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RESPONSIBILITY WITHOUT AUTHORITY

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NEARLY FOUR thousand years ago relations between owners and contractors were relatively simple in nature. The building owner was usually also its designer, transmitting his instructions directly to the contractor on a sheet of papyrus or clay tablet. These specifications were usually brief, limited mainly to the size and shape of the building, the exterior materials to be used, and the number and size of openings. Detailed descriptions of workmanship were not deemed necessary, as recognized builders were given credit for possessing the required skills to execute the contract properly and with due regard for the safety of the occupants.

This arrangement surely must have resulted in few disputes over interpretations of requirements and responsibilities, in contrast to the myriad controversies that engulf the construction industry today. But if a dispute between owner and builder did arise in ancient Babylon, the legal code provided a mechanism for swift and equitable settlement.

Hammurabi, King of Babylon near the end of the 20th century B.C., is credited with bringing into existence the first set of written laws in history. The Code of Hammurabi, as it became known, contained sections with laws relating to personal property, real estate, trade, business relations, the family, labor relations, and personal injuries. On a magnificent stone stele or monument of black diorite, unearthed by archeologists at Susa and now in the Louvre, these engraved words are to be found: ". . . If a builder constructed a house, with the result that his work collapsed and so has caused the death of the owner of the house, that builder shall be put to death. . . ."

Hammurabi had fought and worked hard to establish his state out of a rabble of squabbling tribes, and as an able administrator he knew that it could not succeed without a clear cut establishment of rights and order based upon law. He also knew that if the laws were going to do the job, the language of these laws had to be clear and unambiguous. Further, these laws had to clearly state lines of responsibility and punishments for deviation from such responsibility.

Today the lines of responsibility in building contracts are often unclear, muddied by ambiguous language. In the centuries since Hammurabi established man's earliest law and order regime, there has gradually developed a third-party role in the building process, known as the consultant.

The punishment for malfeasance in building practices of course has gradually softened as the combined role of the architect-engineer-master builder became prevalent, starting in Greco-Roman times. But even up to the Renaissance period a contractor whose work collapsed was required to replace the work at his own expense or face imprisonment.

As the construction industry grew more sophisticated, the roles of architect-engineer and contractor gradually separated, but without clear lines of separation of responsibility. For a while custom dictated certain rules of behavior, but lately there appears to be a drift back to the philosophy of Hammurabi. Damaged owners, while not seeking the death penalties of ancient Babylon, are seeking justice in the courts and demanding harsh economic penalties for shoddy building practices. Defense in lawsuits now takes up an abnormally large part of a contractor's time and overhead. In New Jersey alone in the past six months, the number of construction disputes handled by the American Arbitration Association has doubled. Andy Britton, tribunal administrator of the A.A.A., expects that the number will double again in the next six months.

Who's Responsible?

In almost every case, the basic dispute would be easily settled if the contractual responsibilities of the architect and the general contractor were more clearly defined. But as the roles of each evolve, with the consultants trying to reserve to themselves more and more of the authority for construction decisions, the responsibility for many decisions actually becomes less and less clear. The net result is a sort of "no man's land" where each

wants certain authority without the attendant responsibilities.

When the chips are down and someone must own up to responsibility for an error, omission, or just plain bad results, each points the accusing finger at the other to avoid blame. When this happens the owner begins to feel that he is the one "holding the bag," and we are now experiencing a sort of owner's revolt about this.

In these cases the contractor takes the position that "there can be no responsibility without authority," and points to the garbled language of the contract he says he has been forced to accept from the architect. The architect in turn points to the "clear-cut" language of the contract charging the contractor with "total responsibility for the quality and serviceability of the work to be performed."

Wherein does lie the responsibility to the owner? The contractor says he didn't design it, and if it doesn't work it's the architect's fault. The architect says he didn't build it, and if it doesn't work it's the contractor's fault. Besides, the architect points to the clause that says "it shall be the responsibility of the contractor to carefully check the drawings and report any errors, omissions, and discrepancies to the architect before proceeding with the work." This does sound like the architect is asking the contractor to step over into the designer's role somewhat. It also brings up the theory that if the contractor has a responsibility to check the architect's work, it follows that he also has the right to interpret the architect's intent.

"The Architect Shall. . ."

Document B131 of the American Institute of Architects, entitled *Agreement Between Owner and Architect,* further attempts to establish the architect's authority with phrases such as: "The architect shall have the authority to act on behalf of the owner . . . The architect shall be, in the first instance, the interpreter of the contract documents . . . The architect shall review and approve all shop drawings, samples, and other submissions . . . The architect shall administer the contract . . . and issue certificates for payment." This presumes to give the architect total control of the construction process.

However, A.I.A. Document A201, the contract between the owners and the contractor, establishes that the architect will **not** be liable for his actions in many of these instances. For example, it states: "The architect's approval of shop drawings or samples shall not relieve the contractor of responsibility for any deviations from the requirements of the Contract Documents . . . nor shall the architect's approval relieve the contractor from responsibility for errors or omissions in the shop drawings or samples . . . The contractor shall indemnify and hold harmless the owner and the architect and their agent for all claims, damages, losses and expenses . . . These incongruities are only a few of the more obvious ones. There are many subtler differences which usually surface only after a dispute develops and lawyers begin to look for protection for their clients, whether owner, architect, or contractor.

The most serious attempt to avoid responsibility by the architect, in my opinion, is the clause found in both of the above documents which states that "the architect will not be required to make exhaustive or continuous on-site inspection to check the quality or quantity of the work." Here the architect, while demanding authority over all phases of the contractor's operations, refuses to accept responsibility for his own actions. If the contractor can do nothing without absolute approval by the architect, why should the contractor be totally responsible? On the other hand, if he is totally responsible anyway, why should he wait for the architect's inspection and approval?

Litigation is always costly and time consuming, and does not always assure that justice will be dispensed to any of the parties to the disputes. Court dockets are crowded, judges are overworked and not always familiar with the intricacies of construction practices. Often a court case may be decided on the basis of some procedural technicality rather than on the actual merits of the case.

To ameliorate this condition and to assure more equitable settlements of disputes, the American Arbitration Association developed rules specifically for the construction industry in 1966. Each year since then, more and more construction people choose arbitration, rather than litigation, as the route to settlement. Today, the American Arbitration Association settles a majority of disputes within the construction industry.

The reasons for the popularity of this type of settlement procedure are several:

1. Arbitration is faster than a court suit, which can extend over several years. A recent review of 179 disputes before the A.A.A. involving architects and contractors showed that most of the arguments were settled in less than six months, with some being disposed of in three months or less.
2. Arbitration gives all parties concerned an opportunity to be judged by professionals knowledgeable in the same field. Technical arguments involving construction practices are usually beyond the comprehension of civil juries.
3. Arbitration costs considerably less than a court suit, if for no other reason than the greater speed of settlement.
4. Arbitration is informal and does not conform to the adversary rules of conduct that the courts require, thereby enabling the arbitrators to hear each and every fact that the parties wish to introduce.

Private and Final

Another important reason for the greater attraction of arbitration is privacy. Litigation cannot fail to focus the attention of the community upon any disagreement between the parties, exposing charges and countercharges of negligence or worse. What begins as an attempt to interpret the contract documents or establish compensation for extra or omitted work sometimes becomes a cause celebre, resulting in erosion of public credibility of the integrity of the industry as well as the litigants. In most cases, arbitration under the A.A.A. construction industry rules avoids such public airing of differences.

Finality is an important plus for arbitration. Court decisions are always open to lengthy appeals. The result of long delays in settling many cases in court is that the aggrieved party may end up out of business before a settlement can be

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reached. The award in an arbitration hearing cannot be changed without both parties agreeing to reopen the case.

The American Arbitration Association does not decide cases. Its function is to provide lists from which the parties may select arbitrators that are mutually agreeable to all parties in the dispute. The American Arbitration Association commercial panel consists of over 35,000 men and women nominated for their expertise, their leadership qualities, and their implied impartiality.

That legal circles view arbitration as a valuable tool in the settlement of disputes is reflected in a recent statement by Chief Justice Warren E. Burger published by *Forbes Magazine*: "There are a great many problems that should not come to judges at all and can be disposed of in other ways—better ways. I can suggest one basic way that must be developed more widely in this country, and that is the use of private arbitration. The American Arbitration Association, a great institution, has worked on this for years . . . we must use this highly acceptable service that, in the long run, is probably less expensive and at least as efficient and fair as any judicial process."

But while improving the method of settling disputes is a worthy goal for the construction industry, equally important is the improvement of the main source of such disputes, the construction contract documents. The existing "model" documents prepared by the American Institute of Architects fall far short of establishing in black and white the lines of both authority and responsibility for either architect, owner, or contractor. As long as these cloudy "gray" areas continue to create vacuums in the construction process, disputes are inevitable.

The construction industry urgently needs a redefinition of the roles of all involved in the building process. As Hammurabi pointed out in the Prologue to his Code " . . . I established law and order in the language of the land, thereby promoting the welfare of the people. . . ." The welfare of the owner, the architect, engineer and the contractor are equally at stake here.

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posed that he be assigned to office work, job promotions, answering telephone or running errands."

Services Not Relevant

"As earlier related, it took a period of only one week to prove that this lather was not qualified to perform office work. There subsequently arose the rather ludicrous situation of where this high-priced employee, Mr. D., was assigned to the menial task of addressing envelopes, a job which he finally refused to further perform on the understandable ground that it was 'demeaning.' Furthermore, he later refused an assignment to repaint furring channels at a jobsite, and although he in fact did engage in some delivery work for the company, the record reflects that this took about 50% of his time, the balance of his 8 hour day being spent idly standing around. In short, I think it clear that the union's offer to have Mr. D. provide the miscellaneous services in question was but a camouflage to get him on the company's payroll, this regardless of the fact that the purported services were not relevant to any company need."

Collective Bargaining Ruled Out

The administrative judge continued his rationale in alluding to the other union involved.

"Finally, further reference is made to the Supreme Court's language in the *Newspaper Case* that Section 8(b)(6) leaves to collective bargaining the determination of what, if any work, including bona fide 'made work,' shall be included as compensable services and what rate of compensation shall be paid for it. Needless to say, *Special Sections* was in no position to bargain with the Lathers' Union for the services of a lather or with respect to any other term or condition of employment. Indeed, inasmuch as the Teamsters Union was recognized as the bargaining agent, Special Sections may well have run afoul of Section 8(a)(2) of the Act had it undertaken to do so."

Conclusion

The administrative law judge concluded, "In sum, I found that in the conduct related herein, the Lathers' Union caused and attempted to cause *Special Sections, Inc.* to pay money or other things of value, in the nature of an exaction, for services not performed in violation of Section 8(b)(6) of the Taft-Hartley Act."

As a remedy, the Lathers Union was ordered to reimburse *Special Sections* the wages paid to Mr. D. in excess of wages he would have received for work actually performed, plus 6% interest. The Union was also ordered not to coerce *Special Sections* or its customers, and ordered it not to induce employees of these customers not to handle any goods furnished by *Special Sections*, where an object is to cause *Special Sections* to pay or deliver money, or other things of value in the nature of an exaction, for services not performed or not to be performed."

Significance

This ruling, being the Board's first on featherbedding in 20 years, should be significant to construction contractors who have often had to employ individuals with highly specialized skills and crafts where not needed. The ruling is technical, to be sure, requiring that there be no collective bargaining relationship between the firm and the demanding union, and requiring that the services not involve competent performance of relevant services. But even within those limitations, the ruling should bring a fresh breath of air into the featherbedding problems of the construction industry.

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