DePaul Law Review

Volume 2
Issue 2 *Spring-Summer 1953*

Article 20

Contracts - Court of Claims Rules Revocation of Offer Before Acceptance Ineffective

DePaul College of Law

for this invention in 1942, he was entitled to compute his taxes as if the sum received in 1942 had been received ratably during the 36-month period ended on February 7, 1931, the date of completion. Both the Circuit Court and the Supreme Court in the *Robertson* case found that the statute expressly calls for proration of the amount received in a taxable year "over that part of the period preceding the close of the taxable year" not to exceed 36 months. Thus the income will be allocated over the 36-month period preceding the close of the taxable year in which received even though the actual work was performed in years preceding the date of payment by more than 36 months.

Thus it appears that in nearly all cases of prizes won in contests the value of the prize will be taxable unless it can be demonstrated that the prize was given as a gift to aid the furtherance of science or education, or the award is made in recognition of past achievements or present abilities,[80] and not given in exchange for services rendered. One must look to the nature and intent of the donor[81] and also determine whether services were rendered by the recipient. If the donor is a nontaxable philanthropic trust, it is easier to establish the requisite conditions necessary to constitute the prize a gift.

CONTRACTS–COURT OF CLAIMS RULES REVOCATION OF OFFER BEFORE ACCEPTANCE INEFFECTIVE

In response to a government solicitation, the plaintiff submitted a bid (offer) on a contemplated contract. Prior to acceptance by the government, but after the bids had been opened, the plaintiff attempted to revoke this offer. In a very curious opinion the Court of Claims declared that this revocation was ineffective. *Refining Associates Inc. v. United States,* 109 F. Supp. 259 (Ct. Cl., 1953).

In recent years the Court of Claims has made some pronouncements concerning contract law which seem contra to all precedent and reason. This was not so eight years ago, when in the case of *Miller v. United States,*[1] the court handed down a superlative decision presenting an accurate analysis of the common law principles governing offer and acceptance of contracts.

The *Miller* case involved a plaintiff who, after submitting a bid of

[80] Old Colony Trust Co. v. Commissioner of Internal Revneue, 279 U.S. 716 (1929).

[81] Commissioner of Internal Revenue v. Jacobsen, 336 U.S. 28 (1949); Bogardus v. Commissioner of Internal Revenue, 302 U.S. 34 (1937); Smith v. Manning, 189 F. 2d 345 (C.A. 3rd, 1951); Poorman v. Commissioner of Internal Revenue, 131 F. 2d 946 (C.A. 9th, 1942); Fisher v. Commissioner of Internal Revenue, 59 F. 2d 192 (C.A. 2d, 1932).

[1] 62 F. Supp. 327 (Ct. Cl., 1945).

$693,000.00 to the National Housing Agency, sent a telegram lowering the bid to $643,000.00. The bids were opened before the defendants received the telegram. Plaintiff's agent, who was present at the opening, notified the plaintiff that its original bid of $693,000.00 was low. The plaintiff then instructed the agent to request the defendant to ignore the telegram when it arrived. The plaintiff's agent did as instructed, and plaintiff later repeated the request in a telegram.

The government contended that the requirement of submitting a bid bond with the offer rendered plaintiff's reduced bid irrevocable for thirty days, giving it the same effect as an offer made for consideration, or an offer under seal at common law.

In a well written decision by Judge Madden, the court pointed out that an offer is not made until communicated to the offeree and so the issue was not the revocation of an offer, but rather the making or nonmaking of one. The second bid never became an offer, for the government had been notified, before receiving the bid, that it was not intended as an offer.

However, four years later the court seems to have embarked on a campaign to revise the law of contracts. Thus in 1949, in the case of *Dick v. United States*,[2] a plaintiff came before the same tribunal and convinced the court that the acceptance of an offer may be nullified before receipt of the same by the offeror. Nearly all precedent holds that while an offer may be revoked at any time before acceptance, an acceptance, if sent by authorized means, is effective when dispatched.[3]

In the *Dick* case, the Coast Guard invited bids on two sets of propeller equipment. Plaintiff submitted a quotation of $68,275.00 in the mistaken belief that defendant's request was for only one set. Defendant sent a purchase order, which amounted to a counteroffer, to plaintiff on March 8, and plaintiff mailed an acceptance on March 15. Plaintiff discovered his error, and on March 16 wired defendant that the price should be doubled. Plaintiff's acceptance of March 15 was not received by the defendant until March 21.

In allowing this "revocation of an acceptance," the court based their decision on the premise that the old common law rule making an acceptance final when deposited in the mail was modified in 1913 by a postal regulation permitting the sender to apply for a letter which he has put in the mail. The court cited Corpus Juris Secundum[4] and a Tennessee decision[5] as its dubious authority for this unique result.

Judge Madden, who wrote the excellent decision in the *Miller* case, dissented in the *Dick* case on well established principles of contract law

[2] 82 F. Supp. 326 (Ct. Cl., 1949). [3] Rest., Contracts § 64 (1933).

[4] 17 C.J.S. Contracts § 5.405 (1939).

[5] Traders' Nat. Bank v. First Nat. Bank, 142 Tenn. 229, 217 S.W. 977 (1920).

and criticized the majority for ignoring such strong precedent. In maintaining that the acceptance was operative when mailed despite the postal regulation, he pointed out that any contrary conclusion would lead to the result that the offeree, by mailing the acceptance, could bind the offeror at the time of mailing, but the offeror, to whom he mailed the acceptance, could not hold the offeree until he received the letter, his rights being subject to the sender's power to withdraw his letter from the mails at any time before delivery.

However, the court refused to allow the persuasiveness of Judge Madden's argument to deter them. It is difficult to comprehend how the same court, which handed down the decision in the *Miller* case and expounded so accurately on the well established principles of contract law, could deviate so drastically from these doctrines in the *Dick* case.

The decision in the *Dick* case was the subject of severe criticism from many sources.[6] It was pointed out that it was possible to withdraw a letter from the mail prior to the postal regulation of 1913,[7] in fact as early as 1902.[8] No court had interpreted this as enabling an offeree to cancel an acceptance and there is no reason to give the 1913 regulation such an extraordinary effect.

The instant case is also subject to severe criticism. Here the plaintiff received an Invitation for Bids issued by defendant. The following provision contained in United States Standard Form 22, was incorporated into the invitation by reference:

> Bids may be withdrawn on written or telegraphic request received from bidders prior to the time fixed for opening. Negligence on the part of the bidder in preparing the bid confers no right for the withdrawal of the bid after it has been opened.[9]

Also applicable was Section 852.303 of the Armed Services Procurement Regulations which provides, in part, that bids may not be modified or withdrawn after opening unless such modification or withdrawal is received before the award is made, and the failure of such modification or withdrawal to arrive before opening was due solely to a delay in the mails, or the modification is in the interest of the government and not prejudicial to other parties.[10]

Between September 30, and October 12, 1948, plaintiff submitted its bids. On October 21, six days after opening of bids, plaintiff sent a tele-

[6] 34 Cornell L.Q. 632 (1949); 38 Geo. L.J. 106 (1949); 62 Harv. L. Rev. 1231 (1949); 44 Ill. L. Rev. 349 (1949); 18 U. of Cin. L. Rev. 381 (1949); 35 Va. L. Rev. 508 (1949) 34 Minn. L. Rev. 140 (1950); 25 Ind. L. J. 202 (1950); 17 U. of Chi. L. Rev. 375 (1950); 59 Yale L. J. 374 (1950).

[7] U.S. Post Office Reg. (1913) §§ 552, 553.

[8] U.S. Post Office Reg. (1902) § 579.

[9] 41 U.S.C.A. App. § 54.12 subd. 12 (1951).

[10] 13 F.R. 3074 (1948).

gram to defendant attempting to withdraw certain of its bids because of circumstances beyond its control. These circumstances turned out to be a strike of refining employees, which had begun on September 1, 1948, and a similar dispute involving longshoremen, which had started August 25, 1948. Both strikes continued until December 16, 1948.

Under these facts, if the court had found that the regulations applied to the bid and deprived the plaintiff of its right to withdraw the offer before acceptance, no fault could be found with the decision. However, after stating that the government contended that these regulations applied to the contract and that the plaintiff denied this contention, the court ignored the regulations and went on to reach its result through a series of irrelevant and questionable pronouncements.

It was conceded by the court that when the United States enters into contractual relations, its rights and duties are governed generally by the law applicable to contracts between private persons. It was also conceded that under these ordinary principles of contract law, an offer, not under seal or for a consideration, may be revoked at any time before acceptance.

The court referred to three of its prior decisions. In the first it had allowed a plaintiff to modify a bid after opening but prior to acceptance on the grounds of a mistake which should have been evident to the government.[11] In the second case the court held the government could accept a lower bid received after the opening of the bids on the ground that since the provision was for the benefit of the government, it could waive it.[12] And in the third case the court had held a bid could be withdrawn when the plaintiff was under an erroneous impression as to the time of delivery.[13]

In the present case the court held the revocation was not valid because plaintiff's contention that the revocation was due to strikes was unjustified. This, by implication, sets out the new doctrine that one cannot revoke an offer unless he has justifiable grounds.

The court then stated that the plaintiff submitted the bid subject to the regulations and, "In so doing, the plaintiff was accorded the right of having its bid considered on its merits, and this right was conditioned on the promise that the bid would remain open during the time specified."[14]

This seems to imply that the "right of having its bid considered on its merits" was the consideration to the plaintiff which made the bid irrevocable. It is obvious of course, that there is no legal basis for this contention.

[11] Alta Electric and Mechanical Co. v. United States, 90 Ct. Cl. 466 (1940).

[12] Leitman v. United States, 60 F. Supp. 218 (Ct. Cl., 1945).

[13] Nason Coal Co. v. United States, 64 Ct. Cl. 526 (1928).

[14] Refining Associates v. United States, 109 F. Supp. 259, 262 (Ct. Cl., 1953).

The next paragraph of the opinion states that "Where there is no mistake, unreasonable delay, or the like, there can be no injustice in holding the bidder to the conditions of the Invitation for Bids."[15] One might point out the injustice in denying to this plaintiff a right that all offerors have had for centuries, namely, the right to revoke an offer at any time before acceptance.

In the decision as a whole, the court seems to object to the grounds for the plaintiff's attempted revocation and to penalize the plaintiff for lacking what the court considers justifiable grounds for revocation. The groundlessness of this reasoning is apparent from the fact that the general rule is that revocation of an offer requires no such justification. An offer, not under seal or for a consideration, may be revoked at any time before acceptance, regardless of the offeror's reasons for so doing.[16]

It is probable that the court could have reached the same result on the more logical ground that Congress, under the powers to wage war and to maintain an army, could change the common law as to army contracts, and that the regulations, which were promulgated under an act of Congress, had the effect of rendering the offer irrevocable. One might speculate that Judge Madden who wrote such fine decisions in the *Miller* case and the *Dick* case, concurred in the seemingly unfounded legal reasoning promulgated in the instant opinion because he realized that he would have to concur in the result, if the above reasoning were adopted.

In the light of the *Dick* case and the *Refining Associates* case, a lawyer will now have a difficult time advising a client as to any contractual problem which might arise before the Court of Claims.

TAXATION–SALES FOR "USE OR CONSUMPTION" UNDER RETAILERS' OCCUPATION TAX ACT

Plaintiff dairy company brought this action against the Illinois Department of Revenue to obtain credit for taxes paid from 1944 to 1947 on gross receipts from sales of milk to a state mental institution. The milk was purchased by the institution for consumption by inmates. The Circuit Court of Kane County entered judgment for plaintiff, and defendant appealed. The Supreme Court of Illinois reversed and remanded, holding that the legislative intent in passing the Retailers' Occupation Tax was to reach sales to purchasers for use or consumption and that it intended the tax to apply wherever the contemplated use of the tangible personal property would take such property off the retail market. *Modern Dairy Company, Inc. v. Department of Revenue*, 413 Ill. 55, 108 N.E. 2d 8 (1952).

[15] Ibid.

[16] Rest., Contracts § 41 (1933).