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FOREWORD

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To paraphrase Calvin Coolidge, the business of America is construction. The industry regularly and directly accounts for over nine percent of the gross national product and employs sixteen percent of the workforce. By any measure, the products and by-products of construction are both the warp and the weft of the economy.

This goliath has, however, been sorely struck by the triple effects of inflation, recession, and high interest rates. Its defensive response has been the development of novel approaches to the construction framework and process. From an organization or contract realignment point of view, the construction manager has emerged to sever the management function from the construction process, and the design-builder to merge the design function with that same construction process. Both efforts improve planning and performance efficiency. From the means and methods perspective, "fast track," or phased project delivery, enables construction to begin before the design is complete in order to recognize the time cost of money and take advantage of the facility utilization value of the work.

As in the case of many modifications to traditional frameworks and processes, however, these innovative approaches have been adopted without adequate analysis of the direct and indirect consequences. While a few successful projects prove the promise of the prophets, the more general experience has ranged from disappointment and disillusionment to disaster. It is the purpose of this Symposium to explore, from the varying perspectives of the industry participants, the issues which have emerged with specific recommendations to maximize the promise and minimize the risks.

Richard D. Conner initiates the exploration by approaching construction management from a purely contract-based approach, defining the construction manager as whatever his agreement with the owner obligates him to be, whether or not he is also a design-builder. To Conner, the owner-Construction Manager(CM)

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agreement, with its cornucopia of potential services and assignments of risk and liability, offers flexibility in the entire scope of work, from pre-design need programming through to the post-construction occupancy phase.

Stanley D. Bynum examines the licensing problems posed by these hybrids, together with their potential liability relationships to other project participants. While accepting the principle that the potential liability of the owner or CM can be limited by contractual agreement, he concludes that this function is secondary to the practical goals of establishing a framework for effective transmission of information and for making and enforcing decisions.

From the perspective of a specialty trade subcontractor who becomes a prime contractor in the construction management relationship, John B. Tieder and Robert K. Cox take the novel approach that, in the new relationships, the ersatz subcontractor has heightened, rather than diminished, expectations of scheduling, coordination, and design refinement. The primary problems with the new techniques are, thus, not in the novel ideas themselves, but in the failure of designers, owners, and contractors to accept or fulfill their augmented responsibilities under systems created and implemented for their benefit. On the other hand, William R. Squires and Michael J. Murphy make a more traditional prediction that a fast track project contains inherent pressures to let specialty trade contracts before bid packages are complete, thereby increasing the likelihood of change order disputes, associated scheduling problems, and resulting delay damage claims. Similarly, the advent of the CM constitutes the addition of an actor whose legal relationship to other actors, particularly subcontractors, remains unclear. Squires and Murphy argue that these flexible approaches, albeit with such problems, can be valuable if draftsmen avoid the temptation to shift the risk to parties (e.g., subcontractors) who are least able to bear it.

Into all this disputation, Professor Justin Sweet, one of the leading United States authorities on the law of architecture and design, resurrects the ghost (or fable?) of the "Master Builder" whose competence and skills preclude the necessity of either CMs or contractors who are also designers. He predicts that, in their haste to jettison responsibilities which may carry concomitant liability, architects have produced the vacuum of service which engendered the development of the CM and design-builder and which, if unchecked, may presage a permanent decline in the position and prestige of architects.

Milton Lunch does not spin a congruent web with Professor Sweet, instead viewing the new contract forms and methods as new opportunities for engineers. Rather than seeking to shift risk through exculpatory contract terms, he advises design professionals to accept responsibility, protecting their economic interest and effectively spreading risk through professional liability insurance.

My own article, which was researched by and written with Scott D. Livingston and R. James Robbins, Jr., explores and uncovers the potential pitfalls for sureties who are in the uncomfortable position of guaranteeing the performance of contracts which have no defined scope and of contractors from whom the management function has been severed and delegated. In addition, construction management may eliminate the double layer of bonding which protects the owner

both in the extent of the guarantee and the singularity of the entity to whom he looks for performance. The solutions may be CM professional liability coverage which insures the quality of the work and, in design build, a unitized surety bond which expands or contracts to fit the ultimate design.

Robert Coulson describes the alternate dispute resolution techniques which can be tailored to fill the void created by the absence of the architect as the first-level decisionmaker for dispute settlement. In addition to traditional arbitration, long the mainstay of the construction industry, the parties may choose mediation, a combination of mediation and arbitration, or an impartial advisory committee.

The forgotten man, the owner, who has most of the risk, little of the expertise, and none of the lobby, is defended by David Dibner, for the governmental owner, and by Deborah Hartzog and Brett Gladstone, *Law and Contemporary Problems* student editors, in their note setting forth the interests and objectives of the private owner. Mr. Dibner identifies the primary problem of the governmental owner as its inability to delegate the same amount of authority as can be given to the CM or design-builder in the private sector. The student editors take an industry approach which views the allocation of risk by contract as secondary to the public policy considerations of risk spreading—for both negligent error, traditionally accomplished by bonding and insurance, and nonnegligent error—currently achieved only by suretyship and limited to failures on the part of the contractor.

Finally, Professor Walter S. Pratt of the Duke University School of Law reviews the issues in the context of an historical perspective upon the allocation of risks by contract. He points to these current developments as parallels to those of the last quarter of the last century and the first quarter of this century, in which economic uncertainty coincided with material developments in contract doctrine to engraft concepts of reliance and unjust enrichment upon the historical principle of the binding nature of obligations voluntarily assumed, thereby rendering uncertain the ability of the parties to allocate risks by agreement.

In summary, many of the ideas expressed and the conclusions drawn are counter to and extend beyond the nonanalytical assumptions commonly held throughout the industry regarding these new construction methods. While CMs and design-build contractors are undoubtedly here to stay, their staying power may well depend upon their ability to meet the challenges and criticisms explored by these leading contributors to this Symposium.

