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Kai-Niklas A. Schneider
University of Baltimore School of Law

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MARYLAND'S APPLICATION OF PROMISSORY ESTOPPEL IN CONSTRUCTION INDUSTRY BIDDING DISPUTES: ELIMINATING FURTHER CONFUSION

I. INTRODUCTION

The relationship between general contractors and subcontractors in the construction industry bidding process¹ has long presented a unique problem to the law of contracts.² In any multi-level bidding system, such as construction projects, parties must rely on each other's estimates in order to accurately submit bids.³ This places parties at risk when an error is discovered or one side refuses to perform and inevitably leads to one party bearing a financial loss.⁴ Recognizing these risks and seeking to prevent the resulting injustice, courts apply promissory estoppel,⁵ among other methods,⁶ to the construction bidding process.⁷ This doctrine has the potential to protect, (1) the general contractor from subcontractors attempting to escape a quoted price,⁸ and (2) subcontractors from general contractors attempting to shop for lower estimates after the main contract has been awarded.⁹

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1. See *infra* Part II.A.
 2. JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS § 28.01, at 620 (5th ed. 1994).
 3. *Id.* at 623.
 4. See *infra* Part II.B.
 5. Although the term "promissory estoppel" has frequently been labeled a misnomer, it is widely used to describe the theory that protects unbargained-for reliance. Despite Maryland courts' use of the term "detrimental reliance," this Comment will adhere to the more widely used term "promissory estoppel." *E.g.*, *Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 146 n.1, 674 A.2d 521, 523 n.1 (1996) (referring to the theory of promissory estoppel as detrimental reliance).
 6. See *infra* Part IV (discussing alternatives to promissory estoppel in solving bid disputes).
 7. See, *e.g.*, *Drennan v. Star Paving Co.*, 333 P.2d 757, 759 (Cal. 1958) (applying promissory estoppel to make a subcontractor's bid irrevocable after discovery of an error). See also *infra* Part III.B for a discussion of the application of promissory estoppel to the construction industry bidding process.
 8. See *infra* note 186 and accompanying text.
 9. See Thomas P. Lambert, Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L. REV. 389, 405-09 (1965) (noting that promissory estoppel can be used to bind the general contractor to the subcontractor, not just vice versa); see also *infra* Part III.B.3.b.

Although the Court of Appeals of Maryland has adopted the doctrine of promissory estoppel,¹⁰ its application in construction bidding disputes remains unclear.¹¹ By misunderstanding the rationale behind the doctrine's use and creating additional requirements,¹² the court ignored cases interpreting the standard and inappropriately applied the *Restatement (Second) of Contracts*.¹³

This Comment analyzes Maryland's application of promissory estoppel to construction bidding disputes between general contractors and subcontractors.¹⁴ In order to fully understand and analyze the correct use of promissory estoppel in construction bidding, Part II of this Comment examines the bidding process, its unique features, the actors involved, and the difficulties the process poses to contract law.¹⁵ Part III addresses the emergence and evolution of promissory estoppel,¹⁶ both nationally and in Maryland, and its more recent application to the construction bidding scenario.¹⁷ In addition, Part III analyzes Maryland's misinterpretation of the *Restatement*¹⁸ and provides suggestions as to how the Court of Appeals of Maryland can rectify the current situation.¹⁹ Part IV explores the viability of potential alternatives in establishing a balance between the rights and needs of general contractors and subcontractors.²⁰ This Comment concludes by suggesting that the court of appeals clarify its interpretation of promissory estoppel, thereby permitting the doctrine's use as a solution to the construction industry's bidding dilemma.²¹

II. CONSTRUCTION INDUSTRY BIDDING

As the construction industry employs a unique bidding process prior to contract formation, it continuously challenges contract law to respond with innovative solutions.²² Most disputes involving bidding arise because of a mistake in a bid or an attempt by a general contrac-

10. See *infra* Part III.A.4.

11. See *infra* notes 285-91 and accompanying text.

12. See *infra* Part III.C.2.

13. See *infra* Part III.C.2.

14. See *infra* Part II.A (discussion the unique construction industry bidding process).

15. See *infra* Part II.

16. See *infra* Part III.A.

17. See *infra* Part III.B.

18. See *infra* Part III.C.

19. See *infra* Part III.C.2.

20. See *infra* Part IV.

21. See *infra* Part V.

22. SWEET, *supra* note 2, at 620.

tor to "bid shop."²³ The most volatile area of this process is the relationship between the general contractor, who manages the project, and the subcontractors, who complete the parts of the project in which they specialize.²⁴ This relationship has led subcontracting to be labeled the "legal Achilles' heel of the Construction Process."²⁵ Nevertheless, if functioning properly, subcontracting can reduce the costs of construction by promoting competition among general contractors and subcontractors, and increase the efficiency of the process through specialization.²⁶

A. *The Unique Bidding Process*

In the construction industry, contract formation usually occurs through the bidding process.²⁷ In virtually all construction projects, the following three parties are involved: (1) the landowner, project developer or government agency who requests parties to submit estimates for the construction of the project; (2) the general contractor, who submits bids on the construction of the entire project; and (3) the subcontractors, who submit estimates to the general contractor on a particular part of the project in which they specialize.²⁸

Given this arrangement, two levels of bids are usually submitted on all construction projects.²⁹ At the upper level, the landowner, project

23. BRIAN M. SAMUELS, CONSTRUCTION LAW §§ 6.3-4, at 69-70 (1996) (giving a brief description of mistakes and bid shopping in construction industry bidding). For a definition of "bid shopping," see *infra* note 45 and accompanying text.

24. *See id.* § 6.2, at 66.

25. SWEET, *supra* note 2, at 620.

26. *See id.* (stating that the principal advantage of the subcontracting system is the resulting improvement in efficiency).

27. SAMUELS, *supra* note 23, at 66. The award of the contract constitutes the acceptance of the offer and establishes contractual rights between the owner or solicitor of bids and the successful general contractor. *Id.* at 68. The prices submitted by the subcontractors and other suppliers, which were relied upon by the general contractor in computing the main bid, are irrevocable once acceptance occurs. *Id.* This contrasts with an earlier stage in the bidding process where a subcontractor's bid may be irrevocable, not because the main bid was accepted, but because the general contractor relied on the bid under the doctrine of promissory estoppel. *See infra* notes 193-213 and accompanying text.

28. Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 533-34, 369 A.2d 1017, 1020-21 (1977) (citing John B. Gaides, *The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel*, 10 WM. & MARY L. REV. 212 (1968)).

29. Michael L. Closen & Donald G. Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories*

developer, or government agency solicits bids from general contractors.³⁰ This type of bid includes the estimated cost for the entire project.³¹ At the second level, subcontractors submit bids to the general contractors.³² These bids contain price estimates for the subcontractor's performance of a specific sub-part of the project paralleling the subcontractor's area of expertise.³³

Both levels of bid submission are generally initiated when, at the upper level, the landowner, project developer, or government agency invites or solicits bids for a project.³⁴ The method of bid invitation or solicitation may vary depending on the nature of the project. For example, in Maryland, government agency project bids are solicited by public notice or invitations for bids,³⁵ while in non-public projects, owners and developers use whatever method of communication is available.³⁶

to the Relations Between General Contractors and Subcontractors, 13 J. MARSHALL L. REV. 565, 568 (1980).

30. *Id.* General contractors, also known as prime contractors, do not actually perform the work, "but rather coordinate and supervise the project and the work of each individual subcontractor and supplier." *Id.*
31. *Id.* However, sometimes large projects are broken down into individual segments. *Id.*
32. *Id.*
33. See SWEET, *supra* note 2, at 623 (discussing the common use of sub-bids in the "mechanical specialty trades").
34. *Id.* In the private sector, most invitations to potential bidders contain a statement that the owner reserves the right to accept or reject any bid at its sole discretion, thereby protecting the owner against liability for improper rejection of a bid. SAMUELS, *supra* note 23, at 66.
35. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(c) (1998). This section states:
- (1) A unit shall give public notice of an invitation for bids before bid opening in accordance with this subsection.
 - (2) A unit shall give reasonable notice that shall be at least 10 days before the bid opening.
 - (3) The unit shall publish notice in the Contract Weekly at least 20 days before bid opening if: (i) the procurement officer reasonably expects bid prices to exceed \$25,000
 - (4) In addition to any notice required under this subsection, a unit may publish notice of an invitation for bids: (i) in the Contract Weekly . . . (ii) on a bid board; or (iii) in a newspaper, periodical, or trade journal.
- Id.*
36. See Closen & Weiland, *supra* note 29, at 569 (stating that owners and developers use advertisements, trade newspapers, magazines, individual invitations to known contractors, and word-of-mouth to solicit bids).

Once notice of the project occurs, interested subcontractors – either on their own initiative or at a general contractor’s request – prepare an estimate on a specific part of the project and then submit a bid to one or many general contractors bidding on the project.³⁷ Commonly, interested subcontractors are required to submit written, sealed bids,³⁸ which must arrive at a specified time. The subcontractors’ original bids are followed by price quotes, which are usually relayed only a few hours before the main bid for the project is due.³⁹ The general contractor evaluates the many bids it receives from the subcontractors for every part of the project and compiles a total bid for the soliciting party based on the individual quotes.⁴⁰ After receiving bids from a number of general contractors, the party soliciting bids awards the contract to the lowest reputable bidder.⁴¹

B. Bid Shopping and Bid Peddling

Common law left the general contractor and subcontractor unprotected from practices detrimental to both parties,⁴² as both remained uncommitted until the general contractor’s formal acceptance of the sub-bid.⁴³ These practices included “bid shopping” and “bid peddling.”⁴⁴ Bid shopping occurs when the general contractor uses a low bid already received to induce other subcontractors into submitting lower bids,⁴⁵ while bid peddling occurs when subcontractors attempt

37. SAMUELS, *supra* note 23, at 67.

38. *See, e.g.*, Pavel Enters., Inc. v. A.S. Johnson Co., 342 Md. 143, 162, 674 A.2d 521, 530 (1996) (stating that an offer under seal is a substitute for consideration to make an offer firm).

39. SAMUELS, *supra* note 23, at 67. To prevent a general contractor from using a quoted price to negotiate lower sub-bids, subcontractors submit their bids as late as practicable. *Id.* This last minute rush is the reason for many mistakes by both general contractors and subcontractors in the calculation of bids. SWEET, *supra* note 2, at 625.

40. SWEET, *supra* note 2, at 623-24.

41. SAMUELS, *supra* note 23, at 68. Factors considered in awarding a contract, other than the price of the bid, are the reputation of the lowest bidder and its ability to perform quality work. *Id.*

42. *See, e.g.*, *infra* notes 45-46 and accompanying text.

43. Lambert, *supra* note 9, at 389 (citing 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 22-94 (rev. ed. 1963); *see also infra* notes 158-60 and accompanying text).

44. Lambert, *supra* note 9, at 389.

45. *Id.* at 394. These post-award negotiation tactics are often referred to as “bid chopping” and “bid chiseling” and may even be used before the main bid is submitted. SWEET, *supra* note 2, at 625.

to under bid the submitted prices of known competitors in order to obtain the subcontract from the general contractor.⁴⁶

Bid shopping and bid peddling have long been recognized as unethical by construction industry trade organizations, as these practices undermined the public benefits of the bidding process.⁴⁷ Although considered unethical, these practices remain common and have detrimental effects.⁴⁸ The consequences of these practices can be quite severe to the owner or developer of a project, the general contractor, the subcontractors, and the public.⁴⁹ For example, "[w]hen successful this practice places a profit squeeze on subcontractors, impairing their incentive and ability to perform to their best"⁵⁰ Therefore, it is understandable why a remedy such as promissory estoppel⁵¹ is necessary in such an environment to inhibit these harmful practices and bring stability and predictability to the process.⁵²

III. PROMISSORY ESTOPPEL

The doctrine of promissory estoppel was created to eliminate any injustice that may result when a party relies on a promise unsupported by a binding contract.⁵³ Courts often perceive a promisor's refusal to perform as an injustice, particularly when a person incurs substantial

46. Lambert, *supra* note 9, at 394.

47. See SAMUELS, *supra* note 23, at 69. These practices are considered unethical to the point that if a general contractor participates in bid shopping, it may lose its right to hold the subcontractor to its bid. This is generally the remedy given as there is no judicial remedy to date. *Id.*

48. See SWEET, *supra* note 2, at 625.

49. *Id.* Subcontractors assert that other subcontractors who bid peddle save considerable expenses by not preparing their own bids and, therefore, are at a distinct advantage. *Id.* The practice of bid shopping compels subcontractors to wait until the last minute to submit their sub-bids to the general contractor, which arguably is the cause for many mistakes. *Id.*; see also *supra* note 39. Also, because subcontractors feel they must pad, or "puff," their bids to be in a better position for post-award negotiations, an inflated bid is often relied upon by the general contractor. SWEET, *supra* note 2, at 625. This has the end result of raising the cost of the project for the owner or the public. *Id.*

50. Southern Cal. Acoustics Co. v. C.V. Holder, Inc., 456 P.2d 975, 981 n.7 (Cal. 1969) (noting that the purpose of the California statute at issue was to protect the public and subcontractors from the results of bid shopping and bid peddling subsequent to the award of a contract).

51. See *infra* Part III for a discussion of promissory estoppel.

52. See *infra* Part III.B.2.

53. See generally L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936) (discussing the reason for protection of the reliance interest).

expense in reliance on a promise.⁵⁴ Instead of denying enforcement for lack of consideration, courts enforce the promise if necessary to avoid injury to the party who justifiably relied on the promise by invoking recovery under the doctrine of promissory estoppel.⁵⁵

This doctrine has been described as "an attempt by the courts to keep remedies abreast of increased moral consciousness of honest and fair representations in all business dealings."⁵⁶ The flexibility of the doctrine is invaluable in the unique situation of the construction industry bidding process⁵⁷ and can, if properly applied, be used as a method to protect both general contractors and subcontractors against risks.⁵⁸

A. *The Doctrine's Origins*

Derived from several court opinions that did not adhere to the traditional contract requirement of consideration,⁵⁹ the doctrine of promissory estoppel is one of the most significant developments in contract law of the twentieth century.⁶⁰ In order to avoid the injustice that would result by application of traditional contract theory, modern courts created the legal fiction of promissory estoppel.⁶¹

54. See Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 848-49 (1990).

55. *Id.* at 848; cf. GRANT GILMORE, *THE DEATH OF CONTRACT* § 4, at 88 (1974) (concluding that the use of promissory estoppel as a substitute for the orthodox contract law requirement of bargained-for consideration has led to the death of the contract).

56. *People's Nat'l Bank of Little Rock v. Linebarger Constr. Co.*, 240 S.W.2d 12, 16 (Ark. 1951) (holding that the defendant was estopped from denying promissory representations contained in a letter to a bank).

57. See *supra* Part II.A.

58. Janine McPeters Murphy, *Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases*, 63 N.C. L. REV. 387, 394-95 (1985); see also *infra* Part III.B.3.b.

59. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 6-1 (3d ed. 1987) (citing Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents*, 50 MICH. L. REV. 639 (1952)).

60. See generally Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981) (noting the proliferation of promissory estoppel in the twentieth century).

61. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1196 (1998).

1. Historical Roots

Promissory estoppel has historical roots in both the common-law action of *assumpsit*⁶² and early equity decisions.⁶³ Its beginnings followed the development of the doctrine of equitable estoppel.⁶⁴ Nonetheless, these two theories are distinctly different.⁶⁵ Traditionally, equitable estoppel has been limited to defensive uses⁶⁶ and invoked only where one party falsely represented a fact and another party suffered injury as a result of relying on that false representation.⁶⁷ In such cases, courts following this doctrine bar the party who made the false representation from contradicting it.⁶⁸ As this doctrine did not apply solely by a promisee's reliance on a promise, but rather by reliance on a fraudulently made promise,⁶⁹ a need for the doctrine of promissory estoppel arose.⁷⁰

62. See SAMUEL J. STOLJAR, *A HISTORY OF CONTRACT AT COMMON LAW* 37-38 (1975) (stating that at early common law, when a person incurred injury by justifiably relying on another, *assumpsit* became the prime action for enforcing the informal contract).

63. See James Barr Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14-15 (1888) (explaining that equity gave relief to a plaintiff who incurred detriment on the faith of a defendant's promise).

64. CALAMARI & PERILLO, *supra* note 59, § 6-2. The doctrine of equitable estoppel precludes a person by his act, conduct, or silence, from asserting a right he normally had, when it is his duty to act. BLACK'S LAW DICTIONARY 538 (6th ed. 1990).

65. See CALAMARI & PERILLO, *supra* note 59, § 6-2.

66. Robert Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343, 377-78 (1969).

67. See *Clark v. Nat'l Aid Life Ass'n*, 57 P.2d 832 (Okla. 1936). There, the plaintiff argued equitable estoppel to estop the defendant from denying the existence of an insurance contract. *Id.* at 833. The defendant responded arguing that because plaintiff was in poor health at the time of contracting, and a valid contract was conditioned on plaintiff's certification of good health, there was no valid contract. *Id.* at 834. The defendant's agent, however, falsely represented to the plaintiff that the health certification provision did not apply. *Id.* at 833. The plaintiff, in good faith, relied upon the agent's misrepresentation in transferring his insurance to the defendant, resulting in estoppel of defendant's denial of the contract. *Id.* at 834.

68. See *id.* at 835.

69. See *Barnett v. Walfolk*, 140 S.E.2d 466, 472 (W. Va. 1965) (recognizing that "there can be no estoppel in the 'absence of fraud or intentional wrong' on the part of the person to be estopped") (quoting *Spradling v. Spradling*, 190 S.E. 537, 541 (W. Va. 1937)).

70. See generally Henderson, *supra* note 66.

2. The Birth of Promissory Estoppel

Originally, a promise was unenforceable absent consideration, even if the promisee relied on the promise detrimentally.⁷¹ Courts argued that the presence of consideration was necessary to ensure that a person made the promise after sufficient deliberation.⁷² Courts began, however, to make specific exceptions for certain donative promises,⁷³ as they recognized the reliance interest needed protection.⁷⁴ Donative promises were often enforced as long as “the underlying transaction could be artificially construed as a bargain.”⁷⁵ Nonetheless, despite these exceptions, unbargained for promises were generally unenforceable.⁷⁶

3. Evolution of Promissory Estoppel in the Restatements of Contracts

a. *The Promulgation of Section 90 by Restatement (First)*

The doctrine of promissory estoppel was formally introduced into contract law by Professor Samuel Williston through the creation of the *Restatement (First) of Contracts* (“*Restatement (First)*”).⁷⁷ Notwithstanding the emphasis of the *Restatement (First)* on the bargain theory of consideration,⁷⁸ its section 90 changed contract law to allow unbargained-for

71. See CALAMARI & PERILLO, *supra* note 59, § 6-1. Generally, the presence of consideration was a necessity to valid contract formation to “insure that the promise was made with sufficient deliberation.” *Id.*

72. See *id.*

73. See *id.* § 6-2; see also Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 304 (1992). These exceptions were created to avoid injustice for promises made in contemplation of marriage, promises made between relatives, gratuitous promises to give land, and charitable subscriptions. See CALAMARI & PERILLO, *supra* note 59, § 6-2.

74. Fuller & Perdue, *supra* note 53, at 52. The promisee should be afforded protection under the law where his position changed based on reliance of the promise. *Id.*

75. Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 14 (1979) (citing *Siegel v. Spear & Co.*, 138 N.E. 414 (N.Y. 1923)).

76. *Id.*

77. Section 90 provided: “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

78. See Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 657 (1982) (noting that the *Restatement (First)* adhered to the bargain theory in terms, but limited it in section 90).

promises to be binding.⁷⁹ However, the section's authors intended it to enforce relied upon donative promises, rather than promises in a commercial context.⁸⁰ Section 90's definition of promissory estoppel required a promise which the promisor should reasonably expect to lead to the promisee's act or forbearance.⁸¹ Not only must there be a promise, but the reliance of the promisee must have been of a "definite and substantial character."⁸²

b. The Revision of Section 90 and Creation of Section 87 by the Restatement (Second) of Contracts

As a result of a number of decisions concerning promissory estoppel and the confusion and problems created,⁸³ section 90 was reformulated by the promulgation of the *Restatement (Second) of Contracts* ("Restatement (Second)").⁸⁴ The requirement in the *Restatement (First)* that the action in reliance be of "definite and substantial character" was eliminated in the *Restatement (Second)*.⁸⁵ Language was added that permitted flexibility of remedy by enforcing a promise reasonably relied upon to the extent of the reliance.⁸⁶ Therefore, although section

79. See Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 656 (1933) (noting that section 90 is notorious "as representing some modification of the ancient rules of consideration").

80. GILMORE, *supra* note 55, at 73.

81. *Id.*

82. *Id.*

83. See *infra* Part III.B.1; see also RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932). In order to meet this requirement the promise must be one that contemplated and induced a particular act in reliance. *Id.*

84. The new section of the *Restatement (Second)* entitled "Promise Reasonably Inducing Action or Forbearance" states:

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

85. *Id.* However, comment b to section 90 states that the definite and substantial nature of the reliance remains one of the factors to be considered and, although not needed in charitable subscription cases, must be present in cases of firm offers and guarantees. *Id.*, cmt. b.

86. See CALAMARI & PERILLO, *supra* note 59, § 6-6. The *Restatement (Second)* thus provides not only for flexibility as to the substantive doctrine itself but also for a flexible approach regarding remedies. See *id.*; see also *id.* § 6-1.

90 originally applied only to enforce gratuitous promises,⁸⁷ the broadened scope of section 90 allowed courts to apply promissory estoppel to other situations.⁸⁸

In addition to changing section 90, the American Law Institute, in response to a prominent construction case⁸⁹ and seeking to make promissory estoppel more readily applicable to the construction bidding process, created section 87(2).⁹⁰ This new section, entitled the "option contract,"⁹¹ allowed promissory estoppel to apply to reliance on unaccepted offers where the drafters believed application of section 90 would be inappropriate.⁹² Section 87(2) provides that reli-

87. Fuller & Perdue, *supra* note 53, at 52. Gratuitous promises are defined "as [] promise[s] not supported by consideration." BLACK'S LAW DICTIONARY 1229 (7th ed. 1999).

88. *See, e.g.*, Universal Computer Sys., Inc. v. Med. Servs. Ass'n, 628 F.2d 820, 824-25 (3d Cir. 1980) (holding that a promise by an insurer's employee to pick up a bid proposal, which the company relied upon to its detriment, was enforceable on the basis of promissory estoppel); Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1027 (5th Cir. 1980) (applying promissory estoppel to estop a corporation from denying the promise to pay a joint venture corporation pursuant to a promissory note). *But see* James Baird Co. v. Gimbel Bros., 64 F.2d 344, 346 (2d Cir. 1933) (holding that a merchant was not liable for damages under promissory estoppel for withdrawing an offer to a general contractor of prices for linoleum after the general contractor had made a bid on the basis of the prices offered).

89. *See infra* Part III.B.2.

90. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87 (1979). This section states:
(1) An offer is binding as an option contract if it (a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange in fair terms within a reasonable time; or (b) is made irrevocable by statute. (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.

Id.

91. *Id.*

92. RESTATEMENT (SECOND) OF CONTRACTS § 87, cmt. e (1981) (stating that section 87 extends the application of section 90 to reliance on an unaccepted offer with qualifications where it would be inappropriate to apply section 90); *see also* James Baird Co., 64 F.2d at 346 (refusing to apply section 90 of the *Restatement (First)* to a construction bidding dispute). Section 87(2) was, in essence, a codification of the holding of *Drennan v. Star Paving Co.* *See infra* notes 164-88 and accompanying text. In fact, the situation in *Drennan* was used as an illustration in the comments to section 87(2) of the *Restatement (Second)*. RESTATEMENT (SECOND) OF CONTRACTS § 87, illus. 6 (1981).

ance on an offer may create an option contract that precludes revocation even if the offeror has not actually promised to keep the offer open.⁹³ Thus, the subcontractor's bid contains a subsidiary implied promise to hold the bid open.⁹⁴ Reliance on this implied promise to keep a sub-bid open occurs when the general contractor uses the subcontractor's bid in computing the main bid.⁹⁵ Therefore, this new section creates an exception to the traditional rule that an offeror remains free to revoke an offer absent a bargain to keep the offer open.⁹⁶

c. The Differences Between Sections 90 and 87(2) Limit the Situations Where Each is Applicable

Unlike section 90, the application of section 87(2) requires reliance of a "definite and substantial character."⁹⁷ This level of reliance is similar to that required under the original section 90,⁹⁸ but is not necessary under section 90 of the *Restatement (Second)*.⁹⁹ In addition, while application of section 90 creates an enforceable contract,¹⁰⁰ section 87(2) only makes an offer irrevocable.¹⁰¹ Therefore, a general contractor's reliance on the implied subsidiary promise makes the bid irrevocable, but does not yet create a contract between the subcontractor and the general contractor.¹⁰²

Despite the drafters' intention that section 87(2) replace the use of section 90 in construction bidding cases, few courts have actually ap-

93. RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1979).

94. *See id.*

95. *See id.* This concept results from the marriage of two contract theories: the option contract and promissory estoppel. *See supra* notes 90-92 and accompanying text.

96. *See* RESTATEMENT (SECOND) OF CONTRACTS § 87, Reporter's Note (1979); *see also* Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249, 1261-66 (1996) (discussing the development of section 87(2)).

97. RESTATEMENT (SECOND) OF CONTRACTS § 87 cmt. e. The comment states that under certain circumstances the promisee may have to "undergo substantial expense, or undertake substantial commitments, or forego alternatives, in order to put himself in a position to accept by either promise or performance." *Id.* This reliance must be foreseeable as well as substantial. *Id.*

98. *See supra* notes 81-82 and accompanying text.

99. *See supra* note 85 and accompanying text.

100. *See supra* note 84.

101. *See supra* notes 93-96 and accompanying text.

102. *See supra* notes 93-96 and accompanying text.

plied section 87(2).¹⁰³ Nonetheless, a majority of courts apply the reasoning behind section 87(2) to construction bidding disputes¹⁰⁴ by citing section 90 and the analyses of later case law.¹⁰⁵

4. The Birth of Promissory Estoppel in Maryland

Originally, promissory estoppel was a narrow exception to the general requirement of consideration and applied only in cases dealing with "gratuitous agencies and bailments."¹⁰⁶ The development of promissory estoppel in Maryland mirrors its development nationwide.¹⁰⁷ In 1854, *Gittings v. Mayhew*¹⁰⁸ first addressed the doctrine of promissory estoppel in Maryland. In *Gittings*, a charitable fund incurred advances, expenses, and liabilities as a result of voluntary subscriptions to the fund used to benefit the community for the construction of a building.¹⁰⁹ The court noted in dictum that promises are obligatory, provided the advances, expenses, and liabilities incurred by the fund are authorized by fair and reasonable reliance on the promise.¹¹⁰ The dictum in *Gittings*,¹¹¹ together with a

103. *Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 159, 674 A.2d 521, 529 (1996). Although section 87(2) has been in existence for over 18 years, no court has based a decision on it. Gregory Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 521, 544-46 (1998). In fact, one study has found that only 21 cases even cite section 87(2). *Id.* Although none of these cases rejected the section or referred to it negatively, they failed to rely solely on it in reaching their holdings. *Id.* at 521.

104. *See infra* note 190.

105. *See infra* note 178 and accompanying text.

106. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 680 (1983); *see also Pavel Enters.*, 342 Md. at 164, 674 A.2d at 531-32 (stating that the early cases which applied promissory estoppel mainly involved the enforcement of charitable pledges).

107. *See Jason R. Scherr, The Maryland Survey: 1995-1996*, 56 MD. L. REV. 711, 719 (1997) (discussing the origins of promissory estoppel in Maryland).

108. 6 Md. 113 (1854).

109. *Id.* at 131-32. The term "subscription" is defined as "the affixing [of] one's signature to any document . . . for the purpose . . . of adopting its terms as one's own expressions." BLACK'S LAW DICTIONARY 1427 (6th ed. 1990). In the instant case, the subscription is analogous to a promise.

110. *Id.* at 131-32. The judgment of the lower court upholding the validity of the pledge was reversed on the ground that the plaintiff was not the proper person to bring a claim. *Id.* at 134. The validity of the pledge was only discussed because it was of interest to the community and had been addressed by counsel. *Id.* at 130.

111. *See supra* notes 108-10 and accompanying text.

number of subsequent decisions dealing more directly with the issue of reliance by the court of appeals,¹¹² became the law in Maryland.

Eventually, the court in *Maryland National Bank v. United Jewish Appeal Federation of Greater Washington, Inc.*¹¹³ expressly adopted section 90 of the *Restatement (First)*.¹¹⁴ The court, however, held that the plaintiff did not prove reliance as required by the doctrine of promissory estoppel.¹¹⁵ In that case, an individual pledged \$200,000 to the United Jewish Appeal Federation of Greater Washington, Inc. (UJA), which was never paid.¹¹⁶ The court, in applying the *Restatement (First)*,¹¹⁷ held that the defendant's pledge to a charitable institution was unenforceable as a gratuitous promise, because the UJA had not acted in a "definite and substantial" manner in reliance on the pledge.¹¹⁸ By following the reasoning of earlier Maryland courts, the court of appeals held that the Maryland law regarding the enforcement of charitable pledges and subscriptions to charitable organizations was the same as that expressed in section 90 of the *Restatement (First)*.¹¹⁹

112. 286 Md. 274, 407 A.2d 1130 (1979); see, e.g., *Am. Univ. v. Collins*, 190 Md. 688, 59 A.2d 333 (1948); *Sterling v. Cushwa & Sons*, 170 Md. 226, 183 A. 593 (1936); *Erdman v. Trustees Eutaw Methodist Protestant Church*, 129 Md. 595, 99 A. 793 (1917). For a historical development of this doctrine through these cases, see *Maryland Nat'l Bank*, 286 Md. at 281-84, 407 A.2d at 1134-36.

113. 286 Md. 274, 407 A.2d 1130 (1979).

114. See *supra* note 77 and accompanying text.

115. *Maryland Nat'l Bank*, 286 Md. at 289, 407 A.2d at 1138.

116. *Id.* at 275, 407 A.2d at 1131. At the time of the decedent's death, \$133,500 remained unpaid on his initial pledge. *Id.* at 276, 407 A.2d at 1131.

117. See *supra* note 77 and accompanying text.

118. *Maryland Nat'l Bank*, 286 Md. at 289, 407 A.2d at 1138. The outcome undoubtedly would have been different under section 90 of the *Restatement (Second)*, which eliminated the requirement that the reliance be of a "definite and substantial" character. See *supra* note 85 and accompanying text. The court noted that the UJA made allocations to various beneficiary organizations based upon pledges it received, but did not incur liabilities based on those allocations. *Maryland Nat'l Bank*, 286 Md. at 277, 290, 407 A.2d at 1132, 1138. The decedent's failure to fully pay his pledge did not thwart any allocation by UJA, and they did not change their position in reliance on the subscription. *Id.* at 289, 407 A.2d at 1138. Therefore, the court stated, "it [did] not appear that injustice [could] be avoided only by enforcement of the promise." *Id.* at 290, 407 A.2d at 1138.

119. See *id.* at 281, 407 A.2d at 1134 (discussing *Gittings v. Mayhew*, 6 Md. 113 (1854)); see also *supra* note 77 for the text of the *Restatement (First)*.

Notwithstanding this early adoption of promissory estoppel for application in disputes over charitable pledges,¹²⁰ there remained an initial degree of uncertainty in Maryland as to its specific requirements and its utility in other areas.¹²¹ One case that demonstrates this confusion is *Kiley v. First National Bank of Maryland*.¹²² There, in a suit against a bank for closing a depositors' account, the court held that the depositors had failed to show, under the doctrine of promissory estoppel, sufficient detrimental reliance on the bank's alleged promises not to vary the terms of the account or close it.¹²³ In denying the plaintiffs' remedy, the court stated that it was unclear whether Maryland continued to follow the "more stringent formulation of promissory estoppel, as set forth in the original Restatement of Contracts, or now follows the more flexible view found in the Restatement (Second) of Contracts."¹²⁴ Therefore, the court analyzed the case under both the *Restatement (First)* and *Restatement (Second)*.¹²⁵

Maryland courts continued to be confused over this doctrine as evidenced by the decision of the court of special appeals in *Snyder v. Snyder*.¹²⁶ By erroneously imposing the additional requirement of fraudulent conduct on the part of the promisor,¹²⁷ the *Snyder* court refused to apply promissory estoppel to enforce an oral contract trans-

120. See *supra* note 108-10.

121. See, e.g., *Chesapeake Supply & Equip. Co. v. Manitowoc Eng'r Corp.*, 232 Md. 555, 566, 194 A.2d 624, 630 (1963) (merely acknowledging the existence of the doctrine of promissory estoppel, but not mentioning the doctrine's standards); *Kiley v. First Nat'l Bank of Maryland*, 102 Md. App. 317, 649 A.2d 1145 (1994); *Snyder v. Snyder*, 79 Md. App. 448, 558 A.2d 417 (1989).

122. 102 Md. App. 317, 649 A.2d 1145 (1994).

123. *Id.* at 337, 649 A.2d at 1154. The plaintiffs sought compensation and punitive damages for the bank's alleged breach of contract and tortious conduct by imposing service charges on their account, altering the terms of their account, and subsequently closing their account. *Id.* at 321, 649 A.2d at 1146.

124. *Id.* at 337, 649 A.2d at 1154; see *supra* Part III.A.3.

125. *Kiley*, 102 Md. App. at 336, 649 A.2d at 1154. The *Kiley* court noted that whether Maryland followed the *Restatement (First)* or *Restatement (Second)* did not affect the outcome of the case. *Id.* at 336, 649 A.2d at 1154.

126. 79 Md. App. 448, 558 A.2d 412, *cert. denied*, 317 Md. 511, 564 A.2d 1182 (1989). *Contra Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 674 A.2d 521 (1995).

127. *Snyder*, 79 Md. App. at 458, 558 A.2d at 417. This additional requirement demonstrates a potential confusion between promissory estoppel and the doctrine of equitable estoppel. See *supra* notes 64-68.

ferring property between a wife and a husband.¹²⁸ In *Snyder*, pursuant to an oral agreement, the husband refused to re-title a home that he purchased with his wife before they married.¹²⁹ One of the arguments advanced by the wife, to overcome the Statute of Frauds, was that the husband was estopped from asserting a Statute of Frauds defense.¹³⁰ The court stated that “[o]ne of the most significant factors in determining whether justice demands enforcement of a promise is whether the promisor acted unconscionably.”¹³¹ Notwithstanding the fact that the *Restatement (First)*, as quoted by the court, did not require a showing of fraud, the court held that to invoke promissory estoppel, the promisor must have no intention of fulfilling the promise at the time it was made.¹³²

The court affirmed its misapplication of promissory estoppel in *Friedman & Fuller, P.C. v. Funkhouser*.¹³³ There, the plaintiff, defendant’s former employer, sued the defendant for breach of an employment contract.¹³⁴ In an attempt to overcome the Statute of Frauds defense, the employer invoked the doctrine of promissory estoppel.¹³⁵ The court of special appeals held, however, that for promissory estoppel to prevail, not only must all the elements be met, but also, following the precedent of *Snyder*, evidence must demonstrate that the promise was fraudulently made.¹³⁶ Therefore, because it was not clear the employer had failed to prove by clear and convincing evidence that the employee’s actions were fraudulent, the court reversed the

128. *Snyder*, 79 Md. App. at 458, 461, 558 A.2d at 417, 419. Here, the plaintiff attempted to use promissory estoppel as a means for overcoming the Statute of Frauds violation that occurred with an oral promise to transfer property. *Id.* at 451, 558 A.2d at 414.

129. *Id.* at 451, 558 A.2d at 413.

130. *Id.*

131. *Id.* at 458, 558 A.2d at 417.

132. *Id.*

133. 107 Md. App. 91, 666 A.2d 1298 (1995).

134. *Friedman & Fuller*, 107 Md. App. at 91, 666 A.2d at 1299. The employee failed to satisfy the promise to modify the employment agreement to include a provision on trade secrets and a non-competition clause. *Id.* at 97-98, 666 A.2d at 1301-02.

135. *Id.* at 111, 666 A.2d at 1308.

136. *Id.* In order for promissory estoppel to prevail, the court stated that the following five elements must be met: “[1] the promise was fraudulently made, [2] the promisor anticipated that the promisee would rely on the oral promise, [3] the reliance was reasonable, [4] the promisee engaged in acts unequivocally referable to the oral promise, and [5] the promisee suffered substantial injury as a result of [the] reliance.” *Id.* (internal quotations omitted).

trial court's granting of summary judgment for the defendant.¹³⁷ These two cases illustrate the inconsistency and confusion of Maryland appellate courts as to the requirements of promissory estoppel.¹³⁸

B. Courts' Application of Promissory Estoppel to the Construction Industry Bidding Process

Maryland courts may alleviate the unique problems associated with the construction bidding process by using the doctrine of promissory estoppel.¹³⁹ Problems occur when no traditional contract has been formed, usually for lack of an acceptance, but when all parties rely on one another and one party suffers a loss because of an unmet expectation.¹⁴⁰ Promissory estoppel is a legal fiction created to remedy situations where no formal contract exists,¹⁴¹ and acts to fill the void and protect the parties from the potential risk of financial loss.¹⁴²

1. Original Refusal to Apply Promissory Estoppel

The first major case addressing the application of promissory estoppel to the relationship between general contractors and subcontractors is *James Baird Co. v. Gimbel Bros., Inc.*¹⁴³ There, the Court of Appeals for the Second Circuit rejected the general contractor's contention that the subcontractor should be held to his bid under the doctrine of promissory estoppel.¹⁴⁴ Instead, applying traditional contract law, the court held that no contract existed, because the subcontractor's initial offer was withdrawn before acceptance occurred.¹⁴⁵

137. *Id.* at 112, 666 A.2d at 1309.

138. *Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 166, 168-69, 674 A.2d 521, 532-534 (1995) (attempting to address this confusion and refusing to include an element of fraudulent conduct in the court's adoption of the *Restatement (Second)*).

139. *See id.* For alternative remedies to these problems see Part IV.

140. SWEET, *supra* note 2, at 388.

141. *See supra* notes 53-55 and accompanying text.

142. *See infra* Part III.B.2-3.

143. 64 F.2d 344 (2d Cir. 1933).

144. *Id.* at 346.

145. *Id.* at 345. The court noted that it was possible for the parties to make a contract with the understanding that the contractor would accept the subcontractor's bid by submitting the contractor's bid for the entire project. *Id.* at 346. Here, however, the bid was not accepted upon use of the quote by the general contractor, as it contained the phrase "[i]f successful in being awarded this contract, [they] will be absolutely guaranteed, . . . and . . . we are offering these prices for reasonable' (sic), 'prompt acceptance after the general contract has been awarded.'" *Id.* at 345.

In *Baird*, the plaintiff, a general contractor bidding on the construction of a government building, relied on the defendant-subcontractor's bid of December 24, 1932, to supply linoleum at a specified price.¹⁴⁶ After realizing its employee underestimated the total amount of linoleum needed for the project by about one-half the correct amount, the defendant-subcontractor withdrew its bid on December 28, 1932.¹⁴⁷ This withdrawal reached the plaintiff only after it submitted its main bid based in part on the linoleum price quoted by the defendant.¹⁴⁸ Two days after receiving the general contractor's bid, the soliciting party awarded the job to the plaintiff.¹⁴⁹ When the defendant refused to perform, the plaintiff filed suit.¹⁵⁰

Judge Learned Hand, writing for the court, reasoned that because the submission of a bid by the subcontractor was only an offer to contract, a subcontractor could withdraw the offer at any time before the general contractor's acceptance.¹⁵¹ The court refused to apply the doctrine of promissory estoppel, stating that it had no application in a commercial context where "an offer for an exchange is not meant to become a promise until a consideration has been received."¹⁵² Promissory estoppel was only applicable to donative promises where the promisor did not expect an equivalent promise in return.¹⁵³ Where the subcontractor offered to deliver linoleum only in exchange for

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146. *Id.* The defendant sent an offer to supply all the linoleum required to twenty or thirty general contractors it thought would be bidding on the main project. *Id.*
147. *Id.* The defendant withdrew its bid by telegraphing all the general contractors to whom it had sent estimates stating that the quoted price was a mistake and that the actual price would be much higher. *Id.*
148. *Id.*
149. *Id.* Before this acceptance the defendant also wrote a letter confirming its withdrawal. *Id.*
150. *James Baird Co.*, 64 F.2d at 345. The plaintiff sued under breach of contract since the defendant declined to recognize the existence of a contract. *Id.*
151. *Id.* at 346.
152. *Id.* The court wrote that promissory estoppel was primarily used to enforce charitable pledges and did not apply in the case at bar. *Id.* At the time of this decision, most jurisdictions followed the notion that the doctrine of promissory estoppel only applied to charitable pledges where no consideration was present. See CALAMARI & PERILLO, *supra* note 59, § 6-1; see also *supra* note 106 and accompanying text.
153. *James Baird Co.*, 64 F.2d at 346. Offers are ordinarily made in exchange for some sort of consideration; however, a person may make a promise without expecting one in return. *Id.* The court reasoned that the doctrine of promissory estoppel only applied in such donative situations where the promisee relied on the promise. *Id.*

the general contractor's acceptance and payment for it,¹⁵⁴ there was no room for promissory estoppel.¹⁵⁵ The court reasoned that for it to hold otherwise "would be to hold the offeror [to the contract] regardless of the stipulated condition of his offer."¹⁵⁶ Thus, the *Baird* court barred the use of promissory estoppel as a method to hold the subcontractor to a bid.¹⁵⁷

Unless the general contractor formally accepted the subcontractor's bid, this decision left both parties unprotected in the bidding process.¹⁵⁸ By allowing the subcontractor to withdraw from a bid even after the general contractor relied upon the quote to formulate its own bid, general contractors risk being bound to an agreement based on the price of a subcontractor who refuses to perform.¹⁵⁹ Under *Baird*, the subcontractor is also exposed to significant risk because the general contractor, after the award of the contract, is free to negotiate

154. *Id.*; see also *supra* note 145 and accompanying text.

155. *James Baird Co.*, 64 F.2d at 346.

156. *Id.*

157. *Id.* The court also refused to regard the offer as an option allowing the general contractor the right to accept the sub-bid if it was awarded the main bid. *Id.* Nevertheless, the court conceded that, if an option were found, the doctrine of promissory estoppel might apply. *Id.*

158. *Id.* The general contractor could protect itself before the award of the sub-contract, however, by use of a bond or option contract. Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237, 262-63 (1952).

159. Schultz, *supra* note 158, at 239 ("If the subcontractor revokes his bid before it is accepted by the general [contractor], any loss which results is a deduction from the general[] [contractor's] profit and conceivably may transform overnight a profitable contract into a losing deal."); see also *F.B. Reynolds v. Texarkana Constr. Co.*, 374 S.W.2d 818, 820 (Ark. 1964) (criticizing the *Baird* rule and stating that the party who commits the mistake should bear any resulting loss).

for lower bids from other subcontractors.¹⁶⁰ Although this opinion was widely criticized,¹⁶¹ it remained influential.¹⁶²

2. The First Use of Promissory Estoppel to Protect Parties in the Bidding Process

Partly in response to the criticism of *Baird*,¹⁶³ the California Supreme Court addressed the potential unfairness of that decision in *Drennan v. Star Paving Co.*¹⁶⁴ In *Drennan*, the court held that, where a paving subcontractor submitted a bid to the general contractor, the general contractor's reliance on the subcontractor's bid made it irrevocable.¹⁶⁵

The plaintiff, a general contractor, received a bid by phone from the defendant, a subcontractor, to perform the paving work on a project.¹⁶⁶ Relying on the defendant's quote in computing its own bid, the plaintiff submitted the main bid and was eventually awarded the

160. For a discussion of bid shopping and bid peddling, see *supra* Part II.B. See also Closen & Weiland, *supra* note 29, at 583 (noting that under *Baird*, while bound by his offer to the soliciting party, the general contractor is not bound to any specific subcontractor and may, after being awarded the contract, bid shop among other subcontractors before awarding the subcontract). Nonetheless, it could be argued that although entailing risk, this creates a necessary balance between general contractors and subcontractors because, under *Baird*, neither party is bound by the initial offer. Kenneth L. Schriber, Note, *Construction Contracts—The Problem of Offer and Acceptance in the General Contractor-Subcontractor Relationship*, 37 U. CIN. L. REV. 798, 812-13 (1968).

161. See, e.g., James G. Martin, IV, Note, *Contracts—Promissory Estoppel*, 20 VA. L. REV. 214 (1933); Schultz, *supra* note 158, at 242-43.

162. See *Tatsch v. Hamilton-Erickson Mfg. Co.*, 418 P.2d 187, 189 (N.M. 1966) (holding that a builder's reliance upon an offer in preparing his prime construction bid did not amount to an acceptance or constitute promissory estoppel).

163. See *supra* notes 161 and accompanying text.

164. 333 P.2d 757 (Cal. 1958).

165. *Drennan*, 333 P.2d at 759-60. Reliance on the bid made it irrevocable as long as the bid was silent with respect to the subcontractor's right to revoke, and the general contractor used the bid in making its own successful bid on the project. *Id.*

166. *Id.* at 758. The plaintiff testified that it was customary in the trade for general contractors to receive bids from subcontractors by telephone and subsequently rely upon them in computing their bid for the contract. *Id.*; see also *supra* notes 39-40 and accompanying text.

contract.¹⁶⁷ Unlike in *Baird*, where the offer was revoked before the main bid was awarded,¹⁶⁸ the defendant in *Drennan* informed the plaintiff that there was a mistake in the bid and that the quoted price was too low only after the general contract had been awarded.¹⁶⁹ This attempt to revoke occurred, however, before the general contractor's acceptance of the sub-bid.¹⁷⁰ As a result, the plaintiff was forced to use another subcontractor to complete the paving and ultimately paid the difference between the original bid and the substitute bid.¹⁷¹

The court found that there was neither an option contract supported by consideration nor a binding bilateral contract.¹⁷² Nonetheless, the court, relying on section 90 of the *Restatement (First)*,¹⁷³ stated that defendant's bid constituted a promise to perform.¹⁷⁴ Although Judge Rodger Traynor, writing for the court, most likely agreed with Hand's argument that section 90 has no application in a bargained for exchange, the court found, through analogy to section 45 of the *Restatement (First)*,¹⁷⁵ an implied subsidiary promise not to revoke the bid.¹⁷⁶ The court stated that:

167. *Drennan*, 333 P.2d at 758. The plaintiff relied on the defendant's sub-bid in computing its main bid because the defendant's bid for the paving portion of the project was the lowest bid submitted. *Id.*

168. *See supra* notes 147-49 and accompanying text.

169. *Drennan*, 333 P.2d at 758-59. The general contractor was informed of the mistake in the bid when he stopped by the subcontractor's office after being awarded the project contract. *Id.* at 758.

170. *Id.* at 758-59. It could be argued, however, that the general contractor was in the act of accepting the sub-bid when the defendant revoked the offer.

171. *Id.* at 759. The difference between defendant's offer and the cost of using a substitute paving subcontractor was \$3,817. *Id.*

172. *Id.* The defendant contended, much like in *Baird*, that there was no enforceable contract on the ground that the defendant made a revocable offer and withdrew it before the plaintiff accepted. *Id.* As in *Baird*, the *Drennan* court found that no option contract or bilateral contract existed. *Id.* There was "no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid." *Id.* Nor was it shown that the plaintiff's use of the bid was an acceptance binding the plaintiff to award the defendant the subcontract, in the event the plaintiff received the main contract. *Id.*

173. *See supra* note 77.

174. *Drennan*, 333 P.2d at 759.

175. RESTATEMENT (FIRST) OF CONTRACTS § 45 (1932). Section 45 states: "[i]f 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" *Id.*

176. *Drennan*, 333 P.2d at 760. The court was able to overcome *Baird* by analogizing this situation to a unilateral contract. *Id.* at 759. Under section 45 of the *Restatement (First)*, if part of the consideration is given in response to a

When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary, . . . [d]efendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.¹⁷⁷

The court overcame the absence of consideration by substituting for it reliance on an implied promise to keep the bid open for a reasonable period of time.¹⁷⁸ Promissory estoppel was used, not as a consideration substitute for the formation of a contract or the invited acceptance, but as consideration for an implied promise not to revoke the bid.¹⁷⁹ Judge Traynor was able to create this implied promise by melding together sections 90¹⁸⁰ and 45¹⁸¹ of the *Restatement (First)*.¹⁸² Therefore, unlike in *Baird*, the court held the subcontractor to its bid by making the bid irrevocable.¹⁸³

By deliberately rejecting *Baird* and the reasoning of Judge Hand,¹⁸⁴ *Drennan* paved the way for applying promissory estoppel to construc-

unilateral contract, the offeror is bound to the contract. *Id.* at 759 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 45). The court noted that under section 45 comment b, the "main offer includes 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." *Id.* at 760 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 45 cmt. b). Therefore, whether implied in law or fact, the subsidiary promise precludes the injustice which would result if the offeror could withdraw the offer even after the offeree had detrimentally relied upon it. *Id.*

177. *Id.* The court noted, however, that the general contractor is not free to bid shop once the general contract has been awarded, nor can the general contractor attempt to bargain with the subcontractor for a better deal while at the same time claim a continuing right to accept the original offer of the subcontractor. *Id.*
178. *Id.* This principle is now expressed in section 87(2) of the *Restatement (Second)*. See *supra* note 90.
179. *Drennan*, 333 P.2d at 760. The bid was found to be irrevocable even though the offer was silent as to revocation. *Id.* at 759-60.
180. See *supra* note 77 and accompanying text.
181. See *supra* note 175.
182. *Drennan*, 333 P.2d at 759-60.
183. *Id.* at 757.
184. See *supra* notes 175-82 and accompanying text.

tion transactions.¹⁸⁵ This new application afforded the general contractor protection from a subcontractor who attempted to revoke a sub-bid after the general contractor had already justifiably relied on it in computing and submitting the main bid.¹⁸⁶ Although the court did note that a general contractor is not permitted to delay acceptance or reopen bargaining with the subcontractor in order to obtain a better price,¹⁸⁷ the court's holding placed the general contractor in a stronger position than subcontractors.¹⁸⁸

3. Other Jurisdictions' Use of Promissory Estoppel in Construction Bidding Disputes

All jurisdictions in the United States have adopted and currently apply some form of promissory estoppel, usually grounded in section 90 of the *Restatement*.¹⁸⁹ The *Drennan* decision was widely followed by other jurisdictions.¹⁹⁰ The exact form of this reliance theory, how-

185. See Murphy, *supra* note 58, at 393.

186. *Drennan*, 333 P.2d at 759-60.

187. *Id.* at 760. The court noted, in what arguably could be dictum, that a general contractor cannot delay acceptance once the contract has been awarded in order to get a better price, nor can the general contractor reopen bargaining with a subcontractor after accepting the original offer. *Id.*; see also *supra* Part II.B.

188. See Katz, *supra* note 96, at 1277 (stating that general contractors are over-protected under the *Drennan* decision).

189. See Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 265 (1996). Although some critics say promissory estoppel is waning, many jurisdictions have adopted it. *Id.* In fact both Georgia and Louisiana have gone even further and adopted promissory estoppel by statute. See GA. CODE ANN. § 13-3-44 (1982); LA. CIV. CODE ANN. art. 1967 (West 1987).

190. See *Preload Tech., Inc. v. A.B. & J. Constr. Co.*, 696 F.2d 1080 (5th Cir. 1983); *C. R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. 1977); *N. Litterio & Co. v. Glassman Constr. Co.*, 319 F.2d 736 (D.C. Cir. 1963); *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974); *Alaska Bussell Elec. Co. v. Vern Hickel Constr. Co.*, 688 P.2d 576 (Alaska 1984); *Saliba-Kringlen Corp. v. Allen Eng'r Co.*, 92 Cal. Rptr. 799 (Cal. 1971); *Southern Cal. Acoustics Co. v. C.V. Holder, Inc.*, 79 Cal. Rptr. 319 (Cal. 1969); *Norcross v. Winters*, 25 Cal. Rptr. 821 (Cal. 1962); *C.H. Leavell & Co. v. Graffe & Assoc., Inc.* 414 P.2d 873 (Idaho 1966); *Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 674 A.2d 521 (1996); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 374 N.E.2d 306 (Mass. App. Ct. 1978); *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 190 N.W.2d 71 (Minn. 1971); *LAHR Constr. Corp. v. J. Kozel & Son, Inc.*, 640 N.Y.S.2d 957 (N.Y. Sup. 1996); *Arango Constr. Co. v. Success Roofing, Inc.*, 730 P.2d 720 (Wash. App. Div. 1986).

ever, varies from state to state.¹⁹¹ In searching for the correct standard to apply in Maryland, it is helpful to examine how other jurisdictions have applied sections 90 and 87(2)¹⁹² of the *Restatement (Second)* in construction industry bidding disputes.

a. *The Majority's Use of Promissory Estoppel: Adopting Drennan Instead of Baird*

In a large number of states, promissory estoppel is used as a substitute for consideration in order to make a sub-bid irrevocable.¹⁹³ For example, in *Alaska Bussell Electric Co. v. Vern Hickel Construction Co.*,¹⁹⁴ the Supreme Court of Alaska adopted the *Drennan* rationale for applying promissory estoppel.¹⁹⁵ There, the plaintiff, a general contractor, sued the defendant, an electrical subcontractor, for revoking a sub-bid as the result of an error in computation for the building of a commissary for the United States Air Force at Elmendorf.¹⁹⁶ Although the court recognized the risk to subcontractors of broadly applying promissory estoppel,¹⁹⁷ it wrote that "we believe *Drennan* is better case law than *Baird*."¹⁹⁸ The court noted that, as applied in *Drennan*, promissory estoppel has the effect of encouraging subcontractors to take

191. See generally Holmes, *supra* note 189, at 297-514 (giving a comprehensive jurisdiction-by-jurisdiction analysis of promissory estoppel).

192. It is important to note, however, that no jurisdiction in reaching a decision on a construction industry bidding dispute has solely applied section 87(2) of the *Restatement (Second)*. See *supra* note 103 and accompanying text. Rather, a majority of states apply the reasoning behind *Drennan*, while citing both sections 90 and 87(2) of the *Restatement (Second)*. See *supra* notes 104-05.

193. See, e.g., *Air Conditioning Co. v. Richards Constr. Co.*, 200 F. Supp. 167, 170-71 (D. Haw. 1961); *Reynolds v. Texarkana Constr. Co.*, 374 S.W.2d 818, 820 (Ark. 1964); *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958); see also *supra* note 190 and accompanying text.

194. 688 P.2d 576 (Alaska 1984).

195. *Id.* at 579-80. Although the court adopted the *Drennan* rationale, the decision was different in that the jury did not award expectation damages. *Id.* at 581-82. The jury apparently only wanted to award damages for the actual harm incurred to the general contractor, that is, reliance damages. Holmes, *supra* note 189, at 307.

196. *Alaska Bussell Elec. Co.*, 688 P.2d at 577-78. The defendant had informed the plaintiff as to the omission of the cost of site work after the plaintiff was informed it was the lowest bidder, but before the contract was officially awarded to the plaintiff. *Id.* at 577.

197. *Id.* at 580.

198. *Id.* The court described the *Baird* decision as the narrower view and the *Drennan* decision as setting forth a broader application of promissory estoppel to the construction bidding context. *Id.* at 579-80.

greater care when formulating their sub-bids, thereby avoiding errors.¹⁹⁹ This application of promissory estoppel, the court wrote, benefits the needs of the modern construction industry bidding process.²⁰⁰

Similarly, in the 1964 case of *Reynolds v. Texarkana Construction Co.*,²⁰¹ the Arkansas Supreme Court applied section 90 where the general contractor relied on the sub-bid in computing its main bid.²⁰² There the plaintiff, relying on a bid from the defendant for electrical work, was the successful bidder for a school construction project.²⁰³ The defendant, however, refused to perform because of an error in computation.²⁰⁴ Applying section 90 of the *Restatement* as a substitute for a lack of consideration,²⁰⁵ the court found the sub-bid irrevocable.²⁰⁶ The court reasoned that “[j]ustice demands that the loss resulting from the subcontractor’s carelessness should fall upon him who was guilty of the error rather than upon the [general] contractor who relied in good faith upon the offer that he received.”²⁰⁷

Even the forum state of the *Baird* decision has since adopted promissory estoppel when deciding construction bidding disputes.²⁰⁸ As a result of *Baird*, promissory estoppel had no application to commercial transactions in New York, such as construction industry bidding disputes.²⁰⁹ Subsequent New York cases, however, repudiated this restriction.²¹⁰ The New York Supreme Court, in *James King & Sons v. DeSantis Construction*,²¹¹ specifically rejected the *Baird* opinion and held a subcontractor liable in damages, under the doctrine of promis-

199. *Id.* at 580.

200. *Id.* The court went on to label promissory estoppel, as adopted in *Drennan*, a necessary element in the scheme of construction industry bidding. *Id.*

201. 374 S.W.2d 818 (Ark. 1964).

202. *Id.* at 819-20.

203. *Id.* at 819.

204. *Id.* Specifically, the subcontractor overlooked the cost of the fixtures required for the project. *Id.* The defendant’s refusal to perform compelled the plaintiff to hire another electrical subcontractor at an amount in excess of the defendant’s bid. *Id.*

205. See *supra* note 77 and accompanying text.

206. *Reynolds*, 374 S.W.2d at 820.

207. *Id.*

208. See *James King & Son v. DeSantis Constr.*, 413 N.Y.S.2d 78, 81 (N.Y. Sup. Ct. 1977). The elements of promissory estoppel in New York are: (1) a clear and unambiguous promise; (2) reliance by the party to whom the promise was made; (3) reliance that is both reasonable and foreseeable; and (4) the party asserting promissory estoppel must be injured by the reliance. *Id.*

209. See *supra* notes 151-57 and accompanying text analyzing the *Baird* opinion.

210. See, e.g., *James King & Son*, 413 N.Y.S.2d at 81.

211. 413 N.Y.S.2d 78 (N.Y. Sup. Ct. 1977).

sory estoppel, to a contractor who relied on the subcontractor's bid in formulating its main bid.²¹² Nonetheless, New York's highest court has yet to specifically adopt section 90 as an independent claim for relief.²¹³

b. The Minority's Strict Use of Promissory Estoppel to Extend Protection to All Parties

In response to the criticism that *Drennan* left the subcontractor exposed to risk,²¹⁴ other jurisdictions have strictly construed promissory estoppel and refused to apply it if the general contractor demonstrates a lack of reliance by bid shopping.²¹⁵ For example, recognizing the equitable basis for the doctrine of promissory estoppel, Texas courts do not apply it to bidding disputes if the general contractor is found guilty of bid shopping after being awarded the main contract and before accepting a subcontract.²¹⁶ In *Sipco Services Marine, Inc. v. Wyatt Field Service Co.*,²¹⁷ the court reasoned that this practice is evidence of a failure to rely and leaves the general contractor with "unclean hands."²¹⁸

This approach is also taken by Utah, which does not apply the doctrine if the general contractor bid shops for a better deal after being awarded the main contract or engages in bid chiseling with subcontractors.²¹⁹ This was advocated by Judge Traynor in dictum²²⁰ and is

212. *Id.* at 81.

213. Holmes, *supra* note 189, at 266 n.2.

214. *See supra* note 188 and accompanying text.

215. *See, e.g., Sipco Servs. Marine, Inc. v. Wyatt Field Serv. Co.*, 857 S.W.2d 602, 605-06 (Tex. Ct. App. 1993) (holding that the general contractor had not waived its claim of promissory estoppel against the subcontractor by soliciting bids from other subcontractors because changes in the project and lapse of time had occurred since the original sub-bid); *R.J. Daum Constr. Co. v. Child*, 247 P.2d 817, 823 (Utah 1952) (stating that where a general contractor, who created the main contract on the basis of a subcontractor's sub-bid, has submitted counteroffers to other subcontractors, the original subcontractor is not barred by the doctrine of promissory estoppel from denying the main contract); *see also supra* Part II.B.

216. *See Sipco Servs. Marine, Inc.*, 857 S.W.2d at 605-06; *see also supra* Part II.B.

217. 857 S.W.2d 602 (Tex. Ct. App. 1993).

218. *Id.* at 606.

219. *See R.J. Daum Constr. Co.*, 247 P.2d at 823 (explaining that the general contractor's proposed written contract to the subcontractor was a counteroffer and not an acceptance of the subcontractor's bid).

220. If the language of *Drennan* is strictly construed, then the general contractor would not be free to bid shop once the contract has been awarded since this would negate any alleged reliance. *See supra* note 177 and accompanying text.

probably the best method to extend the protection of promissory estoppel to both the general contractor and to subcontractors as well.²²¹

c. Two States' Use of Promissory Estoppel Only as a Defensive Theory

The highest courts of North Carolina and Virginia also have not expressly adopted promissory estoppel to grant relief.²²² For example, in North Carolina, as the result of a lower court's attempt to arrest the development of promissory estoppel, a very different approach is taken than in most other states.²²³ The North Carolina Court of Appeals refused to extend promissory estoppel to bind a subcontractor to its bid based on the general contractor's reliance on that bid.²²⁴ The court stated:

[O]ur courts have never recognized promissory estoppel as a substitute for consideration Cases which have applied the doctrine have done so in a defensive situation, where there has been an intended abandonment of an existing right by the promisee. North Carolina case law has not approved the doctrine for affirmative relief.²²⁵

This decision may discourage parties from pleading promissory estoppel;²²⁶ however, the doctrine does exist as a defensive theory²²⁷ and whether it applies to construction cases will not be finalized until the North Carolina Supreme Court addresses the issue.

C. Maryland's Attempt to Use Promissory Estoppel in the Construction Bidding Context

Maryland cases that address the use of promissory estoppel in construction bidding disputes are sparse.²²⁸ Before 1996, Maryland courts had neither addressed the issue of when a subcontractor's offer

221. See *supra* note 177 and accompanying text.

222. Holmes, *supra* note 189, at 265 n.2.

223. See *Home Elec. Co. of Lenoir, Inc. v. Hall & Underdown Heating & Air Conditioning Co.*, 358 S.E.2d 539, 541 (N.C. Ct. App. 1987), *aff'd per curiam without opinion*, 366 S.E.2d 441 (N.C. 1988) (noting that North Carolina courts do not recognize the doctrine of promissory estoppel in all situations).

224. *Home Elec. Co.*, 358 S.E.2d at 541.

225. *Id.*

226. See, e.g., *Labarre v. Duke Univ.*, 393 S.E.2d 321, 324 (N.C. Ct. App. 1990) (noting that the parties to the case did not attempt to argue that promissory estoppel could be used as a substitute for consideration to enforce a doctor's gratuitous promise).

227. Holmes, *supra* note 189, at 427.

228. For a description of Maryland cases using promissory estoppel in other circumstances see *supra* Part III.A.4.

and a general contractor's acceptance form a binding contract,²²⁹ nor had they addressed the application of promissory estoppel to such a situation.²³⁰ Maryland law does permit a general contractor to accept a subcontractor's bid before the general contractor is awarded the main contract by the soliciting party.²³¹ If, however, acceptance of the sub-bid has not occurred, parties need not honor their offers unless another method, such as promissory estoppel, is applied.²³²

1. *Pavel Enterprises*

In an apparent attempt to clarify the exact status of promissory estoppel in Maryland,²³³ the court of appeals in *Pavel Enterprises, Inc. v. A.S. Johnson Co.*²³⁴ explicitly adopted the *Restatement (Second) of Contracts* for application in construction industry bidding disputes.²³⁵ After reviewing the construction bidding process,²³⁶ providing a historical overview of the cases dealing with its problems²³⁷ and explaining the doctrine of promissory estoppel in Maryland,²³⁸ the court held the evidence insufficient to establish the general contractor's detrimental reliance on the sub-bid.²³⁹

229. *See, e.g., Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 152, 674 A.2d 521, 526 (1995).

230. *Id.* at 163, 674 A.2d at 531 (recognizing that nothing in previous cases suggests that the doctrine of promissory estoppel was intended to be limited to specific instances).

231. *See, e.g., Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 540-41, 369 A.2d 1017, 1024-25 (1977). There, the court of appeals found a valid acceptance by the general contractor of the subcontractor's offer even though the main contract had not been awarded to the general contractor. *Id.* The court also noted that the question of whether an offer is of a type that can be converted into a contract of sale upon its acceptance is dependent upon the intention of the parties and therefore depends on the facts and circumstances of a particular case. *Id.* at 540, 369 A.2d at 1024.

232. *See supra* notes 140-42 and accompanying text.

233. *See supra* Part III.A.4.

234. 342 Md. 143, 674 A.2d 521 (1996).

235. *Id.* at 166, 674 A.2d at 532.

236. *Id.* at 152, 674 A.2d at 525-26.

237. *Id.* at 152-58, 674 A.2d at 526-29.

238. *Id.* at 164-67, 674 A.2d at 531-33.

239. *Id.* at 168-69, 674 A.2d at 534. The court also affirmed the trial court's holding that recovery by the general contractor was not justified under traditional bilateral contract theory. *Id.* at 162, 674 A.2d at 531. The trial court had rejected PEI's claim of a bilateral contract because there was no meeting of the minds, and the offer was withdrawn before acceptance occurred. *Id.*

The facts of *Pavel Enterprises* are typical of most construction bidding disputes resulting from subcontractor error.²⁴⁰ In *Pavel Enterprises*, the National Institute of Health (NIH) solicited bids for a renovation project²⁴¹ and Pavel Enterprises, Inc. (PEI), a general contractor, relying on solicited sub-bids from various subcontractors, placed a main bid for the project.²⁴² One of the subcontractors on which PEI relied was A.S. Johnson Co. ("Johnson"), a mechanical subcontractor, who submitted a written scope proposal for the heating, ventilation, and air conditioning portion of the project, but had omitted the price.²⁴³ As is the practice in the construction industry, Johnson waited until the last day before PEI submitted its main bid to call and verbally submit a price.²⁴⁴

When the general contractors' bids were opened on August 5, 1993, PEI's bid was the second lowest.²⁴⁵ After disqualifying the lowest bidder, the government notified PEI in mid-August that its bid would be accepted.²⁴⁶ On August 26, 1993, Thomas Pavel, president of PEI, met with James Kirk, Johnson's chief estimator, to become acquainted with the company's operations.²⁴⁷ After the meeting, PEI sent a fax to all mechanical subcontractors informing them that PEI would be awarded the contract from NIH.²⁴⁸

On September 1, 1993, PEI mailed and faxed a letter to Johnson formally accepting the sub-bid.²⁴⁹ Upon receipt of the fax, Johnson called PEI to inform them that the bid contained an error and, as a

240. See *supra* notes 146-50, 166-71 and accompanying text.

241. *Pavel Enters., Inc.*, 342 Md. at 146, 674 A.2d at 523. The proposed work entailed demolition and mechanical work, including heating, ventilation, and air conditioning. *Id.* at 146-47, 674 A.2d at 523.

242. *Id.* PEI solicited bids from a number of mechanical subcontractors, one of which was the defendant. *Id.*

243. *Pavel Enters., Inc.*, 342 Md. at 147, 674 A.2d at 523.

244. *Id.* It is common practice in the construction industry for the subcontractor's bid amount to be entered immediately before the general contractor submits the main bid to the owner. *Id.*; see also *id.* at 147 n.2, 674 A.2d at 523 n.2. Johnson's verbal quote was \$898,000 for the heating, ventilation, and air conditioning portion, which PEI then used in computing its own bid of \$1,585,000 for the entire project. *Id.*; see also *supra* note 39 and accompanying text. This custom protects the subcontractor from a general contractor who intends to shop for a lower sub-bid. See *supra* Part II.B.

245. *Pavel Enters., Inc.*, 342 Md. at 147, 674 A.2d at 523.

246. *Id.* This was a few weeks after the date when the general contractors' bids were originally opened. *Id.*

247. *Id.* at 147-48, 674 A.2d at 524.

248. *Id.* at 148, 674 A.2d at 524.

249. *Id.* at 149, 674 A.2d at 524. This fax was sent after PEI had informed NIH that Johnson was to be the mechanical subcontractor on the project. *Id.*

result, the quoted price was too low.²⁵⁰ According to the estimating manager at Johnson who testified at trial, the mistake had been discovered earlier, but because they believed that PEI had not been awarded the contract, they felt no duty to correct the error.²⁵¹ Johnson attempted to immediately withdraw its bid, but PEI refused.²⁵² On September 28, 1993, NIH formally awarded the construction contract to PEI, requiring them to find a substitute subcontractor to complete the heating, ventilation, and air-conditioning work, resulting in financial loss.²⁵³

The trial court held that there was no bilateral contract between PEI and Johnson because PEI failed to make a timely and valid acceptance of Johnson's offer.²⁵⁴ The trial court also rejected PEI's claim of promissory estoppel.²⁵⁵ PEI appealed this decision under traditional contract theory of offer and acceptance and the doctrine of promissory estoppel.²⁵⁶

In response to PEI's promissory estoppel claim, the court of appeals applied *Restatement (Second)* section 90(1).²⁵⁷ Instead of adhering to the text of the *Restatement*, however, the court transformed section 90 into a four-part test.²⁵⁸ This reformulated test required:

(1) a clear and definite promise; (2) where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) which does induce actual and reasonable action or forbearance by the

250. *Id.* at 150, 674 A.2d at 524.

251. *Id.*

252. *Id.* at 150-51, 674 A.2d at 524-25.

253. *Pavel Enters., Inc.*, 342 Md. at 151, 674 A.2d at 525. PEI subsequently brought suit against Johnson to recover \$32,000, the difference between the original sub-bid and the cost of the substitute subcontractor. *Id.*

254. *Id.* at 161, 674 A.2d at 530. The theory endorsed by the trial court was that Johnson's sub-bid was an offer of a contingent contract which PEI accepted on September 1 "subject to the condition precedent" of NIH awarding the contract to PEI. *Id.* at 163, 674 A.2d at 531. Therefore, prior to the occurrence of the condition precedent Johnson was free to withdraw. *Id.*

255. *Id.* at 164, 674 A.2d at 531. This doctrine was applicable if PEI had detrimentally relied on the sub-bid. *Id.*

256. *Id.* at 151, 674 A.2d at 525. Although PEI initially appealed the decision of the court of special appeals, the court of appeals issued a writ of certiorari before the lower appellate court could consider the case. *Id.*

257. *Id.* at 166, 674 A.2d at 532. The court stated that by adopting the *Restatement (Second)*, it was ridding Maryland jurisprudence of the confusion surrounding the doctrine of promissory estoppel. *Id.*; see also *supra* notes 121-38 and accompanying text.

258. *Id.* at 166, 674 A.2d at 532.

promisee; and (4) causes a detriment which can only be avoided by the enforcement of the promise.²⁵⁹

Recognizing the existing confusion over the application of promissory estoppel, the court stated that to the extent past opinions required a showing of fraud on the part of the offeror, they were disapproved.²⁶⁰

Applying this new test to the facts of the case, the court agreed with the trial court that the sub-bid was sufficiently clear and definite to constitute an offer in satisfying the first element.²⁶¹ Under the second element, however, the court found no error in the trial court's holding that due to the lapse of time between the opening of bidding and the actual awarding of the contract, it was "unreasonable for the offer to continue."²⁶² In doing so, the court effectively added the extra requirement that the subcontractor's expectation that the general contractor rely on the sub-bid not dissipate over time.²⁶³ Despite the trial court's lack of findings of fact as to the third and fourth elements, the court assumed and inferred that PEI did not rely on Johnson's bid²⁶⁴

259. *Id.* The court stated that this formulation comported with that in *Union Trust Co. of Maryland v. Charter Med. Corp.*, 663 F. Supp. 175, 178 (D. Md. 1986), where the United States District Court of Maryland held that a corporation, with whom the debtor was purportedly going to merge, could not be held liable to the creditor under the theory of promissory estoppel based on representations made at a meeting. *Id.* at 166 n.29, 674 A.2d at 533 n.29. See also *supra* note 84 and accompanying text for a description of the *Restatement's* version of promissory estoppel.

260. *Pavel Enters., Inc.*, 342 Md. at 166, n.29, 674 A.2d at 532-33, n.29; see also *supra* notes 127-38 and accompanying text.

261. *Pavel Enters., Inc.*, 342 Md. at 167, 674 A.2d at 533. The court noted that determining whether a bid constitutes an offer is such a fact-specific judgment that it is best achieved by a case-by-case analysis. *Id.* In this case the trial judge had found the bid to be an offer, and the court declined to hold this finding to be clearly erroneous. *Id.*

262. *Id.* The court noted that "course of dealing" and "usage of trade" would provide evidence of whether a subcontractor's expectations were reasonable. *Id.* at 167, n.30, 674 A.2d at 533, n.30.

263. *Id.*

264. *Id.* at 168, 674 A.2d at 533. In analyzing whether a party relied on a bid under the third element, the court noted that: (1) the fact that a general contractor engaged in bid shopping or encouraged bid peddling is evidence that the general contractor did not rely on the sub-bid; (2) prompt notice by the general contractor to the subcontractor of an intent to use the bid on a project is evidence that the general contractor relied on the bid; and (3) the fact that a sub-bid is so low that a reasonably prudent general contractor would not rely upon it is evidence that the general contractor did not rely on the sub-bid. *Id.* The court assumed that the third

and, therefore, the case did not merit an equitable remedy.²⁶⁵ Although the court adopted section 90 for use in construction cases, because of the added requirement that the reliance not have a chance to dissipate over time,²⁶⁶ PEI was not afforded a remedy for the subcontractor's error.²⁶⁷

2. The Effects of *Pavel Enterprises*: Continued Confusion Surrounding Promissory Estoppel in Construction Bidding Disputes

By incorrectly applying promissory estoppel as outlined in the *Restatement (Second)*,²⁶⁸ this opinion by the court of appeals arguably returned Maryland to the law under *Baird*, where neither party was protected.²⁶⁹ Even though the court explicitly stated it was adopting the *Restatement* for application in Maryland construction cases,²⁷⁰ its failure to adhere to the *Restatement* diminishes the impact of its purported application and continues to add to the confusion surrounding promissory estoppel in Maryland.²⁷¹

First, the court deviated from the *Restatement's* explicit request that section 87(2), rather than section 90, apply to construction bidding disputes.²⁷² Section 87(2) was expressly intended to deal with these types of disputes as a result of the controversy created by the *Drennan* decision.²⁷³ Nonetheless, the court ignored section 87(2) and focused solely on its reformulation of section 90 of the *Restatement*.²⁷⁴

element was not met based on the trial judge's statement that "'the parties did not have a definite, certain meeting of the minds on a certain price for a certain quantity of goods and wanted to renegotiate . . .'" as evidenced by PEI's August 26, 1993 fax to all mechanical subcontractors. *Id.* The court further stated that although not clearly erroneous, the trial court's assumed finding as to the third element was "indisputably a close call." *Id.*

265. *Pavel Enters., Inc.*, 342 Md. at 168, 674 A.2d at 533-34. For the fourth element, to be demonstrated, the court stated a general contractor must have "'clean hands.'" *Id.* In the instant case, because the trial court was silent, the court inferred the absence of intent to permit an equitable remedy. *Id.*

266. *Id.* at 167, 674 A.2d at 533 (basing the decision on a failure of PEI to satisfy the second element).

267. *Id.* at 167-69, 674 A.2d at 533-34.

268. For a detailed analysis of *Pavel Enters., Inc.* and extensive criticism of that opinion, see Scherr, *supra* note 107. See also *supra* note 84 for the elements of promissory estoppel under the *Restatement (Second)*.

269. See *supra* notes 159-60 and accompanying text.

270. See *supra* note 235.

271. See *supra* notes 121-38 and accompanying text.

272. See *supra* note 92 and accompanying text.

273. See *supra* note 92 and accompanying text.

274. *Pavel Enters., Inc.*, 342 Md. at 166, 674 A.2d at 532.

Second, the court inaccurately analyzed the holding of *Drennan*, and thus failed to eliminate remaining uncertainty regarding the doctrine in Maryland.²⁷⁵ The court expressly recognized that in *Drennan*, promissory estoppel was not applied in its traditional function as a consideration substitute for the entire contract; rather, it was used as consideration for the subcontractor's implied subsidiary promise to keep the bid open for a reasonable period of time.²⁷⁶ This recognition is blurred by the court's subsequent statement that recovery in *Drennan* was based on "traditional bilateral contract [theory], with the sub-bid as the offer and promissory estoppel serving to replace acceptance."²⁷⁷ These two assertions are inconsistent. The interpretation that promissory estoppel replaces acceptance is incongruous with the rationale of *Drennan*.²⁷⁸

If the court of appeals was truly adopting *Restatement (Second)* section 90, it would have followed the application of section 90 in *Drennan*.²⁷⁹ Accordingly, by submitting a bid, a subcontractor is deemed to have reasonably expected the promise to induce action or forbearance, and by using the sub-bid in the overall bid, the general contractor is deemed to have relied.²⁸⁰ This application of section 90, as enunciated in *Drennan*, would have resulted in a different outcome in *Pavel Enterprises*.

Unlike in *Drennan*, where the sub-bid was accepted after the attempt to revoke,²⁸¹ the sub-bid in *Pavel Enterprises* was accepted before the attempted revocation by the subcontractor.²⁸² Arguably, in such a scenario there is no need for promissory estoppel to hold the subcontractor's offer open.²⁸³ Therefore, the facts in this case were not ideal for the application of promissory estoppel.²⁸⁴

Finally, the court's reformulation of section 90 added to the confusion of promissory estoppel jurisprudence in Maryland. Elements three and four are facially consistent with the requirements and language of section 90, but the court imposed additional factors under

275. See *supra* notes 121-38 and accompanying text.

276. *Pavel Enters., Inc.*, 342 Md. at 155, 674 A.2d at 527.

277. *Id.* at 155, 674 A.2d at 527.

278. See *supra* note 179 and accompanying text.

279. See *supra* notes 172-83 and accompanying text.

280. Reliance by the general contractor was present, as the trial court found that "PEI relied upon Johnson's sub-bid" in computing its bid for the entire project. See *Pavel Enters., Inc.*, 342 Md. at 151, 674 A.2d at 525.

281. See *supra* note 170 and accompanying text.

282. See *supra* notes 249-53 and accompanying text.

283. See *supra* note 158 and accompanying text.

284. See *Pavel Enters. Inc.*, 342 Md. at 164-67, 674 A.2d at 532-33.

the first and second elements.²⁸⁵ Section 90 requires that the promisor reasonably expect his promise to induce action or forbearance and that the promise does induce such action or forbearance.²⁸⁶ It does not, as the court added, require an expectation of continued reliance by the promisee.²⁸⁷ Although the general contractor may not rely upon the promise if bid shopping occurs,²⁸⁸ a requirement of continued reliance by the general contractor is unnecessary²⁸⁹ and runs contrary to the case law of other jurisdictions.²⁹⁰ This additional requirement makes promissory estoppel under certain circumstances inapplicable as a protection against the risks encountered by subcontractors and general contractors.²⁹¹

The court's reformulation of section 90 also added an additional requirement to element one, that the promise be of a "clear and definite" nature,²⁹² something that does not exist in the *Restatement (First)*²⁹³ or *Restatement (Second)*.²⁹⁴ Accordingly, Maryland's application of section 90 is conditioned on a threshold finding of a "clear and definite promise."²⁹⁵ This requirement diverges from the *Restatement (Second)* definition of a promise, which only requires a manifestation of intent to act or refrain from acting.²⁹⁶ Requiring a "clear and definite promise" limits the applicability of promissory estoppel.²⁹⁷ One commentator noted that where the requisite promise is elevated to an offer status, promissory estoppel is held inapplicable in most court

285. See *supra* notes 259, 262-63 and accompanying text.

286. See *supra* note 84 and accompanying text.

287. See *supra* note 84 and accompanying text.

288. See *supra* notes 177, 219-20 and accompanying text; see also *supra* Part II.B.

289. See *supra* note 84.

290. Most other jurisdictions only require that the promisor reasonably expect reliance and that the promisee's reliance is satisfied merely by the general contractor's use of the subcontractor's bid. See *supra* Part II.B.3.a. for a discussion of cases which follow *Drennan*.

291. See *supra* note 259 and accompanying text. Therefore, in certain situations, application of this doctrine in Maryland will lead to the same result as would a decision following *Baird*. See *supra* notes 151-60 and accompanying text.

292. *Pavel Enters. Inc.*, 342 Md. at 166, 674 A.2d at 532.

293. See *supra* note 77 and accompanying text.

294. See *supra* note 84 and accompanying text.

295. If the first element is not satisfied there is no cause for the court to apply the remaining elements of promissory estoppel. See *supra* note 259.

296. Holmes, *supra* note 189, at 286 (arguing that court's use of the heightened standard of a "clear and definite promise" ignores the definition of a promise in section 2 of the *Restatement (Second)*).

297. *Id.*

opinions.²⁹⁸ Similarly, the two Maryland decisions after *Pavel Enterprises* that applied the reformulation never reached elements two, three, and four, instead basing their decisions to reject promissory estoppel on a failure to find a "clear and definite promise."²⁹⁹

IV. ALTERNATIVES

In the event the Court of Appeals of Maryland does not clarify the application of promissory estoppel in construction bidding disputes, there are three alternatives available to protect contractors.³⁰⁰ These alternatives, which also bind parties to their bids, arguably create just as stable a construction industry bidding process as the correct application of promissory estoppel.³⁰¹ These alternatives are the firm offer provision,³⁰² bid depositories,³⁰³ and the state bidding statutes.³⁰⁴ Although these are viable alternatives, each has certain limitations.³⁰⁵ Again, the best solution to Maryland's dilemma would be for the court of appeals to clarify its holding in *Pavel Enterprises*.³⁰⁶

A. Firm Offer

One common suggestion is the application by analogy of the firm offer provision as outlined in section 2-205 of the Uniform Commer-

298. *Id.*

299. *See, e.g., Doe v. Doe*, 122 Md. App. 295, 712 A.2d 132 (1998); *Dunnville v. McCormick & Co.*, 21 F. Supp. 2d 527 (D. Md. 1998). In *Doe*, the court of special appeals held, *inter alia*, that Mrs. Doe's promise to Mr. Doe that he could rely on her stock holdings for retirement if he deposited his income into a joint checking account was insufficient for a claim of promissory estoppel because the complaint "did not allege what [the defendant] meant when she allegedly told [the plaintiff] he could 'rely' on her stockholdings for his retirement . . ." *Doe*, 122 Md. App. at 360, 712 A.2d at 164. Thus, the court refused to enforce the promise because there was no "clear and definite promise." *Id.* Also, in *Dunnville*, the Federal District Court for the District of Maryland, applying Maryland law, held that a prospective buyer of a corporation's subsidiary could not maintain a claim against the corporation under the theory of promissory estoppel because the plaintiff could not show that the defendant made "a clear and definite promise." *Dunnville*, 21 F. Supp. 2d at 534.

300. *See infra* Part IV.A-C.

301. *See generally* Michael Gibson, *Promissory Estoppel, Article 2 of the U.C.C., and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659 (1988).

302. *See infra* Part IV.A.

303. *See infra* Part IV.B.

304. *See infra* Part IV.C.

305. *See infra* notes 310-12, 321, 333-34 and accompanying text.

306. *See supra* Part III.C.2.

cial Code (U.C.C.).³⁰⁷ This section makes a subcontractor's bid irrevocable if the offer is in a signed writing, which by its terms gives assurance that it will be held open for a reasonable period of time.³⁰⁸ The authors of this section believed that these two additional requirements to the traditional theory of promissory estoppel would eliminate some of the dangers the conventional doctrine imposed.³⁰⁹ However, because the U.C.C. applies only to transactions in goods,³¹⁰ section 2-205 cannot be applied to most construction bidding disputes, which essentially involve contracts for services.³¹¹ Therefore, only a few courts have considered the relevance of this section before proceeding to apply promissory estoppel.³¹²

B. Bid Depositories

One alternative that has been developed by the construction industry is bid depositories.³¹³ A bid depository is an organization created by subcontractors and used by owners, contractors, and suppliers.³¹⁴ It is designed to facilitate the bidding process according to specified

307. U.C.C. § 2-205 (1999); *see also* MD. CODE ANN., COM. LAW I § 2-205 (1997) (following the U.C.C. verbatim).

308. U.C.C. § 2-205; *see also* MD. CODE ANN., COM. LAW I § 2-205; *Pavel Enters., Inc. v. A.S. Johnson Co.*, 342 Md. 143, 159-60, 647 A.2d 521, 529 (1995) (recognizing the use of U.C.C. § 2-205 as an alternative to promissory estoppel).

309. Gibson, *supra* note 301, at 703. The main reason for the requirement of a writing was to eliminate the danger that an unscrupulous contractor would falsely testify to receiving a sub-bid and subsequently claim to have relied on that sub-bid. *Id.* The main reason for the requirement that the offer be accepted in a reasonable time was that the use of reliance as an enforcement mechanism is decidedly one-sided, as it is easy for a general contractor to rely on a subcontractor's bid, but it is extremely difficult for a subcontractor to use reliance against a general contractor. *Id.*

310. U.C.C. § 2-102 (1999) (stating that the Article applies to transactions in goods, unless the context requires otherwise).

311. Joel R. Wolfson, *Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?*, 600 PLI/Pat 317, 329 (2000). "Goods" are defined as "all things . . . which are movable at the time of identification to the contract for sale." U.C.C. § 2-105(1).

312. *See, e.g.*, *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974) (noting that the offer to supply pipes failed the requirements of U.C.C. § 2-205 and instead was enforced on the basis of promissory estoppel); *Pavel Enters., Inc.*, 342 Md. at 159-60, 674 A.2d at 529 (discussing U.C.C. § 2-205, but applying promissory estoppel instead).

313. SWEET, *supra* note 2, at 626.

314. *Id.*; *see also* SAMUELS, *supra* note 23, at 72.

rules by which members must agree to abide.³¹⁵ These rules require the orderly submission of bids by subcontractors to general contractors on a given date and prohibit subsequent price solicitations by all parties.³¹⁶ Since subcontractors are required to file definitive sub-bids prior to the general contractor's opening of these sub-bids, there is no opportunity for "last minute haggling."³¹⁷ Also, because any difference in price between the sub-bid and the price actually charged are likely to be detected, post-award bid peddling is limited.³¹⁸ If the general contractor awards any sub-bids to subcontractors who did not file with the depository, unsuccessful subcontractors can assume their bids have been used for bid shopping and refuse to submit bids to that contractor in the future.³¹⁹ Thus, nearly all depositories prohibit, by a number of methods, such evils as bid shopping in the bidding process.³²⁰ Although this alternative is extremely attractive, it is preventative, rather than remedial, has antitrust implications,³²¹ and is of no use once a bidding dispute has arisen outside of a depository.

C. Statutory Rules

State legislatures have also responded to the construction industry bidding dilemma by creating statutes that address the ills of bid shopping and bid peddling.³²² Nineteen states have statutes which require subcontractors to be listed on all bids for public construction projects.³²³ The statutes prohibit a general contractor from removing

315. SWEET, *supra* note 2, at 626.

316. George H. Schueller, *Bid Depositories*, 58 MICH. L. REV. 497, 498-99 (1960).

317. *Id.*

318. *Id.*

319. *Id.* at 499.

320. See SAMUELS, *supra* note 23, at 72-73.

321. For cases addressing the antitrust implications of such ventures see *Tekton, Inc. v. Builders Bid Service of Utah, Inc.*, 676 F.2d 1352 (10th Cir. 1982) and *Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Ass'n of South Carolina*, 436 F. Supp. 418 (D. S.C. 1976).

322. See *supra* note 323; see also *supra* Part II.B.

323. See ALASKA STAT. § 36.30.115 (Michie 1998); ARK. CODE ANN. § 22-9-204 (Michie Supp. 1999); CAL. PUB. CONT. CODE § 4104 (West Supp. 2000); CONN. GEN. STAT. ANN. § 4b-95 (West 1998); DEL. CODE ANN. tit. 29, §§ 6911(1), 6904(b)(2) (1997); FLA. STAT. ANN. § 255.0515 (West 1999); HAW. REV. STAT. § 103D-302(b) (Supp. 1999); IDAHO CODE § 67-2310 (Supp. 2000); IOWA CODE ANN. § 18.6(13) (West Supp. 2000); KAN. STAT. ANN. § 75-3741 (Supp. 1999); NEV. REV. STAT. § 338.141 (Supp. 1999); N.J. STAT. ANN. § 40A:11-16 (West Supp. 2000); N.M. STAT. ANN. §§ 13-4-32 to 13-4-43 (Michie 2000); N.Y. PUB. AUTH. LAW § 1735 (McKinney 1999 & Supp. 2000); N.C. GEN. STAT. § 143-128(b) (Supp. 1999); S.C. CODE ANN. § 11-35-3020 (Law Co-op 1999); TENN. CODE ANN. § 62-6-119 (1997); UTAH

or replacing a subcontractor listed in a bid for a state contract, subject to certain exceptions.³²⁴

For example, the California Legislature adopted the Subletting and Subcontracting Fair Practices Act.³²⁵ This Act provides that a general contractor on "any public work or improvement" must put in its main bid "the name and the location of the place of business of each subcontractor who will perform work . . . in an amount in excess of one-half of [one] percent" of the price of the main bid.³²⁶ The general contractor is also required to provide any other information requested by an officer, department board, or commission, concerning any subcontractor who the general contractor is required to list.³²⁷ Once a general contractor's bid on a public project has been accepted, the Act prohibits the general contractor from replacing any of the listed subcontractors, subject to nine exceptions.³²⁸ If a general

CODE ANN. § 63A-5-208 (Michie Supp. 2000); WASH. REV. CODE ANN. § 39.30.060 (West 2000); *see also* Allen Holt Gwyn, *A Review of Subcontractor-Listing Statutes*, 17 CONSTRUCTION LAW 35 (1997) (listing the nineteen statutes and describing their requirements and differences).

324. *See, e.g.*, FLA. STAT. ANN. § 255.0515. *See also infra* note 328 for a list of usual exceptions.
325. *See* CAL. PUB. CONT. CODE § 4101-14. The reason for the enactment of this chapter was legislative findings that bid shopping and bid peddling can "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 [general] contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." *Id.* at 4101; *see also* E.F. Brady Co. v. M.H. Golden Co., 67 Cal. Rptr. 2d 886, 890-91 (Cal. Ct. App. 1997) (stating that the Act was created to prevent bid shopping by general contractors pressuring other subcontractors to submit lower bids and to prevent bid peddling by unlisted subcontractors attempting to undercut known bids of listed subcontractors in order to obtain the sub-contract); *supra* Part II.B.
326. CAL. PUB. CONT. CODE § 4104(a)(1). In the case of bids for the construction of streets, highways, and bridges, however, the subcontractor's work must either be in excess of one-half of one percent of the general contractor's total bid or in excess of \$10,000, whichever is greater. *Id.* Also, no more than one subcontractor may be listed for each portion of the work. *Id.* § 4104(b). It is worth noting that the listing of a subcontractor, as required by the Act, does not create an express or implied contract between the general contractor and the subcontractor. *E.F. Brady Co.*, 67 Cal. Rptr. 2d at 890.
327. *See* CAL. PUB. CONT. CODE § 4104(a)(2) .
328. *Id.* § 4107. The awarding authority:
[M]ay consent to the substitution of the following [nine] situations: (1) When the subcontractor listed in the bid after having a reasonable opportunity to do so fails or refuses to execute a written

contractor violates these provisions, the awarding authority may cancel the contract or assess a penalty in an amount of not more than 10% of the subcontract in question.³²⁹ The Supreme Court of California has additionally held that public authorities have a duty to listed subcontractors not to consent to any wrongful substitutions of subcontractors.³³⁰

Another state, New Mexico, has enacted the Subcontractors Fair Practices Act, which substantially mirrors the California statute.³³¹ However, the New Mexico statute adds the unique requirement that agencies employ alternative dispute resolution procedures to resolve bid shopping and bid peddling claims.³³²

contract, when the written contract . . . is presented to the subcontractor by the . . . [general] contractor; (2) When the listed subcontractor becomes bankrupt or insolvent; (3) When the listed subcontractor fails or refuses to perform his or her subcontract; (4) When the listed subcontractor fails or refuses to meet the bond requirements of the . . . [general] contractor . . . ; (5) When the . . . [general] contractor demonstrates . . . that the name of the subcontractor was listed as the result of an inadvertent clerical error; (6) When the listed subcontractor is not licensed . . . ; (7) When the awarding authority . . . determines that the work performed by the listed subcontractor is substantially unsatisfactory . . . ; (8) When the listed subcontractor is ineligible to work on a public works project . . . ; (9) When the awarding authority determines that a listed subcontractor is not a responsible contractor.

Id.

329. *Id.* § 4110.

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

331. See N.M. STAT. ANN. §§ 13-4-31, 13-4-32, 13-4-34, 13-4-36 (Michie 1997); see also *supra* notes 325-29 and accompanying text. Again, based on findings that "the practice of bid shopping and bid peddling . . . 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 contractors and subcontractors and lead to insolvencies and loss of wages to employees," the Act prohibits a general contractor whose bid is accepted on any public works construction project from substituting a subcontractor in place of the subcontractor listed on the original bid. N.M. STAT. ANN. §§ 13-4-32, 13-4-36. There are nine exceptions to this substitute prohibition. See *id.* § 13-4-36(A)(1)-(9). These nine exceptions follow almost verbatim the nine exceptions in the California statute. See *supra* note 328 and accompanying text.

332. See N.M. STAT. ANN. § 13-4-43. The statute states that once a valid claim has been established the agency may "(a) hold a public hearing for the purpose of providing an informal resolution of the dispute by preparing a 'form of dispute' which shall be available to all parties . . . ; or (b) refer the matter in dispute to be resolved through arbitration." *Id.*

These laws offer a viable alternative to promissory estoppel. Nonetheless, these statutes only regulate construction contracts for public projects,³³³ which are only a small percentage of overall construction contracts.³³⁴ Therefore, in order to fully remedy the construction bidding dilemma, the Maryland Legislature would have to create legislation applicable not only to public, but private construction contracts as well.

V. CONCLUSION

The construction industry's unique practices³³⁵ lend themselves to creative solutions.³³⁶ Promissory estoppel has been applied by some courts as an answer to dilemmas encountered in the construction industry bidding process.³³⁷ The Court of Appeals of Maryland in 1996 took what appeared to be an opportunity to resolve confusion over the doctrine of promissory estoppel and applied it as a creative solution to bidding disputes.³³⁸ Because of continued confusion,³³⁹ however, Maryland, contrary to other jurisdictions,³⁴⁰ currently fails to apply appropriately the doctrine of promissory estoppel³⁴¹ and instead follows a misinterpretation of section 90.³⁴² The most appropriate forum to resolve this problem is the court of appeals.³⁴³ Therefore, when confronted with the correct factual scenario, the court must clarify its holding in *Pavel Enterprises* by applying the correct rationale for the *Restatement's* sections on promissory estoppel.³⁴⁴ Only through this clarification, or an alternative method,³⁴⁵ can a subcontractor's bid become irrevocable³⁴⁶ and a general contractor be prohibited from refusing to accept a sub-bid upon award of the main

333. See *supra* note 323 and accompanying text.

334. See U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 720 (1999). Government construction contracts accounted for 22% of the \$665 billion spent overall on construction in the United States in 1998. *Id.*

335. See *supra* Part II.B.

336. See *supra* Part III.B.

337. See *supra* Part III.B.

338. See *supra* Part III.C.1.

339. See *supra* Part III.C.2.

340. See *supra* Part III.B.3.a-b.

341. See *supra* Part III.A.3.b, III.B.3.a-b.

342. See *supra* Part III.C.1-2.

343. See *supra* Part III.C.2.

344. See *supra* Part III.C.2.

345. See *supra* Part IV.

346. See *supra* Part III.B.3.b.

contract.³⁴⁷ This would level the playing field between these two parties and eliminate any continued exposure to risk.³⁴⁸

Kai-Niklas A. Schneider

347. *See supra* Part III.B.3.a.

348. *See supra* Part III.B.