Chapter One

Contract Formation

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CHAPTER 1: CONTRACT FORMATION

1.01 Introduction

Chapter One provides a series of instructions related to the fundamental elements of the typical construction contract claim. These instructions explain the basic principles of contract formation, including the concepts of offer and acceptance, meeting of the minds, consideration, and the plaintiff’s burden of proof. Although the substance of most of the instructions in this chapter can be applied in any garden-variety contract dispute, the instructions are tailored, where appropriate, to construction contract disputes. These instructions also address the doctrine of promissory estoppel, which can provide a basis of recovery in instances where the requirements for the formation of a contract have not been met. This doctrine is often used in the absence of a written contract by the contractor seeking to enforce an oral bid quotation from a subcontractor on which the contractor relied in submitting its own bid to the owner. The comments following these instructions also provide further discussion of issues that commonly arise in the construction context.

1.02 Contract—Definition

A contract is an oral or written agreement between two or more parties. The parties must have a “meeting of the minds” or agreement on all essential terms for a binding contract to exist. A contract can be a written or oral agreement, or it can be implied from the conduct of the parties. A contract cannot be based on the secret intention or understanding of one party not conveyed to the other. To be enforceable, a contract must be based on consideration—that is, a promise to do something in exchange for something that is a detriment to the other party or a benefit to the first party.
Comment

Most contract disputes involve claims of breach. A contract results in an obligation enforceable at law, but it is distinguished from tort obligations and quasi-contractual obligations as it is promissory in nature and the result of a bargain or an exchange of equivalents. See Branco Enters. Inc. v. Delta Roofing Inc., 886 S.W.2d 157, 160–61 (Mo. Ct. App. 1994); see also Joseph v. Schwartz/Architectural Servs. PC, 957 F. Supp. 1334, 1339 (S.D.N.Y. 1997) (stating that an action should proceed under a contract theory when plaintiff is essentially seeking enforcement of a bargain).

Cases draw distinctions between express contracts, quasi-contracts, and a right to recover based on quantum meruit. An express contract can be written, oral, or inferred from the conduct of the parties. A party can plead, as an alternative theory of recovery, a claim for quantum meruit in addition to its claim for breach of contract. But, if a valid contract exists, there may not be recovery in quantum meruit. See Burnette v. Bradley, 379 S.E.2d 225, 227 (Ga. Ct. App. 1989); C.B. Snyder Realty Co. v. Nat’l Newark & Essex Banking Co., 101 A.2d 544, 553 (N.J. 1953). However, even if a party cannot prove that a valid contract existed, that party may recover in quasi-contract the amount of reasonable value it conferred on the other party to prevent unjust enrichment. See Power-Matics, Inc. v. Ligotti, 191 A.2d 483, 489–90 (N.J. Super. Ct. App. Div. 1963); Birchwood Lakes Cmty. Ass’n v. Comis, 442 A.2d 304, 309 (Pa. Super. Ct. 1982) (plaintiff must show that defendant “wrongfully secured or passively received a benefit that it would be unconscionable for [defendant] to retain”). While an unpaid subcontractor may maintain a quasi-contract claim against an owner when it is not paid for work on a project, the claim may fail if the owner paid the general contractor for amounts attributable to the work. In a well-written opinion on this subject in Commerce Partnership 8098 LP v. Equity Contracting Co., 695 So. 2d 383, 388 (Fla. Dist. Ct. App. 1997), the court pointed out that “the injustice was not visited upon the subcontractor by the owner who paid the contractor in full but by the contractor who hired the sub,” and no recovery was permitted.

Further, the promise may be enforceable by reason of “promissory estoppel,” a promise reasonably inducing definite and substantial action. Restatement (Second) of Contracts § 90 (1979); see also Pavel Enters.

The definition used here is a synthesis of 1 Arthur L. Corbin, CORBIN ON CONTRACTS § 3; 1 WILLISTON ON CONTRACTS § 1; RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); and U.C.C. § 1-201(11) (1999).

1.03 Offer and Acceptance

In this case, you must determine whether a contract exists between the parties. The owner contends a contract does not exist because [e.g., the owner never accepted the contractor’s offer].

For a valid contract to exist, there must be an offer and an acceptance. An offer is a request or communication to enter into a contract made in such a way as to invite acceptance from another to perform according to the offer. Typically, in the construction context, the bidding process is understood to be a formal system of offer and acceptance. For example, a bid may constitute an offer. When a bid is accepted, a contract may be formed.

The owner’s acceptance of the contractor’s offer need not be in writing. If you find that the owner expressed or implied to the contractor that the owner intended to accept the contractor’s offer, such action is sufficient to constitute acceptance.

If the offer specifies how the offer must be accepted (e.g., in writing), the offer can only be accepted in the manner specified. Yet, if the offer does not specify how the offer must be accepted, any reasonable acceptance in accordance with customary practice in the industry constitutes acceptance of the offer.

Comment

The language of this instruction is derived primarily from the RESTATEMENT (SECOND) OF CONTRACTS § 24 with guidance from 1 CORBIN, CONTRACTS § 11. Mutual assent may be found even when the moment of contract
formation cannot be specifically identified. See Restatement (Second) of Contracts § 22.

Typically, an offer must be accepted in the manner and under the terms contemplated by the offer. See id. § 65. When the parties fail to state clearly their intention to make or not make a contract, their words and actions must be interpreted to determine whether they intended to form an agreement. Custom and usage is one of the surrounding circumstances that must be considered in determining whether there was a contract. Custom and usage and other circumstances may establish that a contract is formed on the award of the contract. See Indus. Elec.-Seattle Inc. v. Bosko, 410 P.2d 10, 18 (Wash. 1966); Milone & Tucci Inc. v. Bona Fide Builders Inc., 301 P.2d 759, 761 (1956); see also Burlington Constr. Co. v. R.C. Equip. & Constr. Inc., 537 A.2d 534, 535 (Conn. App. Ct. 1988) (allowing jury “to define the context of the parties’ agreement by reference to trade custom and usage”), appeal denied, 545 A.2d 1099 (1988); Falcon Constr. Co. v. Bacon Towing Co., 613 F. Supp. 221, 225 (S.D. Tex. 1985) (finding actual usage of a barge bound plaintiff to the unsigned lease), aff’d without opinion, 797 F.2d 975 (5th Cir. 1986). However, “custom and usage cannot be invoked to create contract duties that did not previously exist or that are inconsistent with the contract.” Chas. H. Tompkins Co. v. Lumbermen’s Mut. Cas. Co., 732 F. Supp. 1368, 1374 (E.D. Va. 1990). An offer can be accepted by commencing performance only if the offer explicitly invites such an acceptance. See Restatement (Second) of Contracts § 53.

Further, instructing a party to proceed with a project, such as ordering materials, can be deemed an acceptance, even if it is not an explicit acceptance. In these circumstances, a court may consider the custom and usage of the industry and the parties’ intent. See Magnum Opes Constr. v. Sanpete Steel Corp., No. 60016, 2013 Nev. Unpub. LEXIS 1655, at *5–6 (Nov. 1, 2013) (finding the instruction to lock in pricing demonstrative of the contractor’s willingness to be bound by the subcontractor’s past performance of ordering materials).
1.04 Consideration

A contract must include consideration to be binding. Consideration is some promise that each party agrees to give as part of the bargain or exchange. For example, payment of money can constitute consideration. An agreement to do a task or perform a service can constitute consideration. Consideration can be any exchange that is valuable to the other party.

Comment

This instruction is based, in part, on pattern jury instructions from Maryland and Virginia. See MARYLAND CIVIL PATTERN JURY INSTRUCTIONS § 9:9 (4th ed.); and VIRGINIA MODEL JURY INSTRUCTIONS, CIVIL § 45.040 (2014).

1.05 Intention and Formation

The meaning of terms in a contract is determined by what the parties intended when the contract was made. It is generally presumed that the objective meaning of the words and phrases used in the contract expresses the parties’ intent.

Each word and phrase should be given its ordinary meaning and should be interpreted in a way that makes sense considering the other words and phrases in the contract. Unless the contract is deemed to be unclear or capable of more than one meaning, you should only consider the plain meaning of the words in the contract, and you should not consider any outside action or evidence.

If the contract is deemed to be unclear or capable of more than one meaning, then the contract may be deemed to be “ambiguous.” If a contract is deemed to be ambiguous, then you may consider the conduct of the parties and other outside evidence in order to determine what the parties intended the agreement to mean.

If one party can show that the other party knew at the time the contract was made that the first party interpreted words or phrases in a particular way and the other party did not object to this interpretation, then the
contract is to be interpreted using the first party’s understanding of those particular words and phrases.

In determining whether a contract was formed, you may consider not only the alleged contract but also the conduct of the parties with reference to the alleged contract. Their conduct before and after making the alleged contract may shed light on their intent.

Comment
This instruction is based, in part, on pattern jury instructions from Maryland and Florida. See Md. Civ. Pattern Jury Inst. § 9:20; Fla. Construction Law and Practice, Jury Inst. in Construction Cases § 17.3; see also Magnum Opes Constr., 2013 Nev. Unpub. LEXIS 1655, at *5–6; Kowalczyk v. Stroup, 873 N.Y.S.2d 43, 47 (App. Div. 1st Dep’t 2009) (“[W]hen a party gives forthright, reasonable signals that it means to be bound only by a written agreement, that intent is honored.” (internal quotation marks omitted)).

In the majority of states, “the question of the parties’ intent as to contract formation is a factual question.” Liu v. T&H Mach. Inc., 191 F.3d 790, 795 (7th Cir. Ill. 1999). “[W]here the question is as to the existence, not the validity or construction, of a building and construction contract, and the evidence is conflicting, the question is one for the determination of the jury.” Megarry Bros. Inc. v. United States, 404 F.2d 479, 483–84 (8th Cir. N.D. 1968) (citing Gibson & Odom Elec. Co. v. R.F. Ball Constr. Co., 368 F.2d 182, 183 (5th Cir. 1966); Kingsbury Breweries Co. v. Schechter, 142 F. Supp. 219, 222–23 (D. Minn.1956)). Yet other states reserve the determination of whether a contract exists for the province of the court as a matter of law. For example, under Texas law, “when reviewing written negotiations, the question of whether an offer was accepted and a contract was formed is primarily a question of law for the court to decide.” Hollywood Fantasy Corp. v. Gabor, 151 F.3d 203, 207 (5th Cir. Tex. 1998).

The issue of intent to be bound is particularly relevant in the area of construction because of the general industry practice in which many owners (or general contractors) evidence an intent to contract by a notice to proceed or letter of intent prior to execution of a formal subcontract agreement. “The intent of the parties, as always in the law of contracts, is determinative, the
question being whether the parties intended not to be bound or whether either of them manifested an intent to the other not to be bound until a fully integrated contract had been executed.” Saul Bass & Assocs. v. United States, 205 Ct. Cl. 214, 226–27 (1974) (citing 1 Williston on Contracts §§ 27, 28, 28A; Restatement (Second) of Contracts §§ 25, 26).

In determining whether a contract was formed, we may consider not only the alleged contract but also the conduct of the parties with reference to the alleged contract. Wheatland Irrigation Dist. v. Dodge, 387 P.2d 679, 682 (Wyo. 1963). Their conduct before and after making the alleged contract “may shed light on their intent.” 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.8, at 184 (1990). “[A] party’s subsequent behavior, such as issuing a press release, may be persuasive, especially if inconsistent with the party’s later contention.” Id.

1.06 Definiteness of Contractual Obligations

In order to be enforceable, a contract must be complete. In order to be complete, the contract must include all essential terms.

In order to be enforceable, a contract must also be reasonably certain. In order to be reasonably certain, the trier of fact must be able to determine the meaning of the essential terms.

Comment

This instruction is based, in part, on Virginia Model Jury Instruction, Civil § 45.170. “The law rejects post facto claims that agreements are too indefinite for enforcement, where the parties knew what each of them was to do under the contract and some standard exists to measure performance.” Sylvania Elec. Prods. Inc. v. United States, 458 F.2d 994, 999 (1972) (“Every detail and contingency of construction cannot be known in advance, and the contract does not, as plaintiff charges, become a pig in a poke for failure to state every such detail where a definite standard is laid down for what is to be built and furnished.”); see also Saul Bass & Assocs. v. United States, 205 Ct. Cl. 214, 226–27 (1974) (citing 1 Williston on Contracts §§ 27, 28, 28A; Restatement (Second) of...
In Saul Bass & Associates, the Federal Court of Claims determined:

Considering their haste and informality, the letters exchanged by the parties express with reasonable clarity, not only an intention to be bound but also terms sufficiently definite for performance and enforcement. The work the plaintiff is to do is described, provision is made for payment, and the duration of the agreement is specified.


The key factor is not the absence of any contractual undertakings which may normally be included by contracting parties engaged in a similar transaction. It is rather the intent of the particular parties involved in the transaction at issue. And the presence or absence of essential contract provisions is but an element in the evidential panorama underlying a factual finding of intent and enforceability.


1.07 Ambiguity (against Drafter)

Where the meaning of a term cannot be clearly determined from the objective meaning of the words and phrases used in the contract, then any doubts regarding meaning should be resolved against the party who drafted the contract.

Comment

This instruction is based, in part, on Virginia Model Jury Instruction, Civil § 45.170; see Heating & Air Specialists Inc. v. Jones, 180 F.3d 923, 930 (8th Cir. 1999) (contract ambiguities are construed against
1.08 Burden of Proof

The burden is on the plaintiff to show by a preponderance of the evidence that a contract exists.

The existence of a contract may be inferred from facts, circumstances, and the actions of the parties.

Once the plaintiff has demonstrated that a contract exists, the burden shifts to the defendant to demonstrate that no contract exists.

Comment

These simple statements, as they have been applied in the context of construction contracts, are merely recognitions of the general rule that the burden falls on the party trying to establish a claim or defense. See, e.g., Moore v. Ford Motor Co., 901 F. Supp. 1293, 1296 (N.D. Ill. 1995); Foster v. Jackson, 339 So. 2d 865, 868–69 (La. Ct. App. 1976); D.H. Blattner & Sons Inc. v. Firemen’s Ins. Co. of Newark, N.J., 535 N.W.2d 671, 675 (Minn. Ct. App. 1995); Camino Real Mobile Home Park P’ship v. Wolfe, 891 P.2d 1190, 1196 (N.M. 1995); Ragnar Benson Inc. v. Bethel Mart Assoc., 454 A.2d 599, 602 (Pa. Super. Ct. 1982). In the majority of states, “the question of the parties’ intent as to contract formation is a factual question, but once the plaintiff produces evidence establishing a prima facie case that a contract exists, the burden of production [shifts] to the defendant to offer any evidence to the contrary.” Liu v. T&H Mach. Inc., 191 F.3d 790, 795 (7th Cir. Ill. 1999).
1.09 Implied-in-Fact Contracts

Contracts can also be implied from the circumstances and conduct of the parties even if they did not enter into an express agreement. An implied contract exists when the parties’ conduct indicates they intended an agreement to exist. In other words, an implied contract is created when the parties act in such a way as to demonstrate the parties intended to make an agreement. To prove the existence of an implied-in-fact contract, one must demonstrate that the parties

1. intended to have an agreement;
2. each agreed to perform some obligation under the agreement; and
3. the terms of the agreement are sufficiently clear.

An implied-in-fact contract has the same legal effects of an express contract.

Comment


1.10 Contract by Performance

In some cases, a contract can be created by performance. If one party extends an offer and the other party starts to perform in response to an offer, you can find a contract existed. If the offering party was aware that the accepting party started to perform, this can support a determination that a contract was formed. If the performing party exercised reasonable
diligence to notify the offeror that it started performing work to accept the offer, you can find a contract was formed by performance. If the offering party expressly excluded performance as a way to accept the offer, then you should not find a contract was created by performance.

Comment

1.11 Inducement and Reasonable Reliance
(Bid Quotations/Promissory Estoppel)

Even if you find that a contract does not exist between the parties, if one party reasonably relies on an offer of the other party to perform work, the offer can be enforceable. The doctrine of promissory estoppel holds that if a party changes its position or otherwise relies on the promise of another, the promisor is “estopped,” or precluded from canceling the offer.

In the context of construction contracting, a subcontractor’s offer to perform the work at a certain price (or bid) may be enforceable if the contractor relies on the bid. The subcontractor’s promise (or bid) is enforceable if the contractor relied on the subcontractor’s bid quotation in the submission of the contractor’s own bid to the owner. The subcontractor becomes responsible to the contractor for its bid so long as the subcontractor should reasonably have expected the contractor to rely on its bid and the contractor’s reliance was reasonable under the circumstances. Similarly, if a subcontractor submits a bid and the contractor instructs the subcontractor to proceed with ordering materials in accordance with that bid, the contractor is bound to pay the subcontractor according to the bid.
Comment

Due to the statute of frauds, oral bid quotations not eventually put in writing in certain contexts may not be enforceable as contracts. Instead, the party that reasonably relies on the oral promise may recover on the basis of promissory estoppel. See B&W Glass Inc. v. Weather Shield Mfg. Inc., 829 P.2d 809, 813 (Wyo. 1992) (holding that the statute of frauds does not preclude recovery on the basis of promissory estoppel); see also H.B. Alexander & Son Inc. v. Miracle Recreation Equip. Co., 460 A.2d 343, 345 (Pa. Super. Ct. 1983) (finding that a binding oral contract was formed when contractor relied on a subcontractor's telephone bid).

Cases indicating that estimates in bid proposals may constitute a representation that may be relied on by the contractor include Drainage Dist. v. Rude, 21 F.2d 257, 260–63 (8th Cir. 1927); Chernus v. United States, 75 F. Supp. 1018, 1018–19 (Ct. Cl. 1948); Peter Kiewit Sons' Co. v. United States, 74 F. Supp. 165, 167–68 (Ct. Cl. 1947); and Branco Enters. Inc. v. Delta Roofing Inc., 886 S.W.2d 157, 159 (Mo. Ct. App. 1994). For the subcontractor's reliance on the contractor's instruction to proceed, see Magnum Opes Construction v. Sanpete Steel Corp., No. 60016, 2013 Nev. Unpub. LEXIS 1655, at *2–8 (Nov. 1, 2013).