

# Formation of Government Contracts Application of Common Law Principles A Reply

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# FORMATION OF GOVERNMENT CONTRACTS — APPLICATION OF COMMON LAW PRINCIPLES — A REPLY

*Robert S. Pasley\**

The Editors of the Quarterly kindly gave me the opportunity to read Mr. Stelzenmuller's article, "Formation of Government Contracts—Application of Common Law Principles,"<sup>1</sup> before its publication in the last issue. Both the author and the editors graciously accepted many of the suggestions which I made for revision. I still have some reservations, however, concerning Mr. Stelzenmuller's article, and the Quarterly has generously afforded me the opportunity to make the following observations.

While Mr. Stelzenmuller seems to have numerous grievances against Government procurement in general, he has selected two topics for special criticism: one, the rule that in formal advertising bids may not be withdrawn after the opening and before the award; and two, the rule that the Government is not bound by the unauthorized acts of its agents, even when they are within the apparent scope of the agents' authority. While I cannot go along with Mr. Stelzenmuller on the first point, I find myself quite in agreement with him on the second, although I do have some question about the specific illustration which he gives.

## I

### WITHDRAWAL OF BIDS AFTER OPENING

Mr. Stelzenmuller's criticism of the rule that in formal advertising bidders may not withdraw their bids after the opening seems to rest on three main propositions: (a) it is based on historical error; (b) it is a departure from general contract law; and (c) it has no statutory warrant. Let us take up each of these in turn.

#### *A. Historical Error*

We should be grateful to Mr. Stelzenmuller for demonstrating that the rule does indeed seem to rest on historical error. He shows us that the original opinions of the Attorney General were just the other way, and that the case usually cited as the leading authority, *Scott v. United States*,<sup>2</sup> is not authority for the proposition at all. For in that case, the bidder was in fact allowed to withdraw, the only penalty imposed being the forfeiture of his bid deposit. It seems that by a gradual process of encroach-

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\* See Contributors' Section, Masthead, p. 535, for biographical data.

<sup>1</sup> 40 Cornell L.Q. 238 (1955).

<sup>2</sup> 44 Ct. Cl. 524 (1909).

ment, extension, and misreading of prior opinions, the rule has assumed its present form. But does this prove that it is "wrong"? Many a rule of common law has developed in just this way. If we had to discard every such rule, how much of our present law would remain? Before rejecting a rule because it is historically unjustified, do we not also ask whether the rule as we know it is unsound or unjust in practical effect? It seems to me that Mr. Stelzenmuller confines his argument to a *legal* demonstration that the rule is "wrong," because inconsistent with "general contract law," and virtually ignores the important considerations of public policy and of procurement practice which have given rise to the rule and which justify its existence. I think that these require some consideration before we denounce the rule as a "serious error" and an example of "arbitrary official action."<sup>3</sup>

Procurement by advertising, as conducted by the Government, is a formal process which must, in fairness to all, follow definite, established procedures. Invitations are sent out and sealed bids<sup>4</sup> solicited on clearly defined specifications. A date and hour are set for opening the bids, and all bidders are warned that late bids will not be considered, and that after the opening bids may not be withdrawn or modified.<sup>5</sup> On the day and at the hour designated, the bids are opened in public, read aloud, and recorded in an "abstract." They are then evaluated by the Contracting Officer, to determine (1) whether they are in fact responsive to the invitation, (2) whether the bidders are responsible, financially and otherwise, and are eligible under the applicable statutes and regulations to receive Government contracts,<sup>6</sup> (3) whether there is any evidence of collusion or

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<sup>3</sup> Stelzenmuller, *supra* note 1, at 238.

<sup>4</sup> That is, enclosed in a sealed envelope, not necessarily executed "under seal."

<sup>5</sup> Instructions to this effect are included in U.S. Standard Form No. 22, "Instruction to Bidders; Construction and Supplies," 44 C.F.R., § 54.12 (Supp. 1953), 41 U.S.C. App. § 54.12 (1952), which is incorporated by reference in U.S. Standard Form No. 30, "Invitation for Bids; Supply," 44 C.F.R. § 54.19 (Supp. 1953), 41 U.S.C. App. § 54.19 (1952), as well as in other similar standard forms. In addition, the standard forms of bid include an agreement by the bidder to execute a formal contract, or perform in accordance with the bid, upon receipt of written notice of acceptance of the bid within 60 days (or less, if specified) after the date of opening. See, e.g., U.S. Standard Form No. 31, 44 C.F.R. § 54.20 (Supp. 1953), 41 U.S.C. App. § 54.20 (1952). Typical regulations governing withdrawal or modification of bids are found in the Armed Services Procurement Regulation (hereafter referred to as "ASPR") ¶ 2-303, 32 C.F.R., § 401.303 (1951). IA C.C.H. Gov't Contracts Rep. ¶ 29,072 (1954).

<sup>6</sup> For example, the Walsh-Healey Public Contracts Act, applicable to supply contracts above \$10,000, requires that the contractor be a "manufacturer of or regular dealer in" the supplies involved. 49 Stat. 2036 (1936), as amended, 56 Stat. 277 (1942), 41 U.S.C. §§ 35-45 (1952). The Government maintains a list of debarred bidders, who are ineligible to receive awards, either because of violation of or non-compliance with some statute, fraud, prior defaults, or other substantial reason. See, e.g., A.S.P.R. pars. 1-600 to 1-609, 32 C.F.R. §§ 400.600-400.608 (Supp. 1953), 1A C.C.H. Gov't Contracts Rep. ¶ 29,049 (1954).

other irregularity,<sup>7</sup> and (4) which bid, price and other factors considered, is the most favorable to the Government. This process takes a little time. Freight rates must be calculated, discounts computed, financial ratings checked, pre-award surveys conducted, lists of debarred bidders consulted, and so on. Typically, the Government reserves from 15 to 60 days to reach its decision, although normally it does so a good deal sooner. Now if, while this is going on, a bidder can withdraw or modify his bid, the whole procedure is thrown into uncertainty and confusion; in fact, it becomes unworkable. Not only that, bidders would be able to gamble on the result. If a bidder liked what appeared to be the probable outcome, he would hold the Government; if he did not, because of changes in the market or otherwise, he would withdraw his bid. The possibilities of chicanery and sharp practice, if not outright fraud, are limitless.<sup>8</sup>

For, and this is the important point which Mr. Stelzenmuller does not mention, the Contracting Officer has only two alternatives. He is bound by law either (1) to accept the most favorable responsive bid by a responsible supplier, or (2) reject all the bids and start over.<sup>9</sup> The situation is altogether unlike the case of the private businessman, who is free to accept any offer he likes, high, low, or intermediate, for any reason he likes, or to select one offer and use it as the basis for a counter-offer.<sup>10</sup> By the same token, it is altogether unlike the procedure followed in the "negotiation" of Government contracts, in which the Contracting Officer has the same freedom of action as the private businessman. And so it is not surprising that in "negotiation" the ordinary rules of law *are* applied and suppliers *are* allowed to withdraw their offers, or "quotations" as they are called, at any time prior to acceptance by the Government. This difference in treatment, far from reinforcing Mr. Stelzenmuller's argument, as he seems to believe,<sup>11</sup> really demonstrates the exact opposite, namely, that different rules are applied to the two cases because the *situations* are different.

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<sup>7</sup> Both the Armed Services Procurement Act and the Federal Property Act require that any bids received after advertising which evidence any violation of the antitrust laws be referred to the Attorney General for appropriate action. 62 Stat. 21 (1948), 41 U.S.C. § 151(d) (1952); 63 Stat. 393 (1949), 41 U.S.C. § 252(d) (1952). Ordinarily, all such bids would be rejected.

<sup>8</sup> See *Scott v. United States*, 44 Ct. Cl. 524, 527 (1909).

<sup>9</sup> *Ibid.* This requirement is codified in both Section 3(b) of the Armed Services Procurement Act [62 Stat. 22 (1948), 41 U.S.C. § 152(b) (1952)] and Section 303(b) of the Federal Property Act [63 Stat. 395 (1949), 41 U.S.C. § 253(b) (1952)]. It is true that the Government may, in a proper case, reject all bids and negotiate with one or more of the bidders. But the moment it does so, the ordinary rules of offer and acceptance apply, and no bidder can be held to his bid as a "firm offer."

<sup>10</sup> *Scott v. United States*, 44 Ct. Cl. 524, 527 (1909).

<sup>11</sup> Stelzenmuller, *supra* note 1, at 247 and n.43.

It should be observed that the rule against withdrawal or modification of bids after the opening is not so rigidly applied as to admit of no exceptions. Under the Armed Services Procurement Regulation, bids which show an obvious or clerical error may be corrected by the Contracting Officer, and bids which are the result of "mutual mistake" may be permitted to be corrected or withdrawn.<sup>12</sup> In cases where the Armed Services Procurement Regulation is not applicable, the courts have gone further and have permitted withdrawal upon the showing of any "honest" mistake, "mutual" or otherwise, and even where the bidder has been negligent in submitting his bid.<sup>13</sup>

True, the Government could, as Mr. Stelzenmuller suggests,<sup>14</sup> require a bid bond or deposit, and be satisfied with the forfeiture thereof if the bidder should withdraw. But this solution does not fully preserve the integrity of the procurement system outlined above; it would still permit a certain amount of speculation on the outcome. More important, it would not give the Government what it really wants, which is a contract for supplies or services, not the forfeiture of a bid deposit or the proceeds of a penalty bond. Finally, it would increase the over-all cost of procurement to the Government, and thus to the taxpayer, because the cost of any such requirement is ultimately reflected in the prices the Government has to pay for what it buys. And, skeptics to the contrary notwithstanding, Government procuring officials *do* think of the taxpayer. For these reasons, bid bonds are not widely used today, except in the case of construction contracts.

To go back to the matter of historical error. It is perfectly true that the *Scott* case is not really authority for the present rule, because there the bidder was in fact allowed to withdraw his bid and was required only to forfeit his deposit. But if a bid is a mere revocable offer, unsupported by consideration, why is not a bid deposit, which is equally unsupported by consideration, recallable by the bidder? But the general rule is undoubtedly that which was followed in the *Scott* case, that the deposit is forfeited, even though the bid which it is given to secure is revocable.<sup>15</sup> Williston<sup>16</sup> and Corbin<sup>17</sup> both state that this is the law. Yet it is hard to

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<sup>12</sup> A.S.P.R. ¶ 2-405, 32 C.F.R. § 401.405 (1951), 1A C.C.H. Gov't Contracts Rep. ¶ 29,085 (1954).

<sup>13</sup> *United States v. Lipman and Spilberg*, 122 F. Supp. 284 (E.D. Pa. 1954); *Rhode Island Tool Co. v. United States*, 128 F. Supp. 417 (Ct. Cl. 1955).

<sup>14</sup> Stelzenmuller, *supra* note 1, at 247.

<sup>15</sup> *Turner v. City of Fremont*, 170 Fed. 259 (8th Cir. 1909); *Daddario v. Town of Milford*, 296 Mass. 92, 5 N.E.2d 23 (1936).

<sup>16</sup> 1 Williston, *Contracts* § 61 (Williston & Thompson ed. 1936).

<sup>17</sup> 1 Corbin, *Contracts* § 47 (1950).

justify the result on the basis of abstract principles, if presence or absence of consideration is the test. Williston says that the deposit is forfeited because that was the understanding of the parties. But is it not equally their understanding, in our situation, by the very terms of the documents signed, that the bid is to be a firm offer, irrevocable for a stated period? Why is the one agreement binding, and the other not? That the result is indeed anomalous appears from Williston's suggestion that a deposit in the form of cash or a certified check is indeed forfeited, but if the deposit is represented by an *uncertified* check, the forfeiture can be prevented by the simple expedient of stopping payment on the check!<sup>18</sup> The real reason for the distinction would appear to be, not the presence or absence of consideration, but the traditional approach of the common law, which would give effect to a transaction evidenced by the physical delivery of a material object, whether a pledge, cash, or a sealed instrument, but not to an "informal" executory promise, whether oral or in writing, unless "consideration" was present. But however natural this distinction may have appeared to the lawyer of the seventeenth century, it makes little sense to the modern businessman.

The point I would like to make is, not that the *Scott* case is "right" or "wrong," but that it has been an easy and logical step from the rule announced there, that the bid deposit is forfeited, to the rule announced in the *Refining Associates* case,<sup>19</sup> and foreshadowed by prior administrative rulings, that the bid itself is irrevocable.

Mr. Stelzenmuller discusses the court decisions rendered during the period between the *Scott* case and the *Refining Associates* case and shows that in none of them was a bidder in fact precluded from withdrawing his bid. It is true therefore that none is authority, strictly speaking, for the rule claimed by the Government. But in at least two of these cases,<sup>20</sup> the courts placed their decisions squarely on the ground of mistake, and in the more recent of the two the court, after citing the prior cases, stated quite unequivocally, albeit by way of dictum:

The federal common law rule, therefore, would appear to be this: Because of the possibility of fraud among bidders the ordinary common law rule that an offer can be withdrawn at any time before it has been accepted does not apply to bids to the United States Government, but instead the rule is that after the bids have been opened, a bidder cannot withdraw his bid, unless he can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved.<sup>21</sup>

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<sup>18</sup> 1 Williston, Contracts § 61, n.17 (Williston & Thompson ed. 1936).

<sup>19</sup> *Refining Associates, Inc. v. United States*, 124 Ct. Cl. 115, 109 F. Supp. 259 (1953).

<sup>20</sup> *Alta Electric and Mechanical Co. Inc. v. United States*, 90 Ct. Cl. 466 (1940); *United States v. Lipman*, 122 F. Supp. 284 (E.D. Pa. 1954).

<sup>21</sup> *United States v. Lipman*, 122 F. Supp. 284, 287 (E.D. Pa. 1954).

I hardly think that these cases, even though they can be distinguished as to result, can be wholly disregarded as authority.

The third case<sup>22</sup> which Mr. Stelzenmuller discusses was also decided on the ground of mistake, but the court went on to point out that the invitation for bids had not contained any provision precluding withdrawal.<sup>23</sup> Mr. Stelzenmuller says that the court did not explain how it could have made any difference if the invitation had contained such a provision, and the court's "remark would appear to be mere thoughtlessness."<sup>24</sup> This may be so, but it does seem to me that the case was decided pretty squarely on the ground of mistake, and speculation as to what the result might have been, *if* there had been no mistake and *if* the invitation had called for firm bids, is not going to help us very much today.

There is another, very recent case, which does seem to lend some support to Mr. Stelzenmuller's position, but which apparently appeared too late for inclusion in his article. In *United States v. Sunshine Dairy, Inc.*,<sup>25</sup> the Court of Appeals for the Ninth Circuit upheld a bidder who had, after opening but before award, withdrawn his bid on an invitation to supply milk to a Veterans' Administration Hospital. The Oregon State Department of Agriculture had established new minimum prices for the sale of milk, which were higher than the prices bid by the plaintiff. Notice thereof, coupled with a threat to enjoin any deliveries at the bid price, reached the plaintiff after it had submitted its bid, which it promptly withdrew because of this circumstance. The court held that the plaintiff was justified in so doing, in that (i) it was threatened with injunctive proceedings and possible penalties, (ii) it had not been guilty of negligence, (iii) the Government's Standard Form seemed to contemplate circumstances short of negligence where withdrawal might be justified, and (iv) otherwise a gross injustice would be perpetrated. The court discussed the general rule that an offer may be revoked at any time before acceptance, and the Government's contention that that rule did not apply to public contracts, and also discussed the *Refining Associates* case. The court found the latter "important and interesting," but felt that the reasoning therein was perfectly consistent with its own decision in the case before it. While there is perhaps a suggestion in the opinion that the court did not particularly care for the rule contended for by the Government, the court was careful not to invalidate that rule unnecessarily, and its square decision of the case as coming within a permissible exception can hardly be dismissed as thoughtless or inadvertent.

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<sup>22</sup> *Nason Coal Co. v. United States*, 64 Ct. Cl. 526 (1928).

<sup>23</sup> *Id.* at 533.

<sup>24</sup> Stelzenmuller, *supra* note 1, at 244.

<sup>25</sup> 215 F.2d 879 (9th Cir. 1954).

*B. Departure from General Contract Law*

It is indeed written in the hornbook of the law that an offer may be withdrawn at any time before acceptance, and that at common law there is no such thing as a firm offer not supported by consideration. This rule is simply one aspect of a more general principle of mutuality of obligation believed to be fundamental in the law of bilateral contracts.<sup>26</sup>

But how fundamental is the rule about the revocability of offers? Has it always existed? Does it admit of no exceptions? Will it endure "to the last syllable of recorded time"?

Although some writers tell us that the rule concerning the non-enforceability of gratuitous promises has its origin in the remote mists of Germanic antiquity, the rules of offer, acceptance, and consideration as we know them in the law of contract are of comparatively recent origin, at least when viewed against the perspective of world history. They seem to have developed as part of the struggle, fought out first in equity, to give a remedy for the breach of an "informal" contract, at a time when the common law recognized only the specialty or sealed instrument, enforceable by the action of covenant, the obligation to pay a sum certain, supported by a *quid pro quo*, enforceable by the action of debt, and the obligation to return a bailed chattel, enforceable by the action of detinue.<sup>27</sup> In this sense these newer concepts marked a great step forward in the

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<sup>26</sup> Corbin quotes the following version of the principle of mutuality of obligation, as popularly understood: "It has been said, thousands of times, that both parties to a contract must be bound or neither is bound." 1 Corbin, Contracts § 146 (1950). He then proceeds to show that there are numerous situations where the supposed principle does not hold.

It would appear that more than one rule has grown up in the field of Government contracts which is at variance with the supposed rule of mutuality of obligation. For comments on some of these, see Note, "Government Contracts: Pitfall for the Unwary?" 3 J. Pub.L. 276 (1954), criticizing 33 C.G. 180 (1953), and Note 27 So. Calif. L. Rev. 496 (1954), criticizing *United States v. Weisbrod*, 202 F.2d 629 (7th Cir. 1953).

<sup>27</sup> See study prepared by Professor Horace E. Whiteside for the New York State Law Revision Commission, "The Development of the Doctrine of Consideration," and authorities cited therein. Second Annual Report of New York State Law Revision Commission 167-182 (1936). Professor Whiteside reached the following interesting conclusion on the question here involved:

It was not a necessary consequence of the requirement of consideration in simple contracts that a simple offer should be revocable unless supported by a consideration. Enforcement of offers according to their terms without reference to consideration would not be equivalent to enforcement of a gratuitous promise; the offeror would in any event be assured the consideration specified in his offer, and that consideration would have to be sufficient in law. . . . It may be a consequence of the eighteenth century will theory of contract that an offer should not bind the offeror after he has changed his mind unless supported by a valuable consideration. Be that as it may, it is now generally held that an offer or option (except the option under seal) may be revoked at any time by mere communication of such revocation, notwithstanding that it is irrevocable in terms or the offeror has promised to keep the offer open for a time. (Id. at 137.)

progress of the law. But it by no means follows that they are fixed, eternal principles, which lie forever beyond the possibility of change.

Now that the efficacy of the seal as a substitute for consideration has been largely done away with,<sup>28</sup> the common law rule that there can be no such thing as an irrevocable offer unsupported by consideration has itself become an anachronism. The rule has been severely criticized, especially in recent years.<sup>29</sup>

But even the common law has created occasional exceptions to the rule. Take the case of the "auction without reserve," where the auctioneer is held to his promise not to withdraw the goods from sale, once a bid has been made.<sup>30</sup> Although this rule is now codified in the Sales

<sup>28</sup> There is no federal statute that I know of which abolishes the common law effect of the seal. This raises the interesting possibility that bids on government contracts could be rendered irrevocable by the simple expedient of requiring that they be submitted under seal. The Navy formerly had such a requirement in the case of bids submitted on behalf of corporations (see Navy Contract Law, 30, 290 (Navpers 10841, 1949)), but the present regulations of the Armed Services and of General Services Administration do not include any such requirement. Undoubtedly, however, the practice of placing a corporate seal on bids is still widely followed. There is a question, however, whether a mere corporate seal, without a recital, is enough to make a corporate instrument a specialty. See e.g., *Hugg v. Maxwell*, 218 Fed. 356, 358 (2d Cir. 1914); Second Annual Report of New York State Law Revision Comm., 291-296 (1936).

<sup>29</sup> See, e.g., Pollock, *Principles of Contract* 21 (13th ed. by Sir Percy H. Winfield, 1950). Pollock had stated the traditional rule. Professor Winfield added, in brackets:

Such was the decision in *Dickinson v. Dodds* [(1876) 2 Ch. Div. 463; 45 L.J. Ch. 777]. One reason for it was that there was no consideration for keeping the offer open for the specified time. It is submitted that this is unsound. A stated in his offer the exact price of the house. That was the consideration on his side. Why should the law insist that he was entitled to extra consideration for allowing the offeree a certain time within which he could accept? Presumably he might have taken that very factor into account in fixing the sum that constituted the price, i.e., he may have fixed it rather higher than he would have done if no time had been specified.

Pollock's text goes on to show that the rule is different in modern Roman law: "There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign . . ." Pollock, *op. cit. supra*, at 21.

Our own critics are beginning to question more and more the soundness of the common law rule on this point. See, e.g., Llewellyn, "What Price Contract?" 40 *Yale L.J.* 704, 742 (1931); Corbin, "Recent Developments in the Law of Contracts," 50 *Harv. L. Rev.* 449, 451-453 (1937); Sharp, "Pacta Sunt Servanda," 41 *Col. L. Rev.* 783, 792-793 (1941); Fuller, "Consideration and Form," 41 *Col. L. Rev.* 799, 818-819 (1941); Mason, "Consideration—A Comparative View," 41 *Col. L. Rev.* 825, 844-848 (1941); Hays, "Consideration: A Legislative Program," 41 *Col. L. Rev.* 849, 859-860 (1941); Llewellyn, "Common Law Reform of Consideration: Are There Measures?" 41 *Col. L. Rev.* 863, 872-873 (1941); Corbin, "The Uniform Commercial Code-Sales: Should It Be Enacted?" 59 *Yale L.J.* 821, 827-829 (1950). For a dissenting view, see Havighurst, "Consideration, Ethics and Administration," 42 *Col. L. Rev.* 1, 23-25 (1942).

<sup>30</sup> *Warlow v. Harrison*, 1 E. & E. 309, 120 *Eng. Rep.* 925 (1859); *Johnston v. Boyes*, [1899] 2 Ch. 73, 68 L.J. Ch. Div. 425 (dictum). *Contra*: *Anderson v. Wisconsin Cent. Ry. Co.*, 107 *Minn.* 296, 120 *N.W.* 39 (1909). For an interesting controversy on the soundness

Act,<sup>31</sup> the fact remains that it was granted recognition, at least in England, without the aid of legislation. Although this result is usually explained in terms of orthodox theory,<sup>32</sup> the fact remains that the common law did really depart from the so-called "general" rule, precisely because the business practice was different, and common usage in auction sales demanded recognition.

Another area where the common law of some jurisdictions has granted halting recognition to the needs of business by creating an exception to the "general" rule is in the case of the so-called "firm offer puzzle," where a general contractor has submitted a bid on a project in reliance on "firm" offers from his suppliers, and then the latter have attempted to revoke their offers before the general contractor has received an award and accepted his suppliers' offers.<sup>33</sup> Again, a few courts at least

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of the English view, which raises many of the problems discussed herein, see Slade, "Auction Sales of Goods Without Reserve," 68 L.Q. Rev. 238 (1952); Gower, "Auction Sales of Goods Without Reserve," 68 L.Q. Rev. 457 (1952); and Slade, "Auction Sales of Goods Without Reserve," 69 L.Q. Rev. 21 (1953). The view that the auctioneer may not withdraw the goods in an auction without reserve, once a bid has been made, is supported in Restatement, Contracts, § 27 (1932); 1 Corbin, Contracts 341 (1950); and 1 Williston, Contracts §§ 29, 30 (Williston & Thompson ed. 1936) [So stated at p. 69 of the text. The 1954 Supplement, which was not prepared by Professor Williston or Professor Thompson, states that this rule, even though reflected in the Restatement, is entirely statutory in the United States, and that there is no common law authority therefor in this country. This seems to be correct. See Hashour, "Bids as Acceptances in Auctions 'Without Reserve.'" 15 Minn. L. Rev. 375 (1941)].

<sup>31</sup> Uniform Sales Act § 21(2). The rule is broadened in the Uniform Commercial Code to prohibit the withdrawal of bids as well as of the goods in auctions without reserve. Uniform Commercial Code § 2-328(3), and Comment 2.

<sup>32</sup> For example, that in this type of auction, the auctioneer makes the offer, whereas in the ordinary case he merely invites offers. 1 Williston, Contracts 69 (Williston & Thompson ed. 1936). The English courts have rationalized the result by holding that attendance at and participation in an auction without reserve creates a "collateral contract" between the auctioneer and the bidders. 1 Williston, Contracts 73 (Williston & Thompson ed. 1936) and cases cited, n.2.

<sup>33</sup> *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943), holding the suppliers' offers irrevocable on the theory of "promissory estoppel." *Contra*: *James Baird v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933). In *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1951), the court refused to accept the reasoning of the Baird case, but on the facts held that promissory estoppel could not be invoked.

For two different views on this problem, see Schultz, "The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry," 19 U. Chi. L. Rev. 237 (1952), and Sharp, "Promises, Mistakes, and Reciprocity," 19 U. Chi. L. Rev. 286 (1952). Although Professor Schultz concludes that there seems to be little necessity to hold the supplier's offer irrevocable in this situation (Professor Sharp disagrees), it is noteworthy that he has attempted to make a thorough survey of actual business practices and needs in the area.

In a very recent article, Mr. Stoljar dismisses the problem as unreal, since the general contractor has the power to accept the subcontractor's offer by making a counter-promise to place his orders with the offeror should his own bid prove successful, and that such a conditional promise constitutes valid consideration for a bilateral contract. Stoljar, "The False Distinction Between Bilateral and Unilateral Contracts," 64 Yale L.J. 516, 532-533

have been willing to recognize that an exception should be made and have held the suppliers' offers to be irrevocable, whether on a theory of "promissory estoppel" or of "business custom."<sup>34</sup> The real reason would appear to be that the old rules do not always fit modern needs, and when such a situation becomes acute, the common law, however reluctantly and with however much creaking of the joints, does eventually change. And it is to this very ability to change, to adapt itself to new and different situations, when the facts and business practices warrant, that the common law owes its strength and its amazing capacity to survive the most drastic political and economic upheavals. Deny this power of adaptation and change to the common law, and it will soon cease to be a living force in the modern world.

Dissatisfaction with the common law rule has been reflected in numerous proposals for legislative reform, some of which have been given effect. The Uniform Written Obligations Act,<sup>35</sup> adopted in Pennsylvania in 1927,<sup>36</sup> pointed the way by making enforceable, without consideration, any written promise containing the express statement that the signer intended to be legally bound. Then in 1941, pursuant to a recommendation of the New York State Law Revision Commission,<sup>37</sup> the New York Legislature changed the common law by providing that a written signed offer, stated to be irrevocable, shall be binding on the offeror for the period stated, or if no time is fixed, for a reasonable time.<sup>38</sup> In the words of Professor George J. Thompson, thus fell "one of the strongest bastions of the common law of consideration."<sup>39</sup>

A similar provision is included in the Uniform Commercial Code,<sup>40</sup>

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(1955). If this is so, why is not the Government's conditional counter-promise, inherent in its statutory obligation mentioned supra p. 520, to accept the most favorable responsive bid from a responsible supplier, if it accepts any, valid consideration for the bidder's promise to hold his offer open? The fact that such conditional counter-offers sound strange to our legal ear proves only that the latter is more attuned to the artificialities of orthodox doctrine than to the realities of business practice.

<sup>34</sup> But cf. *Albert v. R. P. Farnsworth & Co.*, 176 F.2d 198 (5th Cir. 1949). The subcontractor's offer had been held irrevocable by the District Court on the ground that such was the custom of the building trade in Louisiana [79 F. Supp. 27 (E.D. La. 1948)]. The Court of Appeals reversed, holding that custom cannot create a contract. On the general subject of business usage, see Wright, "Opposition of the Law to Business Usages," 26 Col. L. Rev. 917 (1926).

<sup>35</sup> 9A Uniform Laws Annotated 418-419 (1951).

<sup>36</sup> Pa. Stat. Ann. tit. 33, §§ 6-8 (1949).

<sup>37</sup> Leg. Doc. 65(M) 11, 16, 52, Report of N.Y. Law Rev. Com., 355, 360, 396 (1941).

<sup>38</sup> N.Y. Pers. Prop. L. § 33(5); N.Y. Real Prop. L. § 279(4).

<sup>39</sup> Thompson, "New York Reconsiders Consideration," 15 N.Y. State Bar Ass'n Bulletin 63, 77 (1943).

<sup>40</sup> Uniform Commercial Code § 2-205. Although Professor Williston has criticized the Code, his only objection to this section (aside from matters of wording) is that it is not

also now law in Pennsylvania,<sup>41</sup> and almost certainly destined to be adopted, in some form at least, in the remaining states. The English Law Revision Committee recommended similar legislation for Great Britain in 1941,<sup>42</sup> but this recommendation has apparently not been adopted.<sup>43</sup>

Admittedly, these are statutes or proposed statutes, which have no direct application to our problem. But they evidence considerable dissatisfaction with the common law rule. Perhaps the federal courts and the Court of Claims, in recognizing an exception to the rule in the case of Government procurement by formal advertising, without waiting for a statute, are simply demonstrating that they are in touch with the times and that much ahead of their more conservative fellow-lawyers, who "remove not the ancient landmarks." And is not this willingness to accept change, when change is justified, itself in the grand tradition of the common law?<sup>44</sup>

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as general in its application as the Uniform Written Obligations Act. Williston, "The Law of Sales in the Proposed Commercial Code," 63 Harv. L. Rev. 561, 576-577 (1950).

<sup>41</sup> Pa. Stat. Ann. tit. 12A, § 2-205 (1954).

<sup>42</sup> Law Revision Committee, Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration), CMD No. 5449, at 22-23 (1937). But see criticism of this report by Hamson, "The Reform of Consideration," 54 L.Q. Rev. 233 (1938).

<sup>43</sup> The recent report of the English Law Reform Committee, First Report (Statute of Frauds and Section 4 of the Sale of Goods Act, 1893) CMD No. 8809 (1953), recommending repeal of the Statute of Frauds except for contracts of guaranty and land contracts (which recommendation has been adopted by enactment of the Law Reform (Enforcement of Contracts) Act, 1954, 2 & 3. Eliz. 2, c. 34), does not cover the problem of consideration or of the irrevocable offer.

<sup>44</sup> It is interesting to note that Lord Mansfield, some 200 years ahead of his time, tried to eliminate the requirement of consideration in commercial cases involving written agreements, and won the entire Court of King's Bench to his view. *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1663, 97 Eng. Rep. 1035 (1765). The concurring opinion of Mr. Justice Wilmot is so pungently phrased that I cannot refrain from a few quotations:

I have traced this matter of the nudum pactum; and it is very curious.

Many of the old cases are strange and absurd; so also are some of the modern ones; . . .

In another instance, the strictness has been relaxed; as for instance, burying a son; or curing a son; the considerations were both past, and yet holden good. It has been melting down into common sense, of late times.

But this victory over the doctrine of consideration was short-lived, and was repudiated by the House of Lords in *Rann v. Hughes*, 7 T.R. 350 n, 101 Eng. Rep. 1014 n (1778), holding that the common law recognized only two types of contracts, agreements by specialty, and agreements by parol, and that the alleged third class, contracts in writing and therefore not requiring consideration, did not exist.

In their recent casebook on contracts, Professors Kessler and Sharp make this observation: Despite this set-back, Judge Wilmot's treatment of the consideration doctrine should not be overlooked. His opinion contains the seeds of a possible expansion of consideration which would include not only actual reliance (forbearance) on the part of the promisee but also the likelihood or risk of reliance. Outside commercial cases, however, the potentialities inherent in this approach have been developed hardly at all. . . . The reluctance of the courts to apply a risk of reliance doctrine is strikingly illustrated by their treatment of firm offers. Under a risk of reliance doctrine, the enforcement of a firm offer would present no doctrinal difficulty. Kessler and Sharp, *Contracts, Cases and Materials* 339-340 (1953).

### C. *Lack of Statutory Justification*

Concededly, there is no federal statute which expressly changes the common law rule. The problem would be a great deal simpler if there were. But it seems significant to me that on two recent occasions Congress has enacted comprehensive legislation in the field of Government procurement, the Armed Services Procurement Act of 1947<sup>45</sup> and the Federal Property and Administrative Services Act of 1949,<sup>46</sup> without mentioning the point.

This silence of Congress admits of a variety of interpretations. It may mean that Congress intended to approve and keep in effect the common law rule. But this is a palpable fiction. It may mean that Congress, knowing of the administrative interpretations which had been placed on Section 3709 of the Revised Statutes,<sup>47</sup> which was in large measure restated by those parts of the new statutes dealing with formal advertising,<sup>48</sup> intended to reaffirm such interpretations. This is equally a fiction, although it is one which has support in other fields where the intent of Congress becomes important.<sup>49</sup>

The truth is that Congress had no intention in the matter. It never thought about the question, because it was never called to its attention. I am satisfied that the reason it was not was that the executive agencies which sponsored the new legislation must have assumed that the point was too well settled to be debatable.

Mr. Stelzenmuller cites some of the statutes which do exist, and argues that none of them confers any rule-making power which would justify the executive in issuing regulations, binding on those outside the Government,

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<sup>45</sup> 62 Stat. 21 (1948), 65 Stat. 700 (1951), 41 U.S.C. §§ 151-161 (1952).

<sup>46</sup> 63 Stat. 393 (1949), 64 Stat. 591 (1950), 65 Stat. 700 (1951), 66 Stat. 594 (1952), 41 U.S.C. §§ 251-260 (1952).

<sup>47</sup> 41 U.S.C. § 5 (1952).

<sup>48</sup> 62 Stat. 22 (1948), 41 U.S.C. § 152 (1952); 63 Stat. 395 (1949), 66 Stat. 594 (1952), U.S.C. § 253 (1952). The wording of these two sections is identical, except for the substitution in the latter of the word "property" for "supplies." The legislative history of the former makes it clear that Congress intended to restate the advertising requirements of Revised Statutes § 3709 (*supra* note 47), in the light of a "century's accumulation of statutes," while giving procurement officials broader authority to negotiate and, in the case of advertising, to consider factors other than price in determining which bid is "most advantageous to the Government." H.R. Rep. No. 109, 80th Cong., 2d Sess. (1947); S. Rep. No. 571, 80th Cong., 2d Sess. (1947), 2 U.S. Code Cong. Serv., 80th Cong., 2d Sess. 1048-9, 1064 (1948).

<sup>49</sup> *Helvering v. Winmill*, 305 U.S. 79 (1938); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *Stout v. Hancock*, 146 F.2d 741 (4th Cir. 1944) cert. denied, 325 U.S. 850 (1945). But see *Helvering v. Wilshire Oil Co.*, 308 U.S. 90 (1939); *Helvering v. Griffiths*, 318 U.S. 371, 395 and n.46 (1942); *Commissioner of Int. Rev. v. Glenshaw Glass Co.*, 75 Sup. Ct. 473, 477 (1955).

which change the general law of contracts.<sup>50</sup> I will not dispute the point, although my own concept of the rule-making power of the executive is perhaps somewhat broader.

Mr. Stelzenmuller does not specifically cite Section 206(a)(4) of the Federal Property Act,<sup>51</sup> which authorizes the Administrator of General Services to "prescribe standardized forms and procedures" for Government procurement, warehousing, and related activities, and which is the statute under which the Government's standard forms, including instructions to bidders, are now issued. Nor does he cite Executive Order No. 6166, of June 10, 1933,<sup>52</sup> issued under the Reorganization Act of 1933,<sup>53</sup> establishing a Procurement Division in the Treasury Department and authorizing it to determine "policies and methods of procurement" and to prescribe the "manner of procurement," which Executive Order is the authority under which the earlier standard forms were issued, and which for that matter is still in effect in this respect.<sup>54</sup>

Admittedly, however, the statute and Executive Order just mentioned do not delegate any legislative power, which is Mr. Stelzenmuller's test, and if the forms prescribed thereunder do in fact change the law to the detriment, and without the consent, of private parties, no authority therefor can be found in this statute or this Executive Order. I would prefer to rest the argument on the proposition that the regulations which have been issued, and the forms which have been prescribed, simply reflect the "federal common law" on the point, as it has developed over the past forty-five years and as it has come to be recognized by the courts, the Comptroller General, and the Attorney General, and as reinforced by the statutory requirements, mentioned above,<sup>55</sup> binding the Government to accept the most favorable responsive bid by a responsible supplier, or else reject all bids.

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<sup>50</sup> Stelzenmuller, *supra* note 1, at 246-247.

<sup>51</sup> 63 Stat. 390 (1949), 40 U.S.C. § 487(a)(4) (1952).

<sup>52</sup> 5 U.S.C. § 132 note (1952).

<sup>53</sup> 47 Stat. 1517 (1933), 48 Stat. 16 (1933).

<sup>54</sup> The authority to prescribe standard forms seems to have been inferred from the intent of Executive Order No. 6166 as a whole, rather than from anything specifically set forth therein. See for example 44 C.F.R. §§ 54.1-54.31 (Supp. 1953), prescribing standard forms for use "without deviation by all Executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them," which expressly cites as authority Executive Order No. 6166. However, Section 602(b) of the Federal Property and Administrative Services Act of 1949, as amended (originally Section 502(b)), 63 Stat. 401 (1949), 64 Stat. 583 (1950), 5 U.S.C. §§ 124-132 note (1952), expressly preserves certain provisions of Executive Order No. 6166 relating to functions, then exercised by the Bureau of Federal Supply (the statutory successor to the Procurement Division of the Treasury), "with respect to standard contract forms."

<sup>55</sup> *Supra* p. 520 and note 33.

To sum up, I do not believe that the holding in the *Refining Associates* case "teeters precariously on juristic straws,"<sup>56</sup> or that it "necessarily merits rejection by fair-minded men."<sup>57</sup> I believe that it is supported by compelling reasons of policy, which I have tried to outline above. And I do not believe that these reasons are outweighed by the "desirability of protecting the businessman's expectation that he will be contractually bound with the government only by the same kind of juristic acts that bind him to any business agreement," or by the "desirability of rational consistency in the law."<sup>58</sup> I submit that the average businessman knows and cares little about "juristic acts," but does know a good deal about the documents he signs, and when such a document includes his promise that he will keep an offer open for a stated period, he expects to be bound thereby, absent mistake, frustration, or impossibility of performance. As for rational consistency, it is certainly a desirable goal. But it should not be placed above the dictates of common sense, the actual practices of Government buyers and suppliers, and the real needs of the Government.

## II

### APPARENT AUTHORITY

It seems to me that Mr. Stelzenmuller is on much firmer ground when he criticizes the rule that the Government is not bound by unauthorized acts of its agents, even though within the apparent scope of their authority. I agree with him that the application of this rule in its extreme form, once perhaps necessary for the protection of the public purse at a time when Government contracts were relatively few and it was fairly simple to ascertain or verify the agent's authority, is not in keeping with today's realities. And, as Mr. Stelzenmuller points out, the courts have in fact resisted the strict application of the rule, and have found various ways of escaping it, so much so that it can no longer be confidently asserted that it really is the law.<sup>59</sup> Yet the rule remains on the books, and is still invoked, especially by the Comptroller General, often with harsh results.<sup>60</sup>

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<sup>56</sup> Stelzenmuller, *supra* note 1, at 247.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> In addition to the cases cited by Mr. Stelzenmuller, see *United States v. Jones*, 176 F.2d 278, 282-285 (9th Cir. 1949); *Southern Pacific Co. v. United States*, 192 F.2d 438 (3d Cir. 1951).

<sup>60</sup> A recent example is 34 Comp. Gen. 280 (1954). The contracting officer had purchased an electric water cooler on the open market for \$190. In fact, unknown to the contracting officer, the same item was available in a General Services Administration warehouse for \$112. Under applicable regulations, all executive agencies were required to procure their electric water coolers through General Services Administration. The Comptroller General held that the contracting officer had exceeded his authority in

But it is by no means clear that the contractor in Mr. Stelzenmuller's illustration would have lost his case, had he stood by his guns. For the law seems fairly clear that the Government *is* bound by a contract duly entered into by an authorized contracting officer on the basis of a determination that the product offered is acceptable, even though that determination later turns out to have been erroneous.<sup>61</sup> It is simply not true that the Government is "allowed to avoid every imprudent transaction" on the ground that "its agents have no actual authority to make mistakes in judgment."<sup>62</sup>

But before venturing an opinion whether the case cited by Mr. Stelzenmuller should have been decided in favor of the contractor, we should note that we have before us only the contractor's *ex parte* version of the facts. Without in any way questioning the latter's perfect good faith in recounting his story to Mr. Stelzenmuller, I feel that I must point out that, as every lawyer knows from experience, a grievance asserted by a complainant will often assume an entirely different aspect after the other side's version has been heard, and still another aspect after both versions have been aired in court. Accordingly, I would prefer to suspend judgment on Mr. Stelzenmuller's illustration, as it is presented to us, until I had heard the Government's side of the case.

But apart from this specific example, and generalizing a bit, it may well be that the rule as commonly stated lends itself to abuse, and it is perfectly possible that it has been invoked *in terrorem* in cases to which it was never intended that it apply. But my own experience in Government procurement leads me to question Mr. Stelzenmuller's rather sweeping, but undocumented, conclusions:<sup>63</sup>

1. That "there is no reason to believe that this is an isolated instance, for the situation is fairly common";
2. That this "erroneous view of this area of the law is practically universal among contracting officials"; and
3. That "not only is it taught them in training courses, but the very example with which this discussion was begun is taught as an admirable or ideal example of its application."

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buying the water cooler elsewhere at a higher price. The contractor was, however, allowed to recover \$112, plus transportation.

Insult is added to injury by the doctrine that the rule is solely for the benefit of the Government and may therefore not be invoked by the contractor. Accordingly, a liquidated damages clause has been successfully invoked *against* a contractor, despite the fact that its inclusion in the contract was contrary to regulations and apparently unauthorized. *Hartford Accident & Indemnity Co. v. United States*, 127 F. Supp. 565 (Ct. Cl. 1955).

<sup>61</sup> *United States v. Jones*, supra note 59.

<sup>62</sup> Stelzenmuller, supra note 1, at 249.

<sup>63</sup> *Id.* at 255.

Finally, I cannot help but observe that on this subject Mr. Stelzenmuller is very critical of the present rule, which he describes as a "venerable commonplace,"<sup>64</sup> a "musty rule-of-thumb doctrine as it is usually stated,"<sup>65</sup> an example of "formulary reasoning,"<sup>66</sup> and an "old rubric."<sup>67</sup> Yet in the first part of his article, he accepts with equanimity the equally venerable and unrealistic rule of the common law that there can be no such thing as a firm offer without consideration. To me, this approach lacks consistency, except on the premise that the Government must be wrong either way. And that seems hardly fair.

#### CONCLUSION

In conclusion, I would like to say a few words in defense of that much maligned individual, the Government contracting officer, and his even more unpopular superior, the procurement policy official. Mr. Stelzenmuller, apparently drawing on his own experience as a contracting officer and on the misfortunes of certain contractors as recounted to him, is very unhappy about the whole situation. Although he concludes his article with a plea to the "fair minded" procurement official, his other statements leave the definite impression that that official is a rare personage indeed. For, we are told, contracting officials as a class seem to display a "rather cavalier attitude" toward the "application of dubious legal principles when it is to the government's advantage,"<sup>68</sup> they seem to be "subjected constantly to influences that induce them to distort the law and policies relating to government contracts to the detriment, or at least annoyance, of people who engage in business with the government";<sup>69</sup> and they are induced to "cover up" their mistakes "if necessary even by unfair dealings with third persons."<sup>70</sup> All of this is wearisomely familiar, and contracting officials have grown tired of even trying to refute it. Even more familiar are the charges, often made by the same person in almost the same breath, despite their palpable inconsistency, that contracting officers on the one hand squander the taxpayer's funds, and on the other are mean and niggardly in recognizing contractors' claims to compensation.<sup>71</sup>

I can only say, after eight years of rendering legal advice to hundreds of contracting officers and procurement officials, of all ranks and grades,

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<sup>64</sup> *Id.* at 248.

<sup>65</sup> *Id.* at 250.

<sup>66</sup> *Id.* at 253.

<sup>67</sup> *Id.* at 254.

<sup>68</sup> *Id.* at 255.

<sup>69</sup> *Id.* at 256.

<sup>70</sup> *Ibid.*

<sup>71</sup> Mr. Stelzenmuller seems guilty of this very inconsistency. See Stelzenmuller, *supra* note 1, at 256, and n.69.

that such sweeping charges are unjustified. Contracting officers, like other human beings, are of three different sorts, good, bad, and indifferent. But as a class, and with few exceptions, they try to do the best job they can for the taxpayer, while striving to be fair toward those with whom they deal. Perhaps a few in their zeal do overstep the bounds and treat contractors with undue severity. For every such instance, I can think of a dozen cases in which contractors have been guilty of sharp practice, or of shameless grasping for unjustified compensation. We live in an imperfect world, and the best of us can ill afford to boast of his virtue. Government contracting officials are no exception to the general rule. But the charge that the Government, on the whole, treats its contractors unfairly or unjustly is one which the record simply does not sustain.