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The following article is the final contribution of the late Professor Wendell F. Grimes to the field of legal research and writing. It was completed just prior to his untimely death.

UNILATERAL MISTAKES IN CONSTRUCTION BIDS: METHODS OF PROOF AND THEORIES OF RECOVERY—A MODERN APPROACH

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What are the remedies of one who has prepared a bid for a particular construction project and whose bid, saturated with a substantial and material error caused by the bidder's own mistake, has been accepted by the other party? The purpose of this article is to review developments in the field of unilateral mistake in construction bids which have taken place since the thorough analyses of Professor Patterson[1] and Samuel Lubell[2] and the suggestion of methods of proof and standards of recovery which can be applied in this ever-growing and vastly complex field of law.

The bidder may be seeking to rescind before any performance and recover a bid deposit[3] or he may be seeking to use his mistake

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[1] Patterson, Equitable Relief for Unilateral Mistake, 28 Colum. L. Rev. 859 (1928).

[2] Lubell, Unilateral Palpable and Impalpable Mistake in Construction Contracts, 16 Minn. L. Rev. 137, 138 (1931).

[3] M. F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 235 P.2d 7 (1951); Kutsche v. Ford, 222 Mich. 442, 192 N.W. 714 (1923); St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916); Donaldson v. Abraham, 68 Wash. 208, 122 Pac. 1003 (1912). Generally, provisions in contracts permitting no withdrawal of a

defensively when sued for breach of contract on the basis of his refusal to perform.[4] Of more importance for purposes of this article is the case wherein the bidder seeks to utilize his mistake as a basis of rescission or reformation of the contract after either partial, substantial or complete performance, with recovery off the contract for the value of the work performed.[5] Interesting questions arise concerning the several available methods of computing this recovery.

To qualify for equitable, or other non-statutory relief, the bidder must show by clear and convincing evidence, not by a mere preponderance of the evidence, that a material and substantial mistake was made in the preparation of the bid, that the bid was infected with or saturated by this error and that the mistake was known or should have been known by the other party. For purposes of a clear understanding of the cases and the knowledge concept discussed therein, "known" means either actual, subjective knowledge or objective knowledge in the sense that from all the circumstances the accepting party is charged with knowledge that something was wrong with the bid. Generally, the law is phrased that if the party receiving the bid knows or has reason to know, because of the amount of the bid or otherwise, that the bidder made a mistake, the contract is voidable by the bidder.[6]

Type of Mistake

Some writers and many courts have relied upon classification of the type of mistake as an important factor in allowing or denying relief.[7] Among the more common areas of classification, seemingly utilized to predetermine the result, are omissions of specific items or prices from a bid,[8] arithmetical mistakes and transpositional errors[9] and mis-

bid after its opening do not preclude equitable relief. Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373 (1900); M. F. Kemper Constr. Co. v. City of Los Angeles, supra; City of Baltimore v. De Luca-Davis Constr. Co., 210 Md. 518, 124 A.2d 557 (1956). See cases collected in Annots., 52 A.L.R.2d 803 (1957); 107 A.L.R. 1451 (1937); 80 A.L.R. 586 (1932); 59 A.L.R. 809, 824 (1929).

[4] Lubell, op. cit. supra note 2. Unilateral mistakes, particularly in bids for construction contracts, are of frequent occurrence. See Welch, Mistakes in Bids, 18 Fed. B.J. 75 (1958), wherein it is noted that 404 cases were submitted to the Comptroller General for decision in 1956.

[5] C. N. Monroe Mfg. Co. v. United States, 143 F. Supp. 449 (E.D. Mich. 1956). Such was the theory of the plaintiff's case in Poley-Abrams Corp. v. Chaney & James Constr. Co., 220 F. Supp. 401 (D. Mass. 1963). The authors were co-counsel for the plaintiff in that case.

[6] Saligman v. United States, 56 F. Supp. 505 (E.D. Pa. 1944); State of Connecticut v. F. H. McGraw & Co., 41 F. Supp. 369 (D. Conn. 1941); Kemp v. United States, 38 F. Supp. 568 (D. Md. 1941); Restatement, Contracts § 503 (1932); 5 Williston, Contracts § 1578 (Rev. Ed. 1937).

[7] Patterson, op. cit. supra note 1, at 884.

[8] Kutsche v. Ford, 222 Mich. 442, 192 N.W. 714 (1923) (final bid omitted a sub-bid for part of the work); Conduit & Foundation Corp. v. Atlantic City, 2 N.J. Super. 433, 64 A.2d 382 (1949) (omission of one sheet of tabulations from final bid).

[9] Poley-Abrams Corp. v. Chaney & James Constr. Co., supra note 5 (a figure of

takes caused by the misreading or misinterpretation of plans or specifications.[10] Broader classifications have been made in language similar to the following:

> There is a difference between mere *mechanical or clerical errors* made in tabulating or transcribing figures and *errors of judgment*, as, for example, underestimating the cost of labor or materials . . . . Generally, relief is refused for error in judgment and allowed only for clerical or mathematical mistakes. [Emphasis supplied.][11]

The questions presented in all cases of unilateral mistake are whether the mistake is material and substantial, whether the ultimate bid is infected with or saturated by the error and, finally, whether the offeree knew or should have known that the bid was materially in error. It is to be noted that it is not a requirement for, or condition of, relief that the offeree know, either objectively or subjectively, the exact nature of the error.

None of these fundamental issues can be helpfully answered by first classifying the error into either one of mechanics or one of judgment. The fact of the existence of an error and the effect of this error, be it of judgment or mechanics, upon the intended bid should be enough to start the legal proceedings toward relief.[12]

$53,951 was erroneously transcribed $5,395); School District v. Olson Constr. Co., 153 Neb. 451, 45 N.W.2d 164 (1950) (the figure carried was $2,689; it should have been $26,289).

[10] Wheaton Bldg. & Lumber Co. v. City of Boston, 204 Mass. 218, 90 N.E. 598 (1910). The case is noted in 3 Corbin, Contracts § 609 n.48 (1951).

[11] M. F. Kemper Constr. Co. v. City of Los Angeles, supra note 3, at 703, 235 P.2d at 11 (omission from final bid of an item of $301,769 on a work sheet).

[12] Where relief for mistake is sought against a state and grounds for relief have been included within a statute allowing suit against the state the bidder must, of course, bring his case within the terms of the statute. California, for example, has a statute, Cal. Gov. Code § 14353, which provides:

> Basis of recovery. The bidder shall establish to the satisfaction of the court that:
>
> (a) A mistake was made.
>
> (b) He gave the department written notice within five days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred.
>
> (c) The mistake made the bid materially different than he intended it to be.
>
> (d) The mistake was made in filling out the bid and not due to error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

A similar statute was enacted in Massachusetts. Mass. Gen. Laws ch. 149, §§ 44 B(2),(3) (Supp. 1962). Provisions for relief for mistakes in bids submitted to the Department of Defense are contained in 32 C.F.R. § 2.406 (1961), as amended, § 2.406-4 (Supp. 1963). Section 2.406-1 provides in part

> After the opening of bids, contracting officers shall examine all bids for mistakes. In case of apparent mistakes, and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake.

Methods of Proof

A plaintiff seeking relief, by way of rescission or otherwise, has the burden of proving either that the defendant actually knew that plaintiff's bid was not the one intended or that, because of the accompanying circumstances, the defendant is to be charged with the knowledge that the plaintiff did not intend to submit that bid. This burden of proof seemingly cannot be satisfied by a mere preponderance of the evidence which is the normal degree of proof required in the usual civil case. The authorities require proof which charges a defendant with knowledge to be "clear and convincing evidence and not by a mere preponderance."[13]

Rare is the case wherein the proof offered is actual, subjective evidence that the defendant knew that the bid was in error. This is so because the only evidence available would be either extrajudicial statements or conduct of the defendant admissible under the hearsay exception concerning admissions. Generally, the defendant-offeree does not have access to and has not reviewed the work sheets, which are a prime source of error and upon which a final bid is based. Thus, one of the very best sources of actual knowledge of an error is not even available to the offeree. Therefore, in the overwhelming number of cases the method of proof utilized must be circumstantial in nature.

There are various types of circumstances serving to charge an offeree with knowledge. For purposes of this discussion, these can be grouped into four general fact patterns, each of which will be discussed separately herein.

The first of the fact patterns appears in cases where there is a wide range between the low, erroneous bid and the other bids submitted.

The second embraces those instances where there is a substantial difference between the bid submitted and an estimate prepared by or for the offeree.

The third is made up of those cases where a wide disparity exists between the bid submitted and the amount which the offeree, by reason of his prior experience in situations similar in nature and scope to the contract in question, could reasonably expect a bid to be.

The fourth consists of those cases in which there exists a substantial degree of difference between the bid as submitted and what the bid, but for the error, would have been.

As to each of the above patterns, it is submitted that the occupa-

If the bidder alleges a mistake, the matter shall be processed in the manner set forth below.

Other provisions carry forward such relief in relation to divisions of the Department. See, for example, 32 C.F.R. § 591.406 (1962) (Department of the Army).

[13] Restatement, Contracts § 511 (1932).

tion, prior experience and expertise of the offeree are relevant factors in ascertaining whether the defendant is to be charged with knowledge of the existence of error in the bid.

In utilizing this method of fact pattern groupings, the purpose served is solely one of convenience. The methods of proof in each case of unilateral mistake will follow a basic form. The fact pattern groupings will frequently overlap, since, for example, a defendant may have prepared its own estimate *and* received other bids *and* have had prior experience in this particular kind of contract. Thus, it is quite probable that the evidence proffered by the plaintiff may have to be admitted *de bene*. It is equally probable that a combination of the factors going to knowledge may warrant a finding for the plaintiff, whereas any one of the several factors may be insufficient to convince a court that the defendant had objective knowledge. In the discussion which follows, it is to be assumed that satisfactory evidence has been introduced proving that an error was made, that it was material and substantial and, most important, that the resultant bid was infected by this error as above defined and, therefore, not intended by the bidder.

OTHER BIDS RECEIVED

A frequent method utilized to offer proof that the defendant should be charged with knowledge of the error is that of comparing this accepted bid with other bids received for the same project.[14]

A contractor bid $339,980 for certain work to be performed for the state. The next lowest bid was $410,682. The low bid, infected by error, was accepted. The court considered the twenty-one per cent variation between the two bids and granted relief. The variation was deemed great enough to have put the state on notice that something was wrong with the low bid.[15]

Another example, wherein relief was denied, further points out that this percentage variation test, comparing all bids, is a reasonable test for the determination of objective knowledge. A low sub-bid of $7,131 was accepted by a private contractor. The next lowest sub-bid was $10,948. Relief was denied on the basis that in that locale for the type of work involved "there was usually a variance of 160 per cent between the highest and lowest bids. . . ."[16] Therefore, the accepting contractor could not have been charged with knowledge that the bid was other than that intended. Thus, considering all the circumstances of the case, including the nature and locale of the work to be performed, a court, notwithstanding the percentage variation between

[14] Patterson, op. cit. supra note 1, at 896 & nn.142, 143.

[15] State of Connecticut v. F. H. McGraw & Co., supra note 6.

[16] Drennan v. Star Paving Co., 51 Cal. 2d 409, 416, 333 P.2d 757, 761 (1958). See also United States v. Conti, 119 F.2d 652 (1st Cir. 1941), where a low erroneous bid was but 4.5% lower than the next lowest bid on total work worth less than $20,000.

bids, may hold that the offeree did not "know" that something was wrong with the bid.

The availability of other bids upon which to make this kind of comparison will depend, to a large degree, upon the nature of the awarding authority and the existence of statutes making the bids part of a public record.[17] If the authority is a public or governmental instrumentality, a list of all bids will generally be prepared and available for use by a relief-seeking offeror.

In the event that the offeree is a private individual or corporation, or absent statutes similar to that in Massachusetts making submitted bids a public record, an offeror is forced to rely exclusively on information obtained by use of the available discovery processes. Interrogatories or pre-trial depositions may enable the offeror to ascertain whether other bids were received, from whom and in what amounts.

DEFENDANT'S OWN ESTIMATES

The second fact pattern which can be utilized to determine the objective knowledge of an offeree compares the accepted bid with the prices or estimates prepared by or for the offeree. The offeree may have used such prices or estimates in the compilation of his own bid or in the evaluation of other bids received.[18] He would prepare such estimates, or cause them to be prepared, if he were bidding for the prime contract and anticipated requesting certain sub-bids for specific parts of it. In certain other cases, particularly when operating within a governmental budgetary framework, he would also have such estimates prepared. The offeree will, therefore, have had some expectation of the range within which prices would fall.

Clearly and necessarily this method relies heavily upon the appropriate use of discovery process and, as a result, may be limited in effect in some jurisdictions. The availability of discovery process may be an important factor in the selection of an appropriate forum.

The actual use of this approach can be explained with reference to the *Poley-Abrams*[19] case. By use of interrogatories, and subsequently at trial, evidence was introduced to the effect that, defendant, as prime contractor, had prepared its own estimate for the work covered by the Poley-Abrams sub-bid. This estimate was reviewed item by item and indicated that the defendant's own estimate for the work, on which plaintiff bid $174,000, was $201,000.[20] This $27,000 variance, exceeding twenty per cent, was not deemed sufficient to charge the

[17] See, for example, Mass. Gen. Laws ch. 149, §§ 44A-44L (1958).
[18] Poley-Abrams Corp. v. Chaney & James Constr. Co., supra note 5.
[19] Ibid.
[20] Id. at 403.

offeree with knowledge that an error had been made, notwithstanding the finding that plaintiff had made an error of more than $48,000.[21]

DEFENDANT'S EXPERTISE

The third fact pattern dealing with proof of objective knowledge is found in those cases in which the plaintiff relies on the prior experience and expertise of the defendant.[22] Here, too, the first of two major problems is discovery, at least with respect to prior experience. The second key problem confronting a plaintiff in this particular category is that of the relevancy of the evidence offered.

Assume a hypothetical case in which the defendant is a general contractor working to a large extent for a particular agency of the federal government. Assume further that this agency, as a contract awarding authority, has over a five-year period invited bids and awarded contracts for the construction of one basic physical facility in various sections of the United States. Assume that each contract and each project are taken from the same plans and utilize the same specifications but, because of soil conditions, some parts of these structures are not identical. Our defendant general contractor bid on five of these projects; it was low bidder and has received the contract for and performed three of them. Finally, assume that this general contractor has been the successful bidder for this final project and that it has requested and received a sub-bid, materially and substantially in error, from the plaintiff for a part of this project.[23] In our hypothetical case, the plaintiff attempts to introduce the above as evidence bearing on the prior experience of the offeree. In addition, the plaintiff is able to secure the original bids submitted by the defendant for six of the jobs and offers these into evidence as well.

The defendant objects on the basis of relevancy, citing a five-year time differential between the first and last jobs, the differences caused by varied soil conditions, the variation in costs caused by both the time differential and the geographical factor, the fact that defendant did not "win" two of the cited projects and finally, that although

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21 Ibid. The court stated:

> It is not uncommon in the construction field for a subcontractor to submit a bid that is below the cost estimated by the general contractor for the same work and for the general contractor to accept the bid if the subcontractor is reliable and can perform the work. Chaney and James also took into account the fact that Poley-Abrams was a local contractor and would be able to obtain better prices from suppliers, better cooperation from the unions, more reliable estimates of local costs, and incur less expense in moving equipment, than a contractor based in a distant state.

Id. at 403-04.

22 See 1 Welch, Mistakes in Bids, op. cit. supra note 4.

23 This situation was factually derived during pre-trial discovery in Poley-Abrams Corp. v. Chaney & James Constr. Co., supra note 5.

the basic plans and specifications were closely related, the jobs did in fact vary, some being larger, some smaller, some having extra wings and other similar factual differences which are conceded by the plaintiff.

Plaintiff submits that each of the objections cited is factually correct. He contends, however, that the basic units required to erect each facility are the same; that, notwithstanding the exact number of wings and the soil conditions, for example, and despite wage and material cost differentials which, indeed, do exist, each point raised by the defendant is calculable with relation to this job; and that the basic lessons learned by the bidding for or performance of these prior jobs are fully applicable to the case at bar, at least insofar as these factors indicate the real knowledge of which defendant was possessed at the time of receipt of this bid.

It is clear that a real problem as to the admissibility of this evidence exists. No reasonable general forecast can be made as to whether this type evidence will be admissible in a given case. It is submitted, however, that the nature of these cases dealing with unilateral mistake compel the court to temper these questions of relevancy with an appreciation of the difficulties of proof involved in the question of objective knowledge. It is further submitted that, since the bulk of the evidence relating to those circumstances serving to charge the defendant with knowledge is in defendant's exclusive possession, the court has a compelling reason for finding that the evidence, such as described above, is admissible.

The question of the defendant's expertise, apart from any consideration of prior experience, is especially important. This aspect of a unilateral mistake case overlaps each of the fact patterns. Notwithstanding the particular method or methods selected to prove knowledge, a key question in each case must be identification of the particular skills and peculiar knowledge of the defendant. Thus, the degree of objective knowledge necessary to charge a homeowner[24] selecting a contractor to undertake a remodeling job would differ greatly from that necessary to charge a skilled prime contractor receiving sub-bids on a public project. The reasonableness of a finding that a particular defendant should be charged with knowledge, then, to a certain extent depends upon the nature of the particular defendant. The more expert a defendant, the more should the facts bearing on knowledge be construed against him.

Some discussion of this concept was involved in *John J. Bowes Co. v. Inhabitants of Town of Milton,*[25] wherein the plaintiff general contractor filed a bid in the amount of $201,784 with the awarding

[24] Harding v. Knapp, 8 N.Y.S.2d 224 (Ct. Com. Pleas 1938).
[25] 255 Mass. 228, 151 N.E. 116 (1926).

authority. The authority was comprised of citizens named to this appointed body. Individually they were probably inexpert in the nuances of construction problems. Bowes' bid was in error by $7,174. Upon discovery of the error, after acceptance of the bid, Bowes notified the authority that an error had been made[26] in the preparation of the bid. The members of the authority acted in good faith, held the Massachusetts Supreme Judicial Court, without any knowledge that the plaintiff had made any mistake in the submission of its bid.[27] Aside from the factors noted bearing upon the plaintiff's good faith, the case rests in large part upon the finding that the size of the error, being less than four per cent of the total bid, was insufficient to put this offeree on notice. One clear implication of this decision is that an ad hoc committee of laymen is not in a position to appraise the situation because of a lack of experience, and that this kind of body is analogous to the average homeowner rather than the expert offeree.

It is submitted that these ad hoc bodies, charged with civic responsibility, are not, in fact, quite that naïve or quite that inexperienced. It is common practice, indeed generally a necessary one, for these authorities to engage consultants, architects and engineers who serve at all stages of a project in aid of the authority. The knowledge of these experts should be imputed to the authority in those areas where advice is sought and received. One of those areas is the solicitation, receipt and review of bids and the preparation of estimates for the use of the authority in evaluating the bids. It is no real answer to cite the inexperience or lack of expertise of an authority in denying relief for a valid error of which a more expert body would have been charged with knowledge. Courts, then, are under a real duty to inquire into the exact nature of the awarding authority so as to be in a position to accurately evaluate the effect of the surrounding circumstances in a given factual context.

THE PROFFERED BID ITSELF

The fourth, and final, fact pattern deals with the percentage differential between the bid submitted and that bid which, but for the error, would have been submitted. The classification will be used when the offeree has not received other bids for this same work and when no estimates have been prepared for or by the offeree. The prior experience factor found in the second classification is not an

[26] The actual error was of $7,174. The plaintiff, however, upon learning that the next lowest bid was some $20,000 higher than the $201,784 figure, informed the authority that an increase in the amount of $16,800 was warranted. The court found this equivalent to bad faith on Bowes' part.

[27] "The mistake was wholly its [Bowes] own; it was not induced in any way by the defendant or its agents." John J. Bowes Co. v. Inhabitants of Town of Milton, supra note 25, at 234, 151 N.E. at 118.

element of this fact pattern. A reasonable offeree will be charged with having some basic knowledge of costs involved in the work that is the subject of a bid.[28] Being charged with this much knowledge does not impose a heavy burden on the offeree.

A contractor submitted a price of $780,305 for certain work. By reason of a transpositional error in the amount of $301,769, the bid submitted was some twenty-eight per cent lower than it should have been. This percentage variation was held to be sufficient to charge the defendant city, through its Board of Public Works, the awarding authority, with knowledge that the bid was not that intended.[29] Another contractor bid $37,700, in error by $9,300. This twenty-four per cent variation was deemed enough to charge the defendant with knowledge.[30] On the other hand, if the percentage variation is deemed insufficient to charge an offeree with knowledge, relief will, of course, be denied.[31]

Plaintiff does not meet his burden by merely submitting the bid, the error and the difference between the two. The key to giving impact to these three basic elements is expert testimony as to the lowest reasonable cost of the work which was the subject of the bid. This expert testimony has the effect of establishing a bid floor. A submitted bid in an amount below the floor should be carefully evaluated by an offeree before it is accepted.

In none of the four fact patterns is there to be found a realistic, lowest common denominator, which when applied to a given set of facts will enable counsel to suggest, with any assurance whatever, the probabilities of a successful conclusion to a potential law suit. The cases do not set precise standards of mathematical certainty as to when relief will be granted and when denied. A fourteen per cent variation may be sufficient in one case[32] and a variation in excess of twenty per cent may be insufficient in another.[33] The cases do, however, indicate a pattern of change which was barely evident thirty years ago. Thus, our courts recognize that unilateral mistake can be effectively

[28] Hudson Structural Steel Co. v. Smith & Rumery Co., 110 Me. 123, 85 Atl. 384 (1912).

[29] M. F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7 (1951).

[30] Brunzell Constr. Co. v. G. J. Weisbrod, Inc., 134 Cal.App.2d 278, 285 P.2d 989 (1955). See also, Conduit & Foundation Corp. v. Atlantic City, supra note 8 (a 34% variation, relief granted); School District v. Olson Constr. Co., supra note 9 (a variation of but 14% in a total bid of $177,153 was deemed enough to allow relief).

[31] Graham v. Clyde, 61 So. 2d 656 (Fla. 1952) involved a 10% variation in a bid of $52,000. It was held, "it is certain that the error was a very small per cent of the bid, in fact, so small that it was not perceptible at a glance. . . ." Id. at 658. See also, John J. Bowes Co. v. Inhabitants of Town of Milton, supra note 25.

[32] School District v. Olson Constr. Co., supra note 9.

[33] Poley-Abrams Corp. v. Chaney & James Constr. Co., 220 F. Supp. 401 (D. Mass. 1963).

proved without the need for proof that the defendant actually knew of the error. Recognition of this advance and availability of the various methods of proving this objective approach has given to this body of law an effectiveness that was formerly lacking.

Defenses Other Than Lack of Knowledge

There exist two classic defensive concepts which have been raised by offerees in unilateral mistake cases. The first of these is the contention that, had there been no error, the bid which the offeror would have submitted would have been so high that no award would have been made by the offeree.

The other defense is that, by reason of either partial or substantial performance by the offeror prior to its discovery of its unilateral error, the status quo has been irreparably affected and relief is thereby precluded.

The Supreme Judicial Court of Massachusetts had the opportunity to review and rule upon both of these considerations in the case of *Long v. Inhabitants of Athol.*[34] This case concerned the efforts of a contractor-plaintiff to be relieved from the obligation of a contract which was awarded by the defendant on the basis of a bid submitted by the plaintiff. This bid was in error by reason of a misdescription of quantities of materials in the job specifications. The misdescription caused an underestimate of the work to be performed.

The defendant town argued that rescission could not be granted because it could not be placed *in statu quo*. A master found that:

> [Plaintiffs] could not by rescinding their contract place the defendants in the same condition that they were in before the beginning of the work, or in other words, could not undo the work of construction, so far as it had been done, and reclaim the materials furnished and labor performed.[35]

This, held the Supreme Judicial Court, is far from being an unqualified finding that the defendant cannot be put *in statu quo*. The court stated: "If the contract is rescinded and the defendants are held to pay the plaintiff for the fair value of the materials and labor furnished by the latter, and no more, we do not see why the defendants are not in a legal sense put in statu quo."[36]

The court dealt, with similar firmness, with another classic defense raised by the defendants. It was claimed that because the plaintiff's work indicated that the performance of the contract was more difficult and more expensive than was anticipated, a new contract

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[34] 196 Mass. 497, 82 N.E. 665 (1907).
[35] Id. at 506, 82 N.E. at 669.
[36] Ibid.

for the same work could not be let on terms as favorable for the defendant. The court answered:

> But it seems to us that this amounts only to saying that the real facts which have become known have operated to deprive them of an inequitable advantage which they formerly enjoyed. . . .[T]he loss of that advantage to the one and the removal of that detriment to the other is not a change of which either party has the right to complain.[37]

It is submitted that the position of the Supreme Judicial Court is proper and that neither status quo nor loss of favorable advantage or increased cost should be bars to rescission in a unilateral mistake case. It is one thing to find that the defendant did not know and should not have known that an error was made, and thereby deny relief; it is quite another, however, to find that knowledge does exist, but to deny relief on the basis of either status quo or loss of an advantage.

A third defense sometimes raised in these unilateral mistake cases is concerned with the failure, negligent or otherwise, of the offeror, whose bid was in error, to discover his error before performance. The Restatement of Contracts, Section 508 recites: "[T]he negligent failure of a party to know or to discover the facts, as to which both parties are under a mistake does not preclude rescission or reformation on account thereof." Language to the same effect can be found in Corbin.[38] This position is reasonable in view of the fact that the basis of the right of action to rescind depends upon the defendant's knowledge that an error was made and the genuine unawareness of the offeror of his error at least until his bid has been accepted and, more often, until his costs rise above what he anticipated and he attempts to discover the reasons for this fact.

This is not to say that a delay by the plaintiff in notifying the defendant after the error has been discovered would not be sufficient to bar relief on the basis of laches. As in all instances when this defense is interposed, it is a question of fact. It is to be recalled that the mere fact that substantial performance has taken place is not itself enough to constitute laches. The evidence must show, and the court must find facts indicating, first, a delay in the prompt assertion of rights[39] and second, a delay that works a disadvantage to the acceptor.[40] This delay in the "prompt assertion of rights" must be measured from the date on which the error was first discovered, not when the error was committed.[41]

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[37] Id. at 507, 82 N.E. at 669.
[38] 3 Corbin, Contracts § 609 (1951).
[39] Patterson v. Pendexter, 259 Mass. 490, 156 N.E. 687 (1927).
[40] Carter v. Sullivan, 281 Mass. 217, 183 N.E. 343 (1932).
[41] Stewart v. Finkelstone, 206 Mass. 28, 92 N.E. 37 (1910).

Standards of Recovery

Assuming that liability has been established, what is the measure of recovery? There are two possible situations when this problem arises. The first is the instance where the mistake has been discovered, and notice thereof brought to the attention of the defendant, prior to any performance on either side. The second occurs when there has been partial or complete performance on the part of the mistaken bidder prior to discovery by him of the mistake. Problems relating to relief in each case will be discussed seperately.

Discovery and Notice Before Any Performance

Relief can be granted easily prior to performance by ordering rescission of the contract. There is no problem of restitution for work done. The contract can be rescinded and the parties made whole by ordering return to the plaintiff of any bid bond, cash, check or other property submitted by plaintiff to accompany his bid.[42]

A Difference in Degree?

Prior to discussion of the theories by which the amount of the recovery can be computed, there is a preliminary matter necessitating brief discussion. Should there be a difference in the theory or amount of recovery dependent on whether the defendant had actual knowledge of the error or was charged with knowledge of the bidder's mistake? Thus, is it proper or equitable to measure recovery by the degree of knowledge of the defendant?

It is submitted that to draw a distinction between actual, subjective knowledge and objective knowledge when considering a theory of recovery is unwarranted and serves only to obfuscate what the law is attempting to do. The Restatement of Contracts in Section 488 which concerns the ability of a plaintiff to recover for performance under a contract voidable by reason of fraud or misrepresentation and which is made applicable to mistake cases by Section 510 provides: (in part)

> [W]here performance of any kind has been rendered . . . and the transaction is voidable, the injured party can have judgment for the value of the performance against any person to whom the performance has been rendered or transferred, other than a bona fide purchaser for value or one succeeding to the rights of such a purchaser; except that one who receives the performance without notice of the . . . [mistake] is discharged if the performance can be and is returned by him in specie; and if without his fault he cannot do this,

[42] M. F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 235 P.2d 7 (1951).

> judgment is restricted to the benefit that he has received from the performance.[43]

It is submitted that this section should not apply to mistake cases so as to allow the use of different methods of computing recovery because of the nature of the defendant's knowledge. If the defendant has actual notice or is charged with notice of the bidder's mistake, the bidder is allowed to rescind; if the defendant has no notice and the circumstances are such that he is not to be charged with notice, the bidder will not be allowed to rescind and relief will be governed by the terms of the original contract. Once it is determined that rescission is to be granted and that liability is to be imposed on terms other than those contained in the contract, it is submitted that the starting point to determine a theory of recovery should be the same in all cases. To do otherwise is to confuse liability and damages. The central problem of relief to an aggrieved bidder should not be obscured by resort to a technique which qualifies as punishment. Section 155(2) of the Restatement of Restitution provides:

> Where a transaction is rescinded solely because of a mistake as to price, the recipient's duty of restitution is to pay not less than he expected to pay nor more than the claimant expected to receive.

It is submitted that in ascertaining the proper amount of relief, the goal sought is the correction of an inequity caused by error. Relief should be provided as equitable considerations dictate, but the *degree* of defendant's knowledge as it relates to money damages is immaterial.

Discovery and Notice After Performance

It would appear that there are five possible methods of measuring the quantum of recovery in those cases wherein the error is discovered and notice of it is given either after performance has begun or after it has been completed. These are as follows:

(1) The actual mathematical size of the error;
(2) The actual cost of performance of the whole job;
(3) The reasonable cost of performance of the whole job;
(4) The cost of performance, either actual or reasonable, of that work directly related to and infected by the mistake;
(5) The value of benefit conferred on the acceptor.

The last-mentioned measure of recovery is measured and defined by any or all of the preceding four. It is to be noted that, as to the first, the contract price, augmented by the amount of the error, is the sum of relief to be granted. Thus, the terms of the original contract stand.

[43] Restatement, Contracts § 488 (1932).

The second and third methods involve complete rescission of the contract; the fourth method involves partial rescission. In this last instance, all elements of the contract not related to or infected by the mistake will stand; those so infected will be excised from the contract and sums properly representing cost of performance for such items will be added to the cost of the remaining items to reach a total. This amounts to an equitable rewriting of the contract so that it is as it would have been but for the error. Partial rescission in this sense is within equity's power to accomplish a just result.

Measurement by Mathematical Size of the Error

In some instances complete relief can be granted by adding to the contract price the mathematical sum representing the error. Thus, if the mistake is simply one of incorrect addition of a column of figures, relief can be granted by correcting the addition. So similarly could relief be granted where a multiplication error has affected the amount of the bid. In either instance, award of the mathematical size of the error would constitute adequate relief. However, where collateral factors other than mathematics are involved, the situation is not so easily remedied. This can be illustrated by the following example. Assume that a bidder estimates the cubic yards of concrete required for foundation footings and walls. As a result of an error, the bid carries 500 cubic yards of concrete instead of 5000 cubic yards. Complete relief cannot be given by merely awarding the bidder the cost of 4500 yards of concrete since other elements of the job will probably be infected by this error. This error, for example, would affect the material and labor estimates for the erection of concrete forms and the labor cost estimated for pouring the foundation footings and walls. The error could affect the time in which the work could be completed, possibly enough to make adverse seasonal weather conditions a factor to be considered in computing recovery.

These basic, potential manifestations of the original error, which are but a part of a far longer listing, are reasons for the necessity of reliance upon the other measures of relief noted above. They also indicate that in many instances mathematics alone will not serve as a basis upon which an aggrieved bidder may be fairly compensated. In other words, when an error in a bid is the result of a mathematical miscalculation, which is readily ascertainable and fully traceable and which does not affect any collateral element of the bid, simple mathematical relief is sufficient. However, in most instances there are both an interrelation between and an interdependence among the several items in a construction bid. Therefore, most frequently, mathematical mistakes cannot be isolated enough to serve as the sole basis of adequate relief.

Actual Cost of Performance

In the non-isolatable situations, the courts can remedy the error by awarding damages as defined by the actual cost of performance.[44] Reputable contractors maintain highly accurate, surprisingly detailed and extremely useful job reports and records which can be used, in combination with invoices, ledger cards, cancelled checks and related information, to prove the actual cost of performance. As an equitable matter, it is quite possible that actual cost of performance would not measure accurately the damage caused by the error. Inefficiency in performance or other factors unrelated to the error may have caused costs to reach a high level. Thus, if this actual cost method were used as a sole basis of computing damages, the effect may be to punish the defendant rather than to stabilize both parties.

Value of Benefit Conferred

Some courts persist in mouthing the old formula "value of the benefit conferred" as the proper basis of damages. This phrase, as a practical matter, must mean the same as cost of performance, as defined above and below. It cannot itself be a satisfactory method of proof in this kind of case. To realistically measure a benefit conferred, the ultimate value of that which is conferred must be determined. This could lead to relief based upon the unknown and the unrealistic. So, by using this particular terminology, the courts are, in effect, holding that cost of performance, either actual or reasonable, is the key to proper relief.[45]

Reasonable Cost of Performance

Another method of measurement of damages in a unilateral mistake case is the reasonable cost of performance.[46] Experts willing, ready and able to testify abound in the construction industry. To them, it is a relatively simple matter to review the plans and specifications for a particular project, to familiarize themselves with labor and material costs, taxes and insurance and to determine from all these data, in light of their expertise, a fair and reasonable cost price for this work. Clearly, the recovery awarded cannot exceed actual cost of performance. This expert testimony has a dual advantage in that it sets a reasonable figure for costs which permits the court to evaluate the actual performance of a contractor and, in the event that actual

[44] Glazer v. Lerman, 330 Mass. 673, 116 N.E.2d 569 (1953); Vickery v. Ritchie, 202 Mass. 247, 88 N.E. 835 (1909).

[45] Shapiro v. Solomon, 42 N.J. Super. 377, 126 A.2d 569 (1956).

[46] C. N. Monroe Mfg. Co. v. United States, 143 F. Supp. 449 (E.D. Mich. 1956); Harrelson v. Raphael, 116 So. 2d 301 (La. 1959); Tyra v. Cheney, 129 Minn. 428, 152 N.W. 835 (1915); Harding v. Knapp, 8 N.Y.S.2d 224 (Ct. Com. Pleas 1938).

costs are inflated by unrelated difficulties, establishes a fair and realistic basis of recovery.

Cost of Particular Items

Contractors, generally, in figuring a particular job, break down their computations on the basis of particular items of work. For example, the cost of labor for forming, pouring and stripping an eight inch concrete wall is computed on a work sheet. The total is carried to a summary sheet and there incorporated into a final price. By this method, each unit of work is "costed" and the total price is the sum of the parts plus overhead and profit. This procedure gives rise to still another method of computing damages in a mistake case: the measurement of recovery by the actual or reasonable cost of performance for that work directly related to and infected by the error, if that work is separable from the balance of the contract.[47] For example, assume an error occurred in the transposition of a labor work sheet total to the summary sheet. Assuming that the labor work sheet related only to concrete walls, a reasonable basis of recovery would have been cost of performance of the labor on these concrete walls. That is, the court would have been able to ascertain the direct relationship between the error and the cost without reviewing costs for the complete project and without altering the entire contract. So long as the contract is separable on a particularized basis of work to be performed, this method seems the most equitable in computing and awarding damages. The comments above, relating to actual or reasonable cost of performance, are applicable to this separable method of measuring recovery.

Conclusions

A reading of the cases dealing with the law of unilateral mistakes in construction bids indicates that, upon satisfactory proof, liability can be established. The cases indicate that the ultimate test of this liability is the knowledge with which the defendant is charged. This article has described several alternative approaches to proof of the knowledge factor.

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[47] See 2 Black, Rescission and Cancellation § 585, at 1368 (1916):

> When a contract is separable or divisible into a number of elements or transactions, each of which is so far independent of the others that it might stand or fall by itself, and good cause for rescission exists as to one of such portions, it may be rescinded and the remainder of the contract affirmed. And as it has been held that where a contract consists of parts so distinct and independent that each could be performed without reference to the others, a failure of one of the parties to perform one of the parts or terms of the contract does not authorize the other to rescind the whole contract, and refuse to accept a tender of performance of the remainder of the contract by the party in default.

See also, Schwasnick v. Blandin, 65 F.2d 354, 358 (2d Cir, 1933); 5 Corbin, Contracts § 1111 (1951); 5 Williston, Contracts § 1530 (Rev. ed. 1937).

The law has reached the point where the concept of unilateral mistake no longer evokes thoughts of automatic defendants' verdicts.

Unfortunately, however, this acceptance of the concept of liability has not been extended to theories of recovery. Developments in that aspect seem to have been on an ad hoc basis. Terminology such as "quantum meruit" and "value of the benefit conferred" are often used without definition. It is submitted that our courts must be concerned with what the law should be. Therefore, the theories which allowed liability to be established in the first instance, should be extended to questions of damages.

The courts should attempt to rectify a substantial and material unilateral error by creating a contract based upon a determination of what the parties would have done but for the error. At the same time, the rights and interests of a defendant, no matter his degree of culpability, must be considered. It is submitted, therefore, that the "reasonable cost of performance" measure of damages best satisfies these conflicting needs and best conforms to the ideal approach to the problem. If the circumstances allow, the measure of damages should be applied only to the separable items of work related to and infected by the error.