

Promissory Estoppel in Construction

What is it? Why Should You Care?

By Matthew DeVries



We all have made promises. Some we keep—some we don't. In the construction arena, a promise to perform certain work at a certain price may give rise to liability, including breach of contract, breach of warranty, and negligence-type claims, like misrepresentation and promissory estoppel. In July 2011, the Supreme Court of Nevada grappled with the issue of promissory estoppel when a subcontractor backed out of a deal and the general contractor suffered large losses to replace the subcontractor.

In *Dynalectric v. Clark & Sullivan Constructors*, the University Medical Center in Las Vegas (owner) solicited bids for an expansion project. Clark wanted to submit a bid to be the general contractor, so it sought bids from various subcontractors, including one from Dynalectric to perform the electrical work. Dynalectric repeatedly assured Clark of the accuracy of its bid and, based upon those representations, Clark incorporated Dynalectric's proposal into its submission to the owner. In the end, Clark was the lowest bidder and the owner awarded the contract to Clark. (Given the title of this article, do you see where this is going?)

Subsequent to the award, Dynalectric withdrew its bid, repudiated its obligations, and refused to negotiate a subcontract agreement with Clark. Left with no other option, Clark contracted with three replacement subcontractors to complete the electrical work for the project. It cost Clark an additional \$2.5 million above Dynalectric's bid to complete the electrical work.

PROMISSORY ESTOPPEL

Clark sued Dynalectric to recover its losses on the project. Although there were many different arguments made, the trial judge awarded the full \$2.5 million to Clark based upon a theory called promissory estoppel. There is a legal definition of promissory estoppel that includes words like *promisor*,

promisee, *reasonably expect*, and *forebearance*. However, the essence of the claim is that a promise to perform can be the basis of contract when someone else relies on the promise and is caused damage. The courts will also look to whether justice requires the relief sought by the injured party. The doctrine takes its name because a promisor who induces another to change its position substantially is "estopped" from walking away from the promise.

Ultimately, the court in *Dynalectric* determined that breach of contract and promissory estoppel were two different claims, but there was no reason to distinguish the type of damages. Numerous other courts have held that the measure of damages in a promissory estoppel case is the difference between the original subcontractor's bid and the replacement subcontractor's bid. Thus, if a subcontractor backs out of its \$3 million bid and it costs \$4.5 million for the replacement contractor to complete the same scope of work, the reasonable claim for damages would be \$1.5 million. The goal often times is to place the injured party in the same position it would have occupied if the breaching party had performed as promised.

Although not addressed by the court in *Dynalectric*, other issues involved in contractor-subcontractor bid disputes are the reasonableness of the bid, whether the subcontractor reaffirms the accuracy of the bid, when the contractor accepts the bid and whether the parties have properly documented the contract negotiations. Contractors should give written confirmation of notice of award of contract and require written acceptance by the subcontractor. To avoid timeliness issues, the parties should also include the time for acceptance in writing. ■

ABOUT THE AUTHOR

Matthew DeVries, construction attorney and LEED AP, is a member of the Construction Service Group of Stites & Harbison, PLLC, as well as the founder of www.bestpracticesconstructionlaw.com. He can be reached at matthew.devries@stites.com.