

1952

R. J. Daum Construction Company v. Thomas B. Child and C. W. Child : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

R. J. DAUM CONSTRUCTION
COMPANY, a corporation,
Plaintiff and Appellant,

— vs. —

THOMAS B. CHILD and C. W.
CHILD, co-partners doing business
under the name and style of Thomas
B. Child and Company,
Defendants and Respondents.

UNIVERSITY OF UTAH

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RESPONDENTS' BRIEF

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Clerk, Supreme Court, Utah

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Defendants and Respondents.

No. 7790

RESPONDENTS' BRIEF

STATEMENT OF FACTS

The appellant's statement of facts does not cover the facts. In many instances matters which are stated to be facts were counsel's view of what he would like the facts to be and not what the evidence showed. We have accordingly deemed it advisable to make our own statement of the facts and to incorporate as nearly as possible the evidence given by the parties rather than our own conclusions as to what that evidence might be.

This is an appeal from a judgment dismissing the action, (R. 60, 97). The motion to dismiss was made at a pre-trial hearing at which both plaintiff and defendants were represented by their counsel, (R. 52, 53). Attorneys for plaintiff at the same hearing moved for judgment in plaintiff's favor with the case to be submitted to the jury for determination of damages only, (R. 52). On October 26, 1951, the court granted the defendants' motion to dismiss the action and denied the plaintiff's motion, and the case was ordered dismissed, (R. 59). The attorneys for the plaintiff on December 5, 1951, submitted to the trial judge a formal order dismissing the case which was signed and filed on that date, (R. 60). The attorneys for plaintiff did not request the trial court at that time to make any findings of fact and did not submit any written findings to the court and thereafter on December 21 filed a notice appealing from the order of December 5, 1951, granting the defendants' motion to dismiss the action and dismissing the plaintiff's complaint, (R. 97). This appeal is accordingly from the order of dismissal which was prepared and submitted to the trial court by the plaintiff.

THE PLEADINGS

According to the complaint, (R. 1-2), the plaintiff was a California corporation qualified to do business in Utah, and as general contractor had submitted a bid, and on June 29, 1950, was awarded a contract to construct certain firewalls in buildings at the Utah General Depot, Ogden, Utah. It was further alleged in the com-

plaint that plaintiff's bid on the project was in part based upon a bid dated June 23, 1950, submitted by the defendants as a proposed subcontractor in which the defendants proposed to furnish all labor and materials necessary for the completion of the brick work on the firewalls for a consideration of \$91,392.00; that the plaintiff accepted the bid made by the defendants and in conformity therewith submitted a contract dated July 11, 1950, to be executed by the defendants, but that the defendants refused to execute the same; that the plaintiff was thereby obliged to do the brick work covered by the defendants' bid at a cost to it of \$79,500.00 over the amount of defendants' bid.

By their answer, (R. 3-5), the defendants admitted that the plaintiff, as general contractor, was awarded the contract; admitted that the defendants had submitted to the plaintiff a proposal dated June 23, 1950, to furnish all labor and materials necessary for the completion of the brick work on the firewalls, but denied that the plaintiff had accepted the defendants' proposal and alleged that under date of July 11, 1950, the plaintiff mailed the defendants a contract for their signature which contract was not in conformity with defendants' proposal and was not an acceptance thereof and was never signed by the defendants. The defendants further alleged that the contract tendered by the plaintiff varied in material provisions from the defendants' proposal. The answer denied that the plaintiff sustained any damage by reason of any action or conduct on the part of the defendants.

THE PROCEEDINGS

R. C. Riding, who testified that he was plaintiff's superintendent of construction, (R. 14), and Thomas B. Child, one of the defendant partners, were the only persons representing either of the parties between whom any conversations were had relative to the issues in the case. All of the preliminary negotiations in connection with the submitting of the bid were handled on behalf of plaintiff by Riding exclusively, (Deposition 5, R. 32, 50). The defendants took the pre-trial deposition of Riding, and the plaintiff took the pre-trial deposition of Child, in which all conversations and dealings between them were covered. These depositions are a part of this record and consist of 118 pages beginning at R. 102.

On September 29, 1951, the attorneys for the respective parties entered into a written stipulation, (R. 14-29), the purpose of which as stated in the opening paragraph thereof, was "to enable the court to determine whether the plaintiff as a matter of law accepted or rejected the defendants' bid proposal." This stipulation further provided that the depositions of R. C. Riding and Thomas B. Child might be opened and published and were made a part of the stipulation in order to fully show the testimony offered by each of said parties with such exceptions as were noted in the stipulation, (R. 14).

On October 16, 1951, the case came on for pre-trial hearing before Judge Ellett, (R. 30-55), at which time the Specifications covering the firewalls were received in evidence and marked Exhibit "A"; also Addendum No. 1 which was dated June 12, 1950, was received in

evidence and marked Exhibit "B," (R. 36). The proposed subcontract which was mailed out to the defendants by the plaintiff was received as Exhibit "C," and the Plans in connection with the proposed firewalls were received as Exhibits "D" and "E," (R. 38). A Subcontract Agreement dated July 31, 1950, between Clark Ivory and the plaintiff for the brick work on said project was received and marked Exhibit "F." At the pre-trial the defendants' counsel conceded that the court might use the information in the stipulation or in the depositions as well as the exhibits for the purpose of determining as a matter of law whether or not there was a contract. However, in the event that the court ruled that there was a contract and ordered the case to be tried to determine the damages, the defendants' counsel reserved the right to present the evidence to the jury not for the purpose of having the jury rule on the question decided by the court, but merely so that it could have the whole picture before it and know what the case was about in assessing the damages, (R. 31). There is no evidence in the record that the plaintiff ever withheld its consent that the trial judge might consider all of the evidence including the depositions for the purpose of determining as a matter of law whether there was or was not a contract. In fact, the stipulation, in which the depositions were incorporated in full, was for the very purpose of enabling the court to rule on the question as a matter of law, the defendants only reserving the right to prove a custom as to one phase of the Specifications in the event that should be necessary to the decision of the case, and the plaintiff

reserving the right to object to the introduction of testimony relative to any such custom, (R. 28-29, 49, 50).

At the close of the pre-trial conference the court advised that he had enough information on which he thought he could rule whether there was a contract or not and whether he could dismiss the action, (R. 51). He at that time invited both parties to make motions. The defendants moved for a dismissal of the case, (R. 53), and the plaintiff moved for a judgment of liability against the defendants with the only issue to be submitted at the trial being the damages to which the plaintiff might be entitled, (R. 52). Thereupon the court made and entered its pre-trial order indicating that the issue of law to be determined was whether a contract had been entered into between the plaintiff and the defendants. The pre-trial order further provided that if there were no contract, then the plaintiff's complaint should be dismissed with prejudice, but if there were a contract between the parties, there would then be a question of fact as to the measure of the damages to be awarded the plaintiff, (R. 56). The pre-trial order further provided that all pleadings were merged in the pre-trial order and the only issues of law or of fact to be determined upon the trial of the lawsuit were those contained in the order, (R. 57). Arguments on the motion were heard on October 20, 1951, and each party submitted written memorandums in support of his position which are a part of this record, (R. 67-96). On October 26, 1951, a minute entry was made, by the court indicating that the defendants' motion to dismiss was granted and the plaintiff's motion denied,

(R. 59). On December 5, 1951, a formal order dismissing the action was signed by Judge Ellett and entered by the Clerk, (R. 60). This order had been prepared by plaintiff's attorneys and submitted by them to the court for signing.

THE EVIDENCE

The facts presented to the court by deposition, stipulation or exhibits are as follows:

Prior to June 20, 1950, the United States Army Engineers issued an Invitation to contractors to submit bids for the construction of firewalls in certain buildings located at the Utah General Depot, Ogden, Utah, in strict accordance with Plans and Specifications prepared therefor, (R. 15, 35). The Specifications, (Exhibit "A"), had been amended by Addendum No. 1, (Exhibit "B"), dated June 12, 1950, (R. 15). The Invitation for Bids was included within the Specifications and is found on the first page thereof. Paragraph 3 of the Invitation for Bids reads as follows:

"The right is reserved, as the interest of the Government may require, to reject any and all bids, to waive any informality in bids received, and to accept or reject any or all items of any bid, unless the bidder qualifies such bid by specific limitation."

The plaintiff was a California corporation with offices in Inglewood, California, (R. 14), and prior to June 20, 1950, was preparing estimates as general contractor

for the submission of a bid on this firewall project, (R. 15). Richard C. Riding conducted all of the preliminary negotiations and all of the work on behalf of the plaintiff in connection with submitting its bid on the project, (Deposition 5, R. 15).

On or about June 20, 1950, Riding contacted Thomas B. Child, one of the defendant partners, by telephone and asked Child if he wished to submit a bid for the brick work. Child replied that he would if he could see the drawings and specifications. Accordingly, on the evening of June 20, 1950, Riding delivered to Mr. Child at his home a set of the drawings and specifications and left them with Child. No copy of Addendum No. 1 or the Plan in connection therewith was ever furnished to Child by Riding or Daum, and Child had never seen Addendum No. 1 and knew nothing about it at the time of making his bid, (Deposition 6, 7, 8, 94, R. 15).

On the morning of June 22, 1950, Child telephoned his bid on the brick work to Mr. Riding's home at Tooele. Riding was not in but Mrs. Riding took down the bid in the total sum of \$91,392.00 for the brick work. The bid opening was scheduled for 2:00 P.M. June 22, 1950, and prior to that time the plaintiff submitted in one lump sum its bid as general contractor for the entire project, which with rolling steel doors, was in the sum of \$190,392.00, (R. 16).

Prior to submitting its bid the plaintiff had also requested bids for the brickwork from other subcontractors, two of whom were Alvin Watkins and Henry L. Ashton. Watkin's bid, according to Riding, was \$151,-

734.00 and Ashton's bid was \$105,000.00. Riding claimed that Ashton had made a mistake as to the date of the bid opening and that his bid was actually not received until one hour after the time set for bid opening, (Deposition 16, 17). A fourth bid for the brickwork was subsequently obtained from Clark Ivory in the sum of \$95,000.00 and a subcontract was in fact entered into between the plaintiff and Clark Ivory in that sum for the brickwork, (Deposition 17, R. 17, 48, 49, Exhibit "F").

The brickwork was covered by Section 3 of the Specifications, (Exhibit "A"), found at Page 3.1 thereof. Paragraph 3-01 reads as follows: "This section covers all masonry work." Other sections of the Specifications related to general conditions, special conditions, earthwork, concrete, sheet metal work, miscellaneous metal, carpentry, roofing and removal and salvage of roof trusses.

Addendum No. 1, (Exhibit "B"), provided for the use of sliding instead of rolling fire doors in the firewalls, and attached thereto is a drawing showing the wall construction for the use of the sliding doors. It also changed Sheet 2 of the original Plans requiring "reinforced pilaster footings," and also provided: "Masonry work shall not be started until concrete foundation has been in place at least seven days."

According to both Child and Riding the next conversation between them took place by telephone a day or two after the bids were opened, (Deposition 15, 96). Both testified that Riding told Child that his bid was low for the brick work and that Child was requested to confirm

his bid in writing which Child did by letter dated June 23, 1950, (Deposition 14, 19, 96, 97. R. 17-18). The written bid was the same as the verbal bid except that the written bid contained a post script, "add for each fire-door if filled \$175.00," which was not included in the verbal bid, (Deposition 11-13, 94, 95, R. 18, 39). This post script was written in by Child because Riding in this telephone conversation asked what charges there would be if the firedoors referred to in the Specifications were bricked in, (R. 18-19). Child further testified that in this conversation Riding said:

"You know how things are. It takes the Government quite a while to decide what they want, but *I think* after we get things fixed up for it we will give you a form of contract." (Deposition 97, R. 17).

Child further testified that Riding at this time gave him to understand that the plaintiff did not have the job, (Deposition 97, R. 17).

According to Riding the next conversation which he had with Child as near as he could remember was about July 3, (Deposition 19, R. 20). At this time he called to see about placing of reinforcing in the brick work and asked Child if he wanted to place it himself or through another subcontractor, to which Child replied that he would rather place it himself provided it was all bent, cut and designed properly, (Deposition 20, R. 20). Child admitted having a conversation with Riding where mention was made about placing of reinforced steel on the

job, but said that this occurred in connection with the previous telephone conversation a day or two after the bids were opened, (Deposition 98, 99, R. 20). Whatever the date of this conversation was, Riding admitted that the plaintiff did not at the time thereof have any contract with the Government and had not accepted Child's proposal, but that the conversation was still of a preliminary nature, (Deposition 20, R. 20). Mr. Riding testified as follows:

"Q. At this time (of the conversation regarding placing the reinforcing steel) you didn't have any contract yourself with the government, did you?

A. No.

Q. And of course you hadn't given Mr. Child any contract or accepted his proposal, had you?

A. No.

Q. This was still just preliminary negotiation, is that correct?

A. That is right." (Deposition 20, R. 20).

By letter dated June 29, 1950, addressed to plaintiff at its Inglewood, California office, the Corps of Engineers advised plaintiff that its bid had been accepted in the sum of \$190,392.00 and enclosed a contract for signature which plaintiff signed and returned, (R. 19, 20). While the general contract between the Government and the plaintiff was dated June 29, the contract was admittedly not signed by the plaintiff on that date as it was mailed out from the Engineer's Office in San Francisco to the plaintiff's office in Inglewood, California, by letter dated June 29, 1950, (R. 19). Under date of July 10, 1950,

the engineers issued formal notice to the plaintiff to proceed and to commence the work within ten days after receipt of notice. This communication was received by the plaintiff at Inglewood, California, on July 13, (R. 21).

On July 11, 1950, plaintiff mailed a letter from its Inglewood, California office to the defendants enclosing contract for signature. This letter with the proposed contract was received by defendants at Salt Lake City, Utah, about July 13 or 14, (R. 21, 22). A copy of the proposed subcontract is in the record marked Exhibit "C." It was signed on behalf of plaintiff by Wade A. Perong, Vice-President. The contract was a printed form contract with certain words typed in, including the following:

"TIME IS THE ESSENCE OF THIS CONTRACT. GENERAL CONTRACT TO BE COMPLETED WITHIN 120 CALENDAR DAYS. \$50.00 PER DAY PENALTY THEREAFTER—SUB-CONTRACTOR TO COMPLETE HIS WORK AS SCHEDULED."

According to both parties the next conversation which they had was by telephone and took place on July 14, (Deposition 20-21, 99-100, R. 22). At this time according to Riding he called Child for an appointment to have him go to Ogden, meet the rest of the subcontractors and get Child's opinions of how he would like to handle his part of the work. According to Riding Child made an appointment to ride up with him to Ogden the following morning and no mention was made to Child about any contract that was mailed out from the plaintiff's Ingle-

wood Office, and so far as Riding then knew Child had not received any such contract, (Deposition 20, 21, R. 22). Child's version of this conversation was that Riding had called him and wanted him to go up to Ogden and go over the job with him, but that he told Riding that he had received a form of contract from the plaintiff; that he and his partners had met together and decided that the contract was not in conformity with their proposal and that they were not going to sign the job up, (Deposition 99, R. 25).

The next conversation between Riding and Child took place at Child's home in Salt Lake on the following morning, to-wit, July 15, (Deposition 21-22, 100, R. 23, 25). According to Riding at this time Child told him that he had met with his brothers the night before and they had decided not to go through with the contract; that the contract was lying on the table and was dated July 11, (Deposition 22); that Child objected to the \$50.00 a day penalty provision in the typewritten insert in the proposed contract, (Deposition 23, R. 23), reading as follows:

“Time is of the essence of this contract. General contract to be completed within 120 days. \$50.00 per day penalty thereafter. Subcontractor to complete his work as scheduled.”

Riding testified that he offered to strike the \$50.00 a day penalty clause and initial it then and there, but he did not recall offering to strike the time limit feature from the contract. Riding testified that he was not an

officer of the plaintiff corporation, (Deposition 23, R. 23); that there was no schedule attached to the subcontract form and nothing in the Specifications showing the manner in which the defendants' work would be scheduled, and that nothing had ever been discussed or agreed upon with the defendants as to any schedule of work by them or the other subcontractors so that the schedule referred to in the typewritten insert in the subcontract agreement was something that would have to be worked out by conversation and dealings with all of the subcontractors and the plaintiff, (Deposition 24-26, R. 23). Riding also testified that he told Child that the penalty provision in the proposed subcontract agreement should not have been in there; that it wasn't according to the Specifications and his office had no reason for putting it in, (Deposition 27, 28, 102, R. 23). Child testified that in this conversation he told Riding that the time limit and penalty clause were not according to their proposal and could not be accepted in view of conditions such as the Korean War; that he also mentioned Addendum No. 1 which was referred to in the contract but which he had never seen. He claimed that Riding never offered to strike anything from the contract and that he took it in any event that Riding didn't have the right to alter the contract but this would have to be done by the people in plaintiff's California office who had made the contract and sent it to him. Child also claimed that in this conversation Riding said that there was no time limit in the Specifications and that the plaintiff had no business writing it in the contract, (Deposition 101-102, R. 25, 26). Also in connection

with this conversation Riding claimed that he brought up the question of brick and asked Mr. Child what he should do about the brick; that Child said he had on order one million two hundred thousand brick for the project and would turn it over to him, (R. 23-24). Riding further testified as follows:

“Q. Did he say he had an order, or did he say he would do what he could with the brick company to get your order? Do you remember specifically on that?

A. That I can't say, if he directly had an order, but he told me he had on order one million two hundred thousand brick for this particular project.

Q. You can state then that prior to the time this contract was mailed out to him by your Inglewood office, this contract dated July 11th, Mr. Child would have no possible basis of holding you under any agreement, would he?

MR. WATSON: We object to that as argumentative and asking for a conclusion.

MR. STRONG: I will re-frame the question.

Q. Prior to the time this contract dated July 11th was sent out, Mr. Child would have no basis for making any order of brick, would he?

A. He should.

Q. He had never received any word prior to that time from you or your company relative to this bid proposal he had submitted?

A. He knew he was low bidder.

Q. That is all he knew though?

A. And the general practice would be to protect you on your buying power on your low bid.

Q. I mean he didn't have any official right, or

any confirmation from your office prior to the time this contract was mailed out?

A. No.” (Deposition 27).

* * *

“Q. You mentioned about the brick, and you talked about him protecting you or something on the order of brick or arrangements he had. What was the outcome of that?

A. He immediately got on the phone and called a man, Calhoun, if I know the name properly—or Cahoon—and told him to transfer his order to R. J. Daum, that I would be right down to see him.

Q. Did he say ‘his order,’ those words?

A. I couldn’t swear to that.

* * *

Q. Whether it was an order or just a statement to the brick yard, you don’t know, do you?

A. No.” (Deposition 28).

Mr. Child testified that Riding mentioned a difficulty about getting bricks and requested him to turn over any priority which he might have. Child then testified:

“Q. What did you say? (Deposition 108).

“A. I told him I would call up; any influence I had to get him the bricks I would sure be glad to help him to do it.

Q. Had you made arrangements for the brick?

A. No; I had told them tentatively I was figuring that job, that I was expecting to sign up with Daum for the job.

Q. And you had put in an order for a million and some hundred thousand brick?

A. No, I just told them I expected to get the job.

Q. Did you at that time call Mr. Cahoon and ask

him to turn over an order you had for brick to Mr. Riding?

“MR. STRONG: I object to that question on the ground it is assuming something not in evidence. He has just stated he had no order with the brick company.”

(last question read by the reporter.)

- A. I think I spoke to Mr. Andrew Bath, the salesman there, and told him I wasn't going to have anything to do with the job up there now, and that anything he could do to help them get the material I wanted him to do it.
- Q. Do you recall the substance of your arrangement as to price for the brick on the job?
- A. No; they give us all the same price.
- Q. I am asking if there had been a price given to you on this?
- A. Yes, there had.
- Q. Did that price include a price as to the delivery on the job as well as a price to deliver to the factory?
- A. When I figured the job I asked what the price would be delivered at the job.” (Deposition 109, R. 17, 24, 25).

The conversations referred to above were the only conversations that took place between Riding and Child and were all of the conversations between the parties that would have any bearing at all on the issue involved in this case.

It is conceded that the defendants never did sign any contract to do the work and never did any work on the project, (R. 26, 28, 48). Thereafter, the plaintiff entered into a subcontract agreement with Clark Ivory to do the brick work for \$95,000.00, (R. 49, Exhibit “F”).

This contract was identical with that submitted to Child with the exception that the features to which Child objected as hereinafter pointed out were deleted therefrom.

POINTS

POINT I.

THE RECORD IN THIS CASE AS A MATTER OF LAW DISCLOSES THAT THERE WAS NO CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANTS.

POINT II.

THE TRANSMITTAL OF THE SUBCONTRACT FORM WAS NOT A CONFIRMATION OF A PREVIOUS ACCEPTANCE NOR MERELY A WRITTEN MEMORIAL OF A PREVIOUS CONTRACT.

POINT III.

THE PROPOSED SUBCONTRACT ITSELF WAS NOT AN ACCEPTANCE OF THE DEFENDANTS' BID BUT CONTAINED NEW MATERIAL WHICH MADE IT A COUNTER-PROPOSAL THEREBY REJECTING DEFENDANTS' BID.

POINT IV.

THE DEFENDANTS ARE NOT ESTOPPED TO DENY THE EXISTENCE OF A CONTRACT. PROMISSORY ESTOPPEL DOES NOT APPLY.

POINT V.

THE RECORD ON APPEAL IS SUFFICIENT TO SUSTAIN THE COURT'S GRANTING OF THE MOTION TO DISMISS. NO JURY ISSUES WERE PRESENT.

POINT VI.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FORMAL WRITTEN MOTION WITH NOTICE THEREOF WERE NOT REQUIRED AND IN ANY EVENT WERE WAIVED BY THE PLAINTIFF'S CONDUCT.

ARGUMENT

POINT I.

THE RECORD IN THIS CASE AS A MATTER OF LAW DISCLOSES THAT THERE WAS NO CONTRACT BETWEEN THE PLAINTIFF AND THE DEFENDANTS.

Appellant contends that the plaintiff by acts and conduct had accepted the defendants' bid and that a binding contract was thereby created. In our argument we will consider the acts and conduct allegedly constituting an acceptance in the order set forth in the appellant's brief.

Appellant at page 15 of its brief refers to a statement made by Child in a telephone conversation between him and Riding on June 23 or 24. In this conversation it was undisputed that Riding told Child that Child's bid was low for the brick work. Riding in his deposition did not testify in this conversation or at any other time that he had ever agreed to give Child a contract. Child testified that Riding in this conversation said:

“You know how things are. It takes the Government quite a while to decide what they want, but *I think* after we get things fixed up for it we will give you a form of contract.”

We submit that the statement quoted above did not show an acceptance of Child's bid by Riding. At most it merely indicated that Child might get a form of contract. If Riding had intended to accept Child's bid at this time, he would have said so without equivocation. His statements in other conversations hereinafter set forth clearly show that he did not consider there had been any acceptance of the defendants' bid.

Defendants were one of several subcontractors from whom the plaintiff had requested bids for the brick work. The mere fact that the defendants' bid may have been low, and even though plaintiff may have used defendants' figure in submitting its own lump sum bid on the whole project to the Government, would not in and of itself obligate the defendants to perform merely because the Government accepted plaintiff's bid and subsequently entered into a contract with it. See *Williston on Contracts*, Sec. 31, pages 74-75:

“* * * an ordinary advertisement for bids or tenders is not itself an offer but *the bid or tender is an offer which creates no right until accepted*. Even though the charter of a municipality expressly requires that a contract shall be awarded to the lowest bidder, a contract is not formed until the lowest bid is in fact accepted. Though the municipality can make a contract with no other person than the lowest bidder, it need make no contract with him.”

The plaintiff could accept or reject defendants' proposal or do the brick work itself. It had not promised

that the defendants would be given the brick work in the event that plaintiff's bid was low, and plaintiff was awarded the general contract. Paragraph 3 of the Invitation for Bids (Specifications Exhibit "A") reads as follows:

"The right is reserved, as the interest of the Government may require to reject any and all bids, to waive any informality in bids received, and to accept or reject any or all items of any bid, unless the bidder qualifies such bid by specific limitation."

Plaintiff clearly understood that there was reserved to it the right to reject or accept the defendants' proposal as plaintiff alone saw fit. This was the provision in the Invitation for Bids. While that provision was with reference to the entire contract, nonetheless the plaintiff by its very position in this suit and by the proposed contract which it subsequently tendered the defendants has taken the position that it had all rights as against the defendants which the Government had or might have under the Specifications against the plaintiff. The third paragraph of the proposed subcontract agreement, (Exhibit "C"), which plaintiff tendered defendants, provides:

"* * * the intention being that with respect to this subcontract, everything required of and binding upon the Contractor shall be required of and binding upon the Sub-contractor, and all rights, privileges, options, and the exercise of discretion with respect to said work reserved by or given to the Owner and the Architect may be maintained and

exercised with and/or against the Sub-contractor.”

There had, accordingly, been no conditional acceptance of the defendants’ bid and there was no promise to give the defendants a contract when and if the Government accepted the plaintiff’s bid.

It is further contended in appellant’s brief, page 16, that the conversation between the parties regarding the placing of reinforcing steel indicates that there had been an acceptance of the defendants’ proposal. There is some discrepancy between the parties as to when this conversation took place, Child claiming that Riding had talked with him over the telphone about placing of reinforced steel on the job, but that this was on June 23 or 24 when he was asked to confirm his verbal bid and was merely for the purpose of determining just what was included within Child’s bid proposal. Riding was not sure but as near as he could remember the conversation took place about July 3. However, Riding admitted that at the time of this conversation the plaintiff did not have any contract with the Government and *further admitted that the plaintiff had not accepted the defendants’ proposal or given the defendant any contract, but that the conversation was all of a preliminary nature.* The testimony of both Riding and Child in connection with this conversation conclusively indicates that it was of a preliminary nature. Both clearly understood that there had been no acceptance of the defendants’ proposal. Both stated that the conversation was of a preliminary nature. Both

recognized that something further must be required before there could be any contract.

The next conduct or action relied upon by appellant in its brief to show an acceptance pertains to conversation between Child and Riding on July 15 relative to bricks to be used on the job. Appellant in its brief, page 17, contends that the defendants had placed an order for one million two hundred thousand brick with the brick company. This is not the case. Child had not ordered any brick for the job. There is nothing whatsoever in the record to support the contention made by counsel for the appellant. In this conversation Riding readily admitted that he couldn't say whether Child told him he had an *order* for the brick and "couldn't swear" that Child actually used the word "order." Child testified that when preparing his bid he had called the brick yard and got a figure for the price of one million two hundred thousand brick delivered at the job site. There is nothing unusual about this practice. In fact, it would have been impossible for Child to have given a bid on the brick work without first knowing what the cost of the brick would be. Counsel for appellant in examining Child in his deposition attempted to have him testify that he had ordered the brick but this he did not do. He said that he had not ordered the brick, and did not have an order for the brick. He merely agreed to use his influence with the brick yard to help the plaintiff get the brick. Here again we submit that the evidence from both parties clearly shows that Child had not placed an order for any brick. There was, accordingly, nothing in this conversation to

indicate an acceptance. Furthermore, Riding at this time clearly understood that there had been no acceptance of the defendants' proposal. He testified that at the time of this conversation the defendants did not have any official right or any confirmation of their bid from the plaintiff.

In support of its argument under this heading the appellant cites *Thornton v. Pasch*, 104 Utah 313, 139 Pac. (2d) 1002. Counsel, however, carefully refrained from setting forth the facts in the Thornton case because they are definitely not in point. In the Thornton case the defendants were in the roofing business. The defendant Pasch asked the plaintiff to make a bid on the hauling of roofing for certain defense homes. The plaintiff went to Pasch's office and wrote out his bid on a scratch pad. Pasch took the bid and said he would take it up with his partner and let the plaintiff know. *About a week or ten days later Pasch told the plaintiff's wife over the telephone that they had a contract for her husband to sign and asked her to have him come in and sign it as soon as possible. In response to this the plaintiff called at Pasch's office, examined the document which was prepared for his signature. He did not sign it at that time, but the next day returned and signed it in Pasch's presence after a short discussion which resulted in some changes. The original was left with Pasch and the plaintiff received a copy. Neither the original or the copy were ever signed by the defendant. The agreement signed by plaintiff in Pasch's office was in the form of a contract and not an offer. Pasch told the plaintiff that*

the work would be ready about May 26. These facts according to the Utah Court indicated an acceptance by the defendant of the plaintiff's bid. However, in the case at bar the parties by their testimony readily conceded that all of these conversations and dealings prior to receipt of the tendered subcontract were merely of a preliminary nature and did not constitute an acceptance of the defendants' proposal.

Appellant also relies on the case of *Raff Co. v. Murphy*, 147 Atl. 709. The facts in that case are clearly distinguishable from those in the case at bar. There the plaintiff was engaged in the heating business and the defendant in the plumbing business. The plaintiff desired to submit a bid on a contract which called for both plumbing and heating. Since the plumbing was out of plaintiff's line, the plaintiff asked Murphy if he was interested in submitting a figure for the plumbing. Murphy agreed to do so, "*on condition that the plaintiff would not obtain figures from anyone else for that work, and would give them the job if the plaintiff secured the contract, and these conditions were accepted*" by the the plaintiff. The plaintiff company thereupon incorporated the defendant's bid in a combined bid covering both the heating and plumbing work and submitted it. Plaintiff was awarded the bid and telephoned one of the defendants advising him at which time this defendant informed him of his pleasure and appreciation. Some two days later the defendants called up plaintiff's office, advised that there had been a mistake in their bid, and that they would not go through with it.

In that case the plaintiff at the defendant's insistence refrained from seeking any other bids and promised to give the defendants the job if the plaintiff secured a contract. However, in the instant case the plaintiff had secured bids from other parties, did not promise to give the defendants a subcontract even though they might be low bidders, and, in fact, reserved the right to reject any and all bids. The Raff case accordingly is not in point.

We submit that the acts and conduct of the parties shows beyond question that there had been no acceptance of the defendants' proposal, and that both Child and Riding so understood.

POINT II.

THE TRANSMITTAL OF THE SUBCONTRACT FORM WAS NOT A CONFIRMATION OF A PREVIOUS ACCEPTANCE NOR MERELY A WRITTEN MEMORIAL OF A PREVIOUS CONTRACT.

At pages 20 and 21 of appellant's brief it is argued that the transmittal of the subcontract form was a confirmation of a previous acceptance and that the subcontract form was merely a written memorial of the contract so created. In our discussion under Point I we have shown that there had been no acceptance of the defendants' proposal by any action or conduct. There, accordingly, was no contract prior to the time that the subcontract form was mailed out. The mailing of the subcontract form, therefore, could not be a confirmation of any previous acceptance. Furthermore, as we shall point out in our discussion under Point III, the subcontract form itself

was not an acceptance of the defendants' proposal. Counsel for appellant quote from Restatement of the Law of Contracts, Chapter 3, Section 26 and also quote a portion of the comment under that section. However, they neglected to quote the remaining portion of the comment which reads as follows :

“On the other hand, if the preliminary agreement is *incomplete*, it being apparent that the determination of certain details is deferred until the writing is made out ; *or if an intention is manifested in any way that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.*”

And again :

“If the parties indicate that the expected document is to be the exclusive operative consummation of the negotiation, their preceding communications will not be operative as offer or acceptance.”

In order for the transmittal of the subcontract form to be a mere memorial or confirmation of a previous contract two things must accordingly be present: (1) The parties must have definitely agreed on all of the terms of the proposed contract so that nothing in addition remained to be determined by the writing; (2) The parties must have intended that the acts and conduct should constitute a binding agreement.

(1) By reference to Child's proposal, (R. 18), it will be observed that the defendants merely proposed to

furnish labor and materials to complete the brick work according to Plans and Specifications for a specified sum. No mention was made as to the time or manner in which the defendants should be paid. No mention was made as to any time limit within which the defendants would complete the brick work, nor as to any penalty that might be applied. No mention was made of any schedule under which the defendants were to complete their work. No mention was made that the defendants would waive any rights or claims which they might have against the contractor or any other subcontractor by reason of any damages caused by any act, omission or delay on the part of the contractor or other subcontractor. No mention was made of Addendum No. 1. No understanding had been reached as to whether the subcontractor would furnish a performance bond. All of these matters were specifically covered in the tendered subcontract agreement which also provided that there were no understandings or agreements except as expressly stated in the subcontract form. There is nothing in any of the conversations between Riding and Child showing any agreement on any of these particulars. Such an agreement would be necessary for a complete understanding and to make a definite and binding agreement. If, as appellant contends, there was an agreement prior to the time that the subcontract form was mailed out, what were the defendants' rights under such agreement? When was it to commence its work? When was it to receive its pay? What time limit or penalty, if any, was to be in force? Where was the plaintiff bound to any contract under which it could be

sued? These and numerous other questions must be answered and decided before there could be any meeting of the minds on any contract. We, accordingly, submit that the parties had not definitely agreed on the terms of any contract and that the transmittal of the subcontract form could not, therefore, be a mere confirmation or memorial of a previous contract.

(2) The parties by their own acts and admissions clearly indicated that all of their conversations were of a preliminary nature and that a contract must be written before either party could be bound. Riding, in his telephone conversation with Child, a day or two following the bid opening said he thought the defendants might receive a contract. This in and of itself indicated that the submission of a contract was to constitute the consummation of any acceptance of the defendants' proposal. Furthermore, in the next conversation between the parties relative to the placing of reinforcing steel Riding at that time specifically stated that the conversation was "just preliminary negotiations" and that the plaintiff hadn't "accepted" Child's proposal. Riding further testified in his conversation that took place at Child's home on July 15 just after the subcontract form had been mailed out that the schedule referred to in the tendered subcontract form was itself something that was not covered either by the Specifications or the Plans and which would even then have to be worked out in negotiations between the parties. He also testified in that conversation that prior to the time that the written contract was mailed out the defendants had no official rights under

their proposal or any confirmation at all from the plaintiff's office. Child, himself, had been given to understand that his proposal had not been accepted and that it would have to be accepted by the plaintiff's California Office. The first communication which the defendants received from the plaintiff's California office was the communication dated July 11 which enclosed the proposed subcontract form.

We submit that neither of the necessary requisites are present to make the tendered subcontract agreement a mere memorial of a previously accepted contract. The parties had not agreed definitely on the terms of any such contract, and, furthermore, they clearly and unmistakeably indicated that their conversations were only preliminary negotiations and that all legal obligations between them should be deferred until a contract was made.

The case of *Calumet Refining Co. v. Star Lubricating Co.*, 64 Utah 358, 230 Pac. 1028, is cited at page 21 of appellant's brief. In that case the defendant had purchased from the plaintiff on previous occasions at least 5 carloads of lubricating oil. Thereafter one of plaintiff's representatives entered into negotiations with the defendant for the sale of such oil as the defendant might need. At the termination of these negotiations the defendant delivered to the plaintiff an order or contract for the purchase of one thousand barrels of oil. There was an exchange of telegrams between the parties. The so called acceptance telegram contained the additional provision: "Terms one per cent ten days or thirty day

trade acceptance.” It was contended that the insertion of these terms in the telegram constituted a qualified acceptance. However, the evidence indicated that in the prior dealings between the parties the time and terms of payment had been the same as those specified in the acceptance telegram and that these were the usual terms of payment. Furthermore, on the same date that the telegram was sent the defendant gave the plaintiff an order for the shipment of one carload of oil under the very terms stated in the confirming telegram and this order was filled by the plaintiff. The Utah Supreme Court merely held that in view of the former relationship between the parties and because of the testimony as to the custom of the trade and the fact that the plaintiff had accepted one order and filled it under the terms called for in the telegram, the insertion of the words in the confirming telegram did not constitute a conditional acceptance. There had been a contemporaneous construction on the part of both parties by the acceptance and filling of the order under the very terms specified in the telegram which showed a complete meeting of the minds. We submit that there is no such evidence in the case at bar, and, in fact, all of the evidence conclusively indicates that both parties clearly understood that their conversation and dealings were of a preliminary nature and that there could be no contract until a written form was signed between the parties.

As indicated in the case of *Wells Construction Co. v. Goder Incinerator Co.*, 217 N.W. 112:

“At the outset of such an inquiry as this, there must be kept in mind the admonition of

Judge Taft (quoting from *Lyman v. Robinson*, 14 Allen (Mass.) 242), that 'care should always be taken not to construe' as a contract communications 'which the parties intended only as a preliminary negotiation,' and (quoting from *Rossite v. Miller*, 5 Ch. Div. 648), to prevent litigants from being 'entrapped into contracts * * * without the slightest idea that they were contracting.' "

The entire testimony of the parties clearly indicates that they were simply negotiating for a possible contract and never went beyond that stage. No agreement was ever reached and no contract was ever made. In fact the essential terms to a definite contract had never been agreed upon. And it was the intention of both parties that neither could be bound until there was a written contract.

Whether plaintiff intended its proposed contract to be a rejection or not is wholly immaterial. If it contained new and additional matter, as we shall see in our discussion under Point III, it constituted a rejection as a matter of law. Child certainly construed the contract as a rejection of the offer and so notified Riding by telephone which was later confirmed in discussions at the Child home.

POINT III.

THE PROPOSED SUBCONTRACT ITSELF WAS NOT AN ACCEPTANCE OF THE DEFENDANTS' BID BUT CONTAINED NEW MATERIAL WHICH MADE IT A COUNTER-PROPOSAL THEREBY REJECTING DEFENDANTS' BID.

The defendants' letter of June 23, 1950, addressed

to the plaintiff was an offer which required acceptance on the part of the plaintiff before there could be any contract. As we have heretofore seen in our discussions under Points I and II, there was no acceptance by any act or conduct. The letter of July 11, 1950, forwarding a proposed subcontract form to the defendants was not an acceptance of the defendants' proposal. The proposed subcontract contained new material and was a counter-proposal, which rejected the defendants' previous offer. Thereafter, the defendants' offer could only be revived by a new offer and such offer was never made.

In considering this proposition it should be noted that while plaintiff's contract with the Government was dated June 29, 1950, that it was not until July 11, 1950, that the plaintiff mailed to the defendants from its Inglewood Office a letter enclosing the proposed subcontract agreement.

A comparison of the defendants' proposal of June 23 with the tendered subcontract agreement dated July 11 conclusively shows that the tendered subcontract agreement was not an acceptance of the defendants' proposal but was in effect a counter-proposal and thereby as a matter of law amounted to a rejection of the defendants' proposal.

I.

In the first place, the proposed subcontract agreement attempted to bind the defendants to perform the work according to the Plans and Specifications, "*including Addendum No. 1.*" It is undisputed that the plaintiff

never furnished the defendants Addendum No. 1 and that the defendants never saw Addendum No. 1 until after the controversy had arisen. Addendum No. 1 provided for the use of sliding instead of rolling fire doors in the firewalls, changed the original plans to require "reinforced pilaster footings," and also provided "Masonry work shall not be started until concrete foundation has been in place at least 7 days." This is important because the defendants had nothing whatsoever to do with the pouring of the concrete. This work would have to be done by the plaintiff or through some other subcontractor over whom the defendants would have no control. Furthermore, the pouring of the concrete itself would be dependent upon other portions of the work to be performed by plaintiff or other subcontractors. Considering the 120 day time limit and \$50.00 per day penalty clause with which plaintiff attempted to saddle the defendants in the proposed subcontract agreement, this proposed 7 day limit could have disastrous results. There were 12 separate fire walls in all which would have to be laid in 4 buildings. However, before any of these fire walls could be started the work of clearing the area, cutting the roofs, tearing up the existing floors where the wall was to go, digging trenches and pouring concrete would have to take place and in addition the defendants would have to wait 7 days after the concrete had been poured on each of the 12 fire walls before the defendants could start their work on any of the walls, (R. 28, 47, 48, Deposition 39-42), and there was nothing in the contract or in the specifications which required the general contractor to follow

any specific schedule or to adopt any particular time limit in the pouring of the various foundations. The plaintiff, as general contractor, would, therefore, have it exclusively within its power to determine when the defendants could start work on any of the 12 fire walls.

It is contended by appellant at page 24 of its brief that this provision in the Addendum made no change whatsoever over the original specifications and that it was trivial in any event. The answer to such argument lies in the fact that the Government in writing the Addendum certainly did not deem that the change was trivial or that it was covered by the original Specifications, otherwise, there would have been no reason for including the change in the Addendum. Furthermore, if Addendum No. 1, as claimed by plaintiff's counsel, did not include any new features, why was it necessary for the plaintiff to specifically insert in its proposed subcontract agreement that the defendants' work should be in accordance with the Plans and Specifications, "including Addendum No. 1." We submit that the inclusion of Addendum No. 1 in the proposed subcontract agreement indicates that it contained provisions covering the brick work which were not included in the original Plans and Specifications, and to which the plaintiff desired that the defendants should be subject.

The appellant at page 25 of its brief further argues that any delay occasioned by the requirement that the concrete should be in place 7 days before any brick work should be started would be a delay occasioned on the part of the plaintiff or some other subcontractor for which the

defendants would not be responsible. We shall point out hereafter (infra p. 44-46) that this is not the case, because in the proposed subcontract agreement the defendants were required to waive any and all claims for damages for any act, omission or delay caused by the plaintiff or any other subcontractor.

II.

The proposed subcontract agreement was in the main a printed form of contract, but there was specifically typed in the following provision :

“Time is the essence of this contract. General contract to be completed within 120 calendar days. \$50.00 per day penalty thereafter—Subcontractor to complete his work as scheduled.”

This provision was a general time limit and penalty clause written into the Specifications to apply as between the Government and the plaintiff. It is true that such provision is for the whole project. However, by inserting such provision in the proposed subcontract agreement, the plaintiff attempts not only to charge the defendants with the 120 day time limit and \$50.00 per day penalty, but in addition thereto to impose upon the defendants a further and indefinite time limit since the defendants were compelled to complete the brick work not only within the 120 day general time limit, but “as scheduled.” It is undisputed that no schedule was attached to the tendered subcontract form showing the manner or time within which the defendants’ work was to be completed.

It is further undisputed that nothing had ever been discussed or agreed upon between Riding and Child as to any schedule or time limit on Child's particular portion of the work. It was also undisputed that the work consisted of several different phases, only one of which, namely, the brick work, was to be performed by the defendants; that before the brick work could commence the buildings would have to be cleared by the Government where the work was going to take place. Everything would have to be moved out from this area. It would then be necessary to take down the existing trusses and a part of the roofing because the 12 brick walls would go right up through the ceiling. Then the concrete flooring where the walls were to go would have to be dug out, trenches would have to be made and the footings poured (R. 28, 47, 48, Depositions 39-42). Seven days thereafter the brick work on such wall could commence. Following this there would be other work on the roof and roofing to complete each fire wall. Riding admitted that no time schedule for the various phases of the work had ever been agreed upon prior to or at the time the proposed subcontract agreement was mailed to the defendants. He admitted that this was something which would have to be worked out by future negotiations.

The defendants took the position that the general time limit and penalty clause in the Specifications had no application to their particular phase of the work. Section 3 of the Specifications Page 3.1, Subsection 301, specifically provides: "This section covers *all* masonry work." Child testified that his bid was based exclusively upon

this section of the Specifications and upon the Plans. There is nothing whatsoever in the masonry section of the Specifications or in the Plans to indicate any time limit or penalty clause for this particular phase of the work or in fact for the entire project itself. It is clear from the conversations and dealings between the parties that no time limit or penalty clause was in the contemplation of either Riding or Child and that such was definitely understood by Riding when he received the defendants' proposal. The defendants' proposal as it was clearly understood by Riding was merely to complete the masonry work pursuant to the masonry section of the Specifications and the Plans without any reference to any time limit or penalty clause. This was definitely understood by Riding who testified that in the conversation with Child on July 15 after Child had received the proposed subcontract agreement that he told Child that the typewritten provision relative to the time limit and penalty should not have been in the subcontract agreement; that it wasn't in the Specifications and that the plaintiff had no reason for putting it in the contract.

Furthermore, when the subcontract agreement with Clark Ivory was subsequently entered into by the plaintiff for the brick work, Riding wrote in ink opposite the typewritten time limit and penalty provision in his own handwriting these words: "This is not called for in Government spec.", and initialled the same.

It is, therefore, apparent that the defendants' bid was taken by Riding with the knowledge that there was to be no time limit or penalty provision at least insofar as

the defendants were concerned. The defendants' bid, therefore, must be interpreted in the light in which it was so understood. See Restatement of the Law of Contracts, page 74, Section 71, subsection (c) :

“Except as stated in Sections 55, 70, the undisclosed understanding of either party of the meaning of his own words and other acts, or of the other party's words and other acts, is material in the formation of contracts in the following cases and in no others :

* * *

(c) If either party knows that the other does not intend what his words or other acts express, this knowledge prevents such words or other acts from being operative as an offer or an acceptance.”

Both Riding and Child, the only persons with whom any dealings and conversations were had relative to the defendants' proposal, clearly and definitely understood that at least insofar as the brick work was concerned there was to be no time limit or penalty provision. However, as we have heretofore indicated, not only was it an attempt to impose the general time limit upon Child, but to include an additional limit that the defendants had to complete their work “as scheduled” by the plaintiff, which would leave the defendants completely at the plaintiff's mercy as the plaintiff might give the defendants any particular schedule that it saw fit.

At pages 22 and 23 of appellant's brief it is claimed that the defendants had notice when they computed their bid of the 120 day time limit and \$50.00 per day penalty

provision because of the provision in the special provision of the Specifications. It is accordingly argued that when the defendants made their bid they knew that time would be of the essence of their subcontract. In support of its position the appellant cites the case of *Ehret Magnesia Mfg. Co. v. Gothwaite*, 149 Fed. (2d) 829. In that case Gothwaite was engaged in the construction of steam distribution systems. He entered into a written contract with the United States to furnish certain materials and perform certain labor in connection with the construction of a steam distribution system. The Magnesium Company agreed to supply the necessary pipe to Gothwaite and to do certain of the work "in accordance with plans and specifications." When the installation was about complete, it was discovered when the steam was turned on that heat had melted various sections of the asphalt water proofing covering the pipe, causing considerable damage, and to remedy the same Gothwaite was put to considerable expense. He brought this suit to recover the expense from the Magnesium Company. One of the items of the plans and specifications required the contractor to guarantee the work for a period of one year after completion. The plans and specifications further required that the insulated pipe should be "permanently waterproofed." Since the Magnesium Company agreed to supply the pipe according to the plans and specifications, the court held that it was liable to Gothwaite for damages since the pipe which it had furnished was not permanently waterproofed.

In that case the provision in the specifications to

which the Magnesium Company was subjected related to the very phase of the work which it had undertaken to perform. It was contained within the very portion of the specifications relating to pipe. The Magnesium Company under these circumstances was held subject to a provision of the specifications which related to the very portion of the work which it had agreed to supply or perform. In the instant case, however, the provision with which the plaintiff seeks to charge the defendants was not contained in the Masonry Section of the Specifications and furthermore the masonry section specifically provided that it included "*All* masonry work."

The use of the words "pursuant to Plans and Specifications" in the defendants' proposal was for the mere purpose of identifying the brick work to be done and the manner in which it should be done pursuant to the masonry subsection. It certainly was not the intention of the defendants to incorporate in their bid proposal all of the Plans and Specifications that might relate between the plaintiff and the Government. See *Cummings Construction Co. vs. Marbleloid Co.*, 51 Fed. (2d) 906, wherein the Third Circuit Court of Appeals said:

"It was far from the intention of the defendant, when it entered into the contract to lay floors, to incorporate therein all the provisions of the plans and specifications in the contract between the plaintiff and the state of Maine."

See also to the same effect *Guerini Stone Company vs. P. J. Carlin Construction Company*, 60 Law Ed. 636:

“The reference in the subcontract to the drawings and specifications was evidently for the mere purpose of indicating what work was to be done, and in what manner done, by the subcontractor. Notwithstanding occasional expressions of a different view (see *Shaw v. First Baptist Church*, 44 Minn. 22, 24, 46 N.W. 146; *Avery v. Ionia County*, 71 Mich. 538, 546, 547, 39 N.W. 742; *Stein v. McCarthy*, 120 Wis. 288, 295, 97 N.W. 912), in our opinion the true rule, based upon sound reason and supported by the greater weight of authority, is that in the case of subcontracts, as in other cases of express agreements in writing, a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.”

It is further argued by counsel for appellant at page 23 of its brief that the \$50.00 per day penalty clause in the inserted typewritten provision did not purport to impose such penalty upon the subcontractor; that the appropriate place to accomplish this would be in the second paragraph of the second section of the subcontract form which was left blank. We submit that this is not the case. If it had not been the intention to charge the defendants with a \$50.00 per day penalty, there would have been no reason whatsoever in inserting the penalty provision in the typewritten portion of the subcontract. The typewritten provision specifically provided that time was of the essence of the contract; that the defendants would complete their work not only within 120 day time limit, but, “as scheduled.” The use of the \$50.00 a day penalty in connection with such language could have

only one meaning, namely, that the defendants would be subject to a \$50.00 per day penalty if they did not complete their contract within the time limit and "as scheduled." The reason the blanks were not filled in on the second paragraph was because the matter had been fully covered in the typewritten provision. Since the plaintiff had gone to the time and trouble to type the specific provisions relative to time limit and penalty into the printed form of contract, it certainly intended that the defendants were to be subject thereto, and we submit that this is the only reasonable construction of the proposed subcontract.

If, as plaintiff contends, the defendants' proposal incorporated the time limit and penalty provision because the proposal stated that the work would be done pursuant to the Plans and Specifications, there would then be no necessity for the plaintiff to type in on its printed form of subcontract this specific proposal because the printed provision of the contract likewise required the defendants to perform and complete the work in accordance with the Plans and Specifications. Certainly, at the time the subcontract agreement was written, it was definitely felt by the plaintiff that the general wording "to complete in accordance with the Plans and Specifications" was not sufficient to bind the defendants to any time limit or penalty provision, otherwise, there would have been no necessity of plaintiff's typing in this provision.

III.

The second paragraph of the second provision of

the proposed subcontract agreement provides that the defendants shall not be held responsible for any delays or interruptions caused by the neglect, delay or default of the plaintiff or the owner or the architect or any other subcontractor and then contains the following provision:

“* * * and the subcontractor hereby waives any and all claims upon the contractor for damages for any act, omission or delay caused by the contractor, the owner, the architect, or any other subcontractor, and hereby undertakes the work subject to all conditions as they now exist or may arise.”

The full significance and import of this provision in the proposed subcontract agreement can only be realized when it is considered in connection with other provisions of the proposed subcontract agreement.

The seventh paragraph of the subcontract agreement reads as follows:

“The sub-contractor shall hold and save harmless the contractor, the owner and the architect from any and all liability, including costs and expenses, in the performance of this sub-contract.”

The tenth provision of the proposed subcontract, among other things provides:

“Sub-contractor agrees to keep his own work protected from damage by the elements and from damage likely otherwise to be occasioned in the performance of construction work *and to protect*

all other parts of the work from damage likely to be caused by the Sub-contractor's work, and should any such damage be so caused, to immediately repair the same. Any default of the Sub-contractor in any such cleaning, protection, or repairs, may be remedied by the Contractor, and the cost deducted from the contract price."

The twelfth provision of the proposed subcontract agreement reads as follows:

"Neither the final payment nor any provision in the contract documents shall relieve the Sub-contractor of responsibility for faulty materials or workmanship; and, unless otherwise specified, he shall remedy any defects and pay for any damage to other work resulting therefrom, which shall appear within one year from the date of completion."

It can thus readily be seen that under the terms and provisions of the proposed subcontract agreement the defendants would not only have to guarantee their work for a period of one year, but, in addition, would have to repair any damage to the work of the general contractor or any other subcontractor resulting from any faulty performance of the work on the part of the defendants. However, should the reverse situation take place and should the defendants sustain damage by reason of any defective workmanship on the part of the general contractor or another subcontractor, the defendants under the proposed subcontract could not claim any damages. They specifically waived the same, and would have to assume the full responsibility of any

such loss. No such provision can be found in the defendants' bid proposal or in the Plans and Specifications themselves, or from the conversations between Riding and Child. These provisions, and particularly, the proposed waiver by the defendants of any claim for damages for any act, omission or delay by the contractor, owner, architect, or any other subcontractor can nowhere be found in or reasonably read into the defendants' proposal or in any provision of the Specifications on which the proposal might have been made. The provisions are new and distinct provisions creating substantially different rights and liabilities and depriving the defendants of rights which by the contract were expressly reserved to the plaintiff as contractor and to other subcontractors. These provisions materially altered the defendants' proposal and accordingly constituted a rejection thereof.

We submit that any one of the above 3 mentioned changes constituted material alterations in the defendants' bid proposal and that any one of such alterations is of such a nature to make the proposed subcontract agreement as a matter of law amount to a new proposal and a rejection of the defendants' original proposal. The original proposal having been rejected by the counter-proposal, the same could not thereafter be revived unless the defendants chose to re-submit it which according to the evidence they did not.

See Restatement of the Law of Contracts, Section 60, page 66:

“A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.”

See also Am. Jur. Vol. 12, page 543, Section 53:

“In order to form a contract, the offer and acceptance must express assent to one and the same thing. The acceptance of the offer must be substantially as made; there must be no variance between the acceptance and the offer. An offer imposes no obligations until accepted according to its terms, without qualification or departure.

* * * The acceptance must be unequivocal and unconditional. If a condition is affixed to the acceptance by the party to whom the offer is made or any modification of, or change in, the offer is made or requested, there is a rejection of the offer, which puts an end to the negotiations, unless the party who made the original offer renews it or assents to the modification suggested. The other party, having once rejected the offer by a conditional acceptance, cannot afterwards revive it by tendering an unconditional acceptance of it.”

See also *William E. Iselin v. United States*, 70 Law Ed. page 872 at page 874:

“It is well settled that a proposal to accept, or an acceptance upon terms varying from those offered is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.”

See also *Polhamus v. Roberts*, (New Mexico 1946), 175 Pac. (2) 196. In that case the plaintiff sent the following wire:

“Will give two year lease on premises you occupy at \$175 monthly. I am also ill and contemplate sale of the building as soon as possible. If you want lease please advise.”

The defendant forwarded the following airmail reply:

“Received your wire dated January 15, 1945, agreeing to lease me the Green Lantern for two years at \$175 per month. I accept the lease proposition but as I wrote you before I am assigning all of my lease rights to the parties to whom I sold the bar, a Mr. J. A. Terry and Mr. Rulon Moody, and they desire to have a written lease from you, and consequently I have had a lease drawn up between you and Terry and Moody leasing this property for a term of two years.

“They have signed the lease in duplicate and when you sign the same it will be complete. You can keep one copy and mail the other copy back to me for the purchasers.

“I am also enclosing check of Moody and Terry for \$175 for the first month’s rent beginning January 20, 1945.

“I am sure these parties I am selling to will keep all rental paid promptly each month and will take good care of the premises.

“If the lease is not satisfactory you can draw a new lease and send it down, but I think the lease is okey.

“Trusting I may hear from you by return mail returning the signed copy of the lease, and with best regards, I am, Etc.”

The court held that the reply though purporting to accept the terms of the offer added the condition that the written lease be made to a third person to whom the offeree was assigning his lease rights; that this constituted a departure from the terms of the offer, and was not a mere request of a favor to be complied with or not at the offeror's option, but was a condition of the acceptance and was, therefore, a counter-offer and gave rise to no contract, quoting from Restatement of Law of Contracts, Section 60, as follows:

“A reply to an offer, though purporting to accept it, which adds qualifications or requires performance of conditions, is not an acceptance but is a counter-offer.”

In *Northeastern Construction Company v. Winston-Salem*, Fourth Circuit, 83 Fed. (2) 57, the city after calling for bid proposals for sewer work eliminated about 15% of the work that had originally been projected. This was held to justify the successful bidder in withdrawing his bid and refusing to undertake the work since obviously the minds of the parties never met. It was further held that a stipulation in the specifications that a certain official was to have the right to eliminate any part of the work did not authorize such an elimination before a contract was entered into as against a bidder

dicating what or whose figure the plaintiff had used in computing the brick work portion of the job. Assuming that the plaintiff had used the defendants' figure, there was nothing to prevent the plaintiff, even after the bids had been opened and the Government had awarded its contract, from soliciting bids from other subcontractors for the brick work and giving the work to them. There is nothing in the record to show that the plaintiff in fact relied upon the defendants' bid because it could have done the work itself or had it performed by some other subcontractor. Since the plaintiff did not desire to bind itself to give a contract to the defendants in the event that the plaintiff was awarded the Government job, it cannot claim the benefit of any promissory estoppel.

Appellant relies upon the doctrine of promissory estoppel as set forth in the Restatement of the Law of Contracts in Chapter 3, Section 90, and claims that the case of *Northwestern Engineering Co. v. Ellerman*, 10 N.W. (2d) 879 is authority for the application of the doctrine in the case at bar. However, an examination of the facts in the *Northwestern Engineering* case will readily disclose that it has no similarity to the facts at issue in this case. In the *Northwestern Engineering Company* case the plaintiff and the defendant had entered into a written agreement which, among other things, recited that the plaintiff proposed to submit a bid for the construction of a certain project; that the defendant desired to subcontract a portion of the work in the event that the plaintiff submitted the lowest bid and was awarded the contract. It was further agreed

in writing that if the plaintiff was awarded the contract, that the defendant would perform a portion of the work as a subcontractor on the terms stated in the written agreement, and the plaintiff agreed to make payment to the defendant in such event. This agreement was signed by both parties. The defendant in fact submitted a bidder's bond guaranteeing its performance. In that case, therefore, the plaintiff by writing obligated the defendant and itself to a subcontract in the event the plaintiff was awarded the general contract. The plaintiff in this case could have followed that procedure and protected itself but chose not to do so, and obviously did not desire to obligate itself in any way to the defendants. The Northwestern Engineering case is, therefore, not in point.

The doctrine of promissory estoppel is one of limited application. It most generally is used in connection with charitable subscriptions but has been extended to a promise not to plead the statute of limitations or other similar defense or to enforce marriage settlements based upon a promise, but it is only in these types of cases that the doctrine applies. See Williston on Contracts, Sec. 139 commencing at page 494:

“In the United States, the decisions which have enforced promises, confessedly because of the promisee's action in reliance thereon have generally been cases of charitable subscriptions where courts, dissatisfied with the prevailing theories by which consideration is found for such agreements, but nevertheless disposed to follow the weight of American authority in sustaining

the subscriber's promise, have explained the liability on the ground of estoppel."

And again in that section :

"Promises of future action, it is generally held, if they can furnish the basis for an estoppel at all, can do so *only where they relate to an intended abandonment of an existing right*, and are made to influence others who in fact are induced thereby to act or forbear. * * *

"The law is clear that in any case where a party to a contract agrees to give up a possible further defense or foregoes the advantage of a condition provided for his benefit *in an existing contract*, the promise is binding if the promisee relying thereon changes his position. In these cases no new right is created. *The court does not maintain an action on the promise*; it reaches the desired result by allowing a defense to an action or allowing an original right to be enforced by merely prohibiting the interposition of a defense."

See also Williston on Contracts, Sec. 692 and 693, commencing at page 1997, where it is clear that the doctrine of promissory estoppel is limited to cases which recreate a liability which by its terms had been extinguished or to an obligation which by its terms has already been extinguished or made impossible of performance.

Williston on Contracts, Sec. 140 states that the rule as announced in the Restatement of the Law, Sec. 90 does not go beyond the existing law as enumerated in the aforementioned sections.

A case which in our opinion clearly shows that the doctrine of promissory estoppel does not apply is that of *James Baird Co. v. Gimbel Bros., Inc.*, Second Circuit, 64 Fed. (2) 344, decided by Judge Learned Hand. In that case the plaintiff had made a general contract for the construction of a public building. The defendant had submitted a bid to the plaintiff for the supplying of linoleum used in the building but through an error had underestimated the total yardage by about one-half of the proper amount. When it discovered its error, the defendant withdrew its offer, but the withdrawal was not received until after the plaintiff had put in its bid on a lump sum basis using the linoleum prices quoted by the defendant. The plaintiff's bid as general contractor was awarded and the defendant refused to recognize the existence of a subcontract to furnish the linoleum. The plaintiff sued the defendant. Judge Hand in that case held that there was no contract and that the doctrine of promissory estoppel did not apply. He said that the plaintiff had a ready escape from its difficulty by insisting upon a contract from the defendant before it used the defendant's figures. This would be similar to the contract used in the *Northwestern Engineering* case. In commenting upon Sec. 90 of the Restatement of the Law of Contracts relative to the doctrine of promissory estoppel the court held that the doctrine did not apply under the facts of the instant case, saying:

“In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter

of indifference to it. That offer could become a promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it. There is no room in such a situation for the doctrine of 'promissory estoppel.' "

The facts in the case at bar are analogous to those in the *James Baird Co. v. Gimbel Bros., Inc.* case. Obviously, when the defendants submitted their bid they were interested in obtaining a contract. They were not interested in submitting a figure to the plaintiff which the plaintiff might use in its lump sum bid, and subsequently perform the work itself or award the work to some other subcontractor. The plaintiff, on the other hand, when it took the bid was not interested in binding itself to award a subcontract to the defendants in the event that the plaintiff was awarded the job. It, therefore, is in no position to now claim that the defendants are estopped to deny the existence of a contract.

POINT V.

THE RECORD ON APPEAL IS SUFFICIENT TO SUSTAIN THE COURT'S GRANTING OF THE MOTION TO DISMISS. NO JURY ISSUES WERE PRESENT.

Both parties had entered into a stipulation and submitted the same, together with other evidence to the Court to enable the Court as a matter of law to determine whether there was a contract between the parties. At the pretrial counsel for the appellant conceded that all of the conversations bearing on the point had been reduced to deposition form and he knew of nothing then

that would change such testimony. (R. 50-51) Without repeating our previous arguments, we submit that the evidence clearly indicated that there was no contract as a matter of law.

The appellant complains that there were disputed facts from which a jury could have found that the defendants' offer had been accepted by the plaintiff. We submit that such is not the case. There was no material disagreement in the essential facts as testified to by Child and Riding in their depositions. Both agreed that all of their conversations prior to the mailing of the printed form of contract by the plaintiff to the defendants were of a preliminary nature. Riding positively testified to this effect and admitted that there had been no acceptance of the defendants' proposal in any of those conversations. There was, accordingly, no disputed issue to be submitted to the jury.

Appellant again cites the case of *Thornton v. Pasch*, 104 Utah 313, 139 Pac. (2d) 1002, which we have discussed elsewhere (*supra*, p. 24) in our brief and have shown was not in point under the facts in this case.

Appellant further contends that there was a disagreement between Riding and Child as to the date on which the conversation relative to the placing of reinforcing steel took place and that if Riding's testimony were believed an inference of acceptance might be drawn. This is not the case because regardless of the date Riding admitted that at the time of such conversation there had been no acceptance and that it was still just preliminary negotiations.

Counsel also persists in stating that there was a difference between Riding and Child as to whether the defendants had ordered brick for the job and that this should be a jury question. This has been fully covered in our brief, (*supra*, p. 23). There was no substantial difference between Riding and Child in this regard. Child testified that he did not order any brick and Riding testified that he was not certain whether Child had used the word 'order' or not.

By the clear and unmistakable statements and admissions of Riding there had been no acceptance of the defendants' proposal prior to the time that the written contract was mailed to the defendants from the plaintiff's California office, and, as we have seen in our discussion under Point IV the mailing of the subcontract form itself was a counter-proposal and a rejection of the defendants' original proposal. The lower court, therefore, properly held as a matter of law that there was no contract between the parties.

POINT VI.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FORMAL WRITTEN MOTION WITH NOTICE THEREOF WERE NOT REQUIRED AND IN ANY EVENT WERE WAIVED BY THE PLAINTIFF'S CONDUCT.

Appellant's counsel complains that no formal motion to dismiss under Rule 12 (c) was made and that no notice of such motion was served upon the plaintiff. This is a unique objection in view of the fact that both parties were in attendance at the pre-trial conference which was

for the very purpose of submitting sufficient facts or data to enable the Court to rule on the question as a matter of law. In fact, the parties had gone to the time and trouble to prepare a written stipulation to aid the Court in this regard. At the conclusion of the pre-trial conference the Court asked the parties if they desired to make a motion and both so indicated and dictated their respective motions into the record. The plaintiff knew what the respective motions were and, as a matter of fact, prepared a written memorandum commencing at R. 67 which was entitled, "Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Motion to Hold the Case for Trial for Assessment of Damages." In other words, both parties at the pre-trial hearing made motions. Neither made any objection to the manner in which the motions were made. Both prepared written memorandums which were submitted to the court at the time of the argument on the motions which was several days after the motions had been made and which date was agreed upon by the attorneys for the parties. If any notice or formal written motion were required, the same had been waived.

Appellant also complains that Findings of Fact and Conclusions of Law were not prepared and signed by the Court. Rule 12 (b) provides for a motion to dismiss and states that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 52 specifically provides, "Findings of Fact and Conclusions of Law

are unnecessary on decisions of motions under Rule 12 or 56 * * *.” We submit that the defendants’ motion was a motion to dismiss where matters outside the pleading were presented to the court in support thereof, and under such circumstances no Findings of Fact or Conclusions of Law were necessary. However, in any event the plaintiff herein waived Findings of Fact and Conclusions of Law since it prepared the written order upon which it has based its appeal and appellant did not see the necessity of submitting any Findings of Fact or Conclusions of Law in support of said order.

The plaintiff certainly understood from the motions and its conduct at the pre-trial hearing that the purpose of the motions was to permit the court to rule as a matter of law whether there was a contract between the parties. In fact, the plaintiff by its motion claimed that there was no material issue of fact and moved that the court find the existence of a contract and order the case for trial with the only question being the amount of the damages to be awarded. Neither party desired to go to the expense of a lengthy trial in which testimony as to accounting and damages would be involved when both felt that the case could be decided as a matter of law on the basis of the stipulated facts and evidence submitted to the court at the time of the pre-trial hearing. Both parties desired the court to rule on the question of the existence of a contract as a matter of law. We submit that both parties agreed to the procedure followed and that such procedure particularly under the circumstances was a proper application of the motion to dismiss and motion

for summary judgment. There was no genuine dispute between the parties on the material issues, and the record clearly indicated that there was no contract between the parties as a matter of law.

CONCLUSION

We respectfully submit that the judgment of the trial court should be affirmed.

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