s fee. The contract specified a guaranteed maximum price. But it also contained a specially inserted provision allowing the contractor to ‘re-bid’ the project after the plans were complete.”¹³⁴ “The new paragraph was entitled, ‘GUARANTEED MAXIMUM PRICE TO BE DETERMINED.’ It provided, ‘Owner and Contractor agree that the plans for the project are incomplete and will be re-bid at completion of the permit set. The GMP shall be adjusted accordingly by change order for any deletions or additions to the scope of the work.’”¹³⁵

The dealership became dissatisfied with Roel’s performance. It stopped paying and found a replacement GC. In the meantime, Roel submitted a rebid of \$1.2 million.

¹³² At 829.

¹³³ Not Reported in Cal.Rptr.3d, 2006 WL 3354013 (Cal.App. 4 Dist.).

¹³⁴ At 1.

¹³⁵ “The plans’ architectural drawings were only 60 to 70 percent complete. Their structural drawings were approximately 50 percent complete. The plans lacked any foundational, mechanical, electrical, or plumbing drawings.” At 2.

Roel sued for, among other things, the lost profits from being deprived of the opportunity to re-bid. It won on the issue of breach, but lost on this element of damages.

The rebid provision suggests the contractor had the duty to begin work based on the preliminary plans; the dealership had the duty to pay for that work and allow the contractor to submit a rebid based on the completed plans. At that point, the contract would simply be discharged by performance, subject to the formation of a new contract at a new price if the dealership accepted the rebid. The rebid provision does not suggest the dealership was bound to accept any reasonable rebid, regardless of price, as the contractor claims. Nor does it suggest the contractor could earn its entire contractor's fee by merely submitting the rebid.¹³⁶

Drennan's role was to provide support for the notion that the contractual right to rebid did not support the GC's claim to lost profits. "No reasonable probability exists the contractor would have earned its contractor's fee. The contract did not require the dealership to accept the contractor's rebid. The term "re-bid," like the term "bid," implies an offer. (See *Drennan v. Star Paving Co.* (1958) 51 Cal.2d 409, 413, 333 P.2d 757 [bid is an "offer" or "promise to perform"]) . . . Thus, while the contractor had the right to begin work on the project and *submit* a rebid upon completion of the plans, the dealership retained the right to *reject* the rebid."¹³⁷ Thus, rather than creating an obligation as Traynor had, here *Drennan's* role is to negate the obligation. A rebid is only an offer and, according to this court, there is no duty to accept it.

B. Section 87(2)

Drennan begat Restatement Second §87(2). "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice." The irrevocable construction bid cases get along just fine without it. Only five of these cases even mentioned that Section.¹³⁸ Of the five, three found an agreement,¹³⁹ and two did not.¹⁴⁰ On the other hand, §90 was mentioned in about 2/3 of the cases. Whether or not one agrees with *Drennan*, it is clear that the courts have found §90 adequate to deal with the problem.¹⁴¹ The innovation has been a dud, even on its home turf.

It hasn't fared any better elsewhere. Only a few cases outside the construction bidding context even consider 87(2), and in even fewer is it successful. Of the 13, cases

¹³⁶ At 9.

¹³⁷ At 8. (emphasis in original)

¹³⁸ Three of these cited to its predecessor, Section 89(b) of the Draft Restatement.

¹³⁹ *Loranger Const. Corp. v. E. F. Hauserman Co.* 384 N.E.2d 176; *Ferrer v. Taft Structurals, Inc.* 587 P.2d 177; *Arango Const. Co. v. Success Roofing, Inc.* 730 P.2d 720.

¹⁴⁰ *Mitchell v. Siqueiros* 582 P.2d 1074; *Pavel Enterprises, Inc. v. A.S. Johnson Co., Inc.* 674 A.2d 521.

¹⁴¹ Four of the five cited §90 as well.

the plaintiff succeeded in only four. The aforementioned *Strata* case is one. The others are *Dankrag, Ltd. v. International Terminal Operating Co.*,¹⁴² *Guckenberger v. Boston University*,¹⁴³ and *In re Donovan's Third Case*.¹⁴⁴ In the first of these, the cost of shipping goods turned out to be much greater than the carrier had anticipated. It tried to get out of the contract by arguing mutual mistake. The court rejected this defense and found that there was an enforceable contract, a perfectly routine result with no need to call upon §87(2). The court tacked on a footnote invoking it: “The doctrine of promissory estoppel also provides authority for the Court’s conclusion that ITO was bound to perform at the offered rate of \$15.75 per long ton, since the CARIB EVE had proceeded up river to Albany in reliance, at least in part, on ITO’s offer.”

In *Guckenberger*, students at Boston University with learning disabilities sued under the Americans with Disabilities Act, claiming that the school had reneged on certain promises to them. The court cited the precursor to §87(2)¹⁴⁵ finding that the school had promised to accommodate students with learning disabilities and had failed to adequately do so. One such disability was a “history of difficulty with foreign language learning.”¹⁴⁶ The students’ reasonable reliance on the school’s promises had created a contract and the university’s failure to honor the agreement entitled the student to damages.¹⁴⁷

Finally, *Donovan* concerned a lump sum settlement of a disability claim with an insurer (Liberty). Donovan withdrew his appeal of a denial of a finding of total disability and on the same day an agreement to pay him a lump sum of \$50,000 was memorialized in a letter. The lump sum payment had to be approved by a state agency, the Department of Industrial Accidents (DIA). Before it gave its approval, Donovan was hospitalized (on unrelated grounds) and died. All the paperwork had been done for the lump sum payment, save a signature by the insurer’s counsel. He refused to sign and Liberty refused to pay. The DIA and the court concluded that Donovan’s withdrawal of his appeal was induced by the promise to pay the lump sum. “This interrelationship of Liberty’s offer and the withdrawal of the appeal is well supported in the record by the July 16, 1997, letter of Donovan’s counsel to Liberty, which confirmed the receipt of the offer and at the same time indicated “[t]he employee [ac]cepts that offer subject to approval of the [DIA], and ... will withdraw the appeal and request lump sum

¹⁴² 729 F. Supp. 360.

¹⁴³ 974 F.Supp. 106, 121 Ed. Law Rep. 541, 7 A.D.

¹⁴⁴ 58 Mass. App. Ct. 566

¹⁴⁵ *Restatement (Second) of Contracts*, § 89B(2) (1973)

¹⁴⁶ At 151.

¹⁴⁷ “BU failed to demonstrate that it met its duty of seeking appropriate reasonable accommodations for learning disabled students with difficulty in learning foreign languages by considering alternative means and coming to a rationally justifiable conclusion that the available alternative (i.e., a course substitution) would lower academic standards or require substantial program alteration. Rather, the university simply relied on the status quo as the rationale for refusing to consider seriously a reasonable request for modification of its century-old degree requirements.” At 115.

proceedings.”¹⁴⁸ Since Donovan’s withdrawal was made in reliance on Liberty’s promise, the court invoked §89B(2) and found the contract valid.¹⁴⁹

These few positive citations don’t amount to much—one win every nine years. And, even then, the court could probably have gotten to the same result without relying on §87(2) at all. The more numerous cases rejecting §87(2) generally conclude that there was not substantial reliance or that denying the existence of a contract would not result in an injustice. To give the flavor of these opinions I will summarize two. In *2949 Inc. v. McCorkle*,¹⁵⁰ the dispute centered on the interpretation of a pre-printed form contract with an irrevocability clause that the plaintiff, a sign company, had presented to a client. The court held that there was no consideration for the irrevocability clause and, therefore, the only way that the clause would be enforceable would be to find that the plaintiff had relied to its detriment. The court distinguished §87(2) from §90, noting that the former included the modifier “substantial,” while the latter did not.¹⁵¹ The plaintiff’s asserted reliance was performance of a credit check and a reference check, and an examination of the order. This the court found to be insubstantial and it therefore granted the defendant buyer’s motion for summary judgment.

The facts in the second case are more complicated so I will simplify them somewhat.¹⁵² In essence, in 1989 the five top managers of a bank held 39% of the bank’s shares and were granted an option to buy the remaining 61% within one year of the death of the majority shareholder. This turned out to be a valuable option; when the dispute arose the option price was about \$1.9 million and its value was about \$4.5 million. The agreement was for “One Dollar (\$1.00) and other valuable consideration,” but no monetary consideration was actually paid. Years later, after the majority shareholder’s death, the trustee for the majority shareholder repudiated the option agreement, saying that there had been no consideration. At that point the managers attempted to pay the \$1, but the proffer was rejected and the court held that it was too late.¹⁵³ The court then turned to the estoppel arguments. There was some evidence that the managers had been promised that they would have the option if they continued to work at the bank during the majority owner’s lifetime. Even if this were so, the court held, the plaintiffs would still lose:

[D]efendants argue that the plaintiffs cannot establish that they relied on the alleged promises to their detriment. They contend that the plaintiffs *were adequately compensated for their services as employees* of the bank, and

¹⁴⁸ At 390.

¹⁴⁹ Why a court in 2003 chooses to cite the tentative draft of 1973 is beyond me.

¹⁵⁰ Not Reported in P.3d, 127 Wash.App. 1039, 2005 WL 1303491 (Wash.App. Div. 1), 58 UCC Rep.Serv.2d 308

¹⁵¹ “The requirement for reliance of a substantial character is a higher standard than that found in the Restatement’s promissory estoppel rule, which does not specify the level of action or forbearance required to establish detrimental reliance.” At

¹⁵² *First Nat. Bankshares of Beloit, Inc. v. Geisel*, 853 F.Supp. 1344.

¹⁵³ Apparently, had the dollar been paid initially, this court would have found adequate consideration. At 1351.

therefore evidence is lacking that any of the individual plaintiffs detrimentally relied on the promises allegedly made....

The court agrees that the evidence advanced by the plaintiffs does not demonstrate detrimental reliance on the part of the plaintiffs “of a substantial character.” See *Restatement (Second) of Contracts* § 87(2). Hence the refusal of the court to enforce the alleged promise would not result in injustice. The plaintiffs *do not dispute that they were very adequately compensated for the years they remained employees of the bank*. Some of the plaintiffs testified by deposition that they had declined to pursue other opportunities based upon their understanding that they would someday have the opportunity to control the bank. However, this is insufficient evidence as a matter of law to support an inference that the plaintiffs substantially relied on the alleged promises and as a result suffered detriment. See *Restatement (Second) of Contracts* § 87(2) cmt. e.¹⁵⁴

The court did not indicate how it determined (on a summary judgment motion) that the managers had received adequate compensation already and that either the \$2.6 million that the managers would have split was not substantial, or that depriving them of those shares would not be an injustice. I would have thought that a bonus averaging half a million dollars per person should have crossed the substantiality hurdle. But that is not my point. The decision is an indication of the futility of relying on §87(2) as a substitute for consideration.

VII. Conclusions

Contracts casebooks and treatises treat *Drennan* as if it were a Really Big Deal. Traynor invented something new, an irrevocable option, albeit one tempered by concerns about reliance and injustice, that dramatically altered the offer-acceptance framework. It didn’t happen. Rather than revolutionizing contract doctrine writ large, it has been confined to its facts—disputes between general contractors and subs. In practice its domain has been even narrower, GC-sub disputes in which the owner is a public entity.

Given its practical irrelevance, the question is: why *Drennan’s* favored place in the contract doctrine universe? Part of the answer most likely stems from the drama of one giant (Traynor) taking on another (Hand). Part, no doubt is the result of history—at that time contracts scholars were looking for vehicles to advance the promissory estoppel alternative to consideration. And part of the answer is that, whatever its warts, *Drennan* is fun to teach.

I think there is a deeper problem. The authors of casebooks and treatises try to distill abstract principles from the case law. Their focus is on decided cases. The context, particularly any regulatory constraints on the parties, is given little attention. Traynor’s treatment of contract law and the naming statute in *Holder* as being from two unrelated bodies of law is a striking example of the disconnect. And there is even less

¹⁵⁴ At 1356. (Emphasis added)

attention to what parties actually do. To be sure, a number of casebooks include a brief discussion of Shultz’s study of the GC-sub relationship in the middle of the last century.¹⁵⁵ But none emphasize the limited scope of that project—public projects only. I do not mean to suggest that litigators should be given free rein to introduce context arguments into every dispute. But there is no reason for scholars to so restrict their inquiry. If we are going to restate contract law, we might as well restate the law that parties actually use, rather than attempting to generalize from context-specific decisions in which the context has been excised.

¹⁵⁵ Cite.