

## DRAWING THE LINE: A PROPOSAL FOR LIMITING THE FORM AND FUNCTION OF CONSTRUCTION MANAGER PROJECT DELIVERY

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### I. INTRODUCTION

Renowned Minnesota construction attorney B.C. Hart remarked in 1972 that the government had given birth to a

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construction method of undefined lineage.<sup>1</sup> Ten years later, construction management still escaped classification.<sup>2</sup> Today, we are no closer to its capture.

Generally, a construction manager (CM) provides clients with expert construction advice, ranging from design constructability and scheduling to procurement and quality control; but as this article explains, conflicting presumptions exist as to what else a CM provides. Failing to decide on the precise use for CM—and the resulting wide variance in applying the CM label—frustrates the industry.<sup>3</sup> Moreover, failing to provide a coherent framework for judges and arbitrators creates needless risk and cost. This article first discusses the impact of these failures and concludes that the industry benefits from taking a uniform approach to the CM delivery method.<sup>4</sup> Next, the article explains that striking the CM approach in an agency die condenses and anneals the model's vital elements, while expelling the impurities that have seeped in from other delivery methods.<sup>5</sup>

For decades, the CM label has run out of control.<sup>6</sup> Undoubtedly, a single article such as this will have little impact on an industry as scattered as construction. This article, therefore, addresses a more practical audience: the advocates and arbiters who deal with the CM label daily. Understanding the economic

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1. B.C. Hart, *Construction Management "CM for Short": The New Name for an Old Game*, 8 FORUM 210, 210–11 (1972). The Public Buildings Service of the General Services Administration announced the use of Construction Management on March 17, 1970. *Id.* at 210.

2. Milton F. Lunch, *New Construction Methods and New Roles for Engineers*, 46 LAW & CONTEMP. PROBS. 83, 83 (1983) (“The one, and probably only, area of agreement regarding construction management is that there is no consensus as to what it is, what it ought to be, and how it should be applied.”).

3. Michael Kenig, vice-chairman of an Atlanta construction firm, voiced these concerns in the commentary section of *Engineering News-Record*:

One example [of the lack of a common vocabulary] is the lack of consensus on the definition of CM at-risk, also known as CM/GC, CMc, GC/CM, etc. A large number of private owners are using CM at-risk without calling it that. How are we going to start cataloguing lessons learned that can be developed into industry-wide best practices if we don't even know what process we're talking about?

If we stay on our current course without common terminology . . . [w]e are going to keep doing what we have always done — making the same mistakes over and over again.

Michael Kenig, *The Industry Needs Common Language*, ENGINEERING NEWS-REC., Feb. 28, 2005, at 67.

4. *See infra* Part II.

5. *See infra* Part III.

6. *See supra* notes 1–2 and accompanying text.

function of CM project delivery provides the knowledge necessary to control the CM label, while the underpinnings of agency allow turning that understanding into earnings.

## II. THE PROBLEM

The inability to communicate razed the Tower of Babel, civilization's first great construction project.<sup>7</sup> Observing humankind's endless potential as one people with a single tongue,<sup>8</sup> God "confused their language" so they could not understand one another.<sup>9</sup> Unable to communicate, the builders soon abandoned their ambitious project and scattered themselves over the face of the earth.<sup>10</sup>

While confusion over the meaning of construction management does not confound with nearly the same magnitude, this Old Testament story illustrates a reality affecting both construction and the law: far less is possible without a common understanding amongst participants.

### A. *Risky Business*

Earning a profit in construction requires digging for pennies in a minefield. The headwaters of this risky business first gather around its lack of vertical integration. Construction can hardly boast one-stop shopping. Not only does the Owner traditionally buy a design and a building from two different sources, but the parties themselves extend hopelessly outward in order to meet their contractual obligations.<sup>11</sup> The magic of raising a glass and brick laboratory, for example, from the raw elements of cement dust, iron ore, clay, and sand requires endless horizontal contracts with specialty designers, tiers of subcontractors, and chains of manufacturers, suppliers, and distributors.

To make matters worse, many people are in the minefield looking for the same pennies. For instance, construction had six

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7. See *Genesis* 11 (New Revised Standard Version).

8. *Id.* at 11:6 ("And the Lord said, 'Look, they are one people, and they have all one language; and this is only the beginning of what they will do; nothing that they propose to do will now be impossible for them.'").

9. See *id.* at 11:7 ("Come, let us go down, and confuse their language there, so that they will not understand one another's speech.").

10. See *id.* at 11:8.

11. See JEREMIAH D. LAMBERT & LAWRENCE WHITE, *HANDBOOK OF MODERN CONSTRUCTION LAW* 100–10 (1982).

times as many suppliers sharing the same dollar in 2002 as wholesale trade, the single largest sector of the U.S. economy.<sup>12</sup> As the economy's sixth largest sector, construction shared \$1.2 trillion with 710,000 suppliers. By comparison, wholesale trade shared nearly four times that amount amongst a far fewer 440,000 suppliers.<sup>13</sup> Moreover, these construction suppliers are mostly small, undercapitalized, and financially unstable.<sup>14</sup> Thus, the extent of this fracturing, coupled with low-entry barriers, translates into expanded risk and high competition.<sup>15</sup> Razor-thin margins result, leaving only pennies for contractors.

For construction's customers, the inescapable reality is that building is a means to an end.<sup>16</sup> In meeting this end, poor timing has always plagued the industry. As early as the 1930s, for example, economists in Chicago found that by the time construction caught up with demand for office space, the demand had already begun to wane.<sup>17</sup> Naturally, this led to an oversupply in the market and falling rents.<sup>18</sup> This illustrates how construction's transaction costs, due in this case to long lead times, keep a constant pressure on demand.

Transaction costs also arise from the uncertain nature of construction itself.<sup>19</sup> This inherent uncertainty compounds the

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12. U.S. CENSUS BUREAU, 2002 ECONOMIC CENSUS tbl.1 (2002), <http://www.census.gov/prod/ec02/ec0200ccomp.pdf>. Wholesale trade generated \$4.6 trillion using 440,000 suppliers, or 95,000 suppliers for every \$1 trillion generated; compare this to construction's crowded 590,000 suppliers for each \$1 trillion generated. *See id.* Thought of another way, the average wholesale trade participant supplies \$10.5 million to the sector, while the average construction participant supplies only \$1.7 million. *See id.*

13. *Id.*

14. *See* LAMBERT & WHITE, *supra* note 11, at 193.

15. An index of publicly traded companies in the General Contractor industry reveals a net profit margin of 3.2%, compared to 6.2% for the entire Industrial Goods sector. *See* Yahoo! Finance General Contractors Page, <http://biz.yahoo.com/p/636qpmu.html> (last visited Oct. 25, 2007).

16. It is axiomatic that no public or private interest will build for the sake of building. Therefore, an Owner's ultimate interest when contracting with builders is the deliverable due at the end of the project. *See* Richard D. Conner, *Contracting for Construction Management Services*, 46 LAW & CONTEMP. PROBS. 5, 6-8 (1983).

17. *See The Skyscraper Boom: Better than Flying*, ECONOMIST, June 3-9, 2006, at 67.

18. *Id.*

19. This proposition has been supported ad nauseam by quoting *Blake Construction Co. v. C.J. Coakley Co.*, 431 A.2d 569, 575 (D.C. Cir. 1981) ("Even the most painstaking planning frequently turns out to be mere conjecture and accommodation to changes must necessarily be of the rough, quick and ad hoc sort, analogous to ever-changing commands on the battlefield."). *See, e.g.*, John D.

diminishing profit margin problem and adds a layer of risk that is unattractive to many investors.<sup>20</sup> Thus, it is no surprise that the largest U.S. corporation *earns* in one quarter what the largest U.S. contractor *sells* in an entire year.<sup>21</sup>

It is important to understand that risk lies at the heart of all construction.<sup>22</sup> The construction industry sweeps across a financially diverse group of owners, contractors, and designers,<sup>23</sup> creating unique risk and a unique means of governing and allocating that risk.<sup>24</sup> Thus, a necessary allocative and distributive purpose for construction exists: to place risk with those who can control it, transfer it, and maximize the cost-benefit of bearing it.<sup>25</sup> The contractor, in particular, is uniquely positioned to affect this process.<sup>26</sup>

### B. *Finding the Pennies*

Our built environment results from combining three fundamental elements: customers, designers, and builders.<sup>27</sup>

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Darling, *Delay of Game*, 26 CONSTRUCTION LAW. 5, 5 (2006); Michael R. Finke, *Claims for Construction Productivity Losses*, 26 PUB. CONT. L.J. 311, 315 n.17 (1997).

20. See 2 PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 7:10 n.1 (2002) ("This competitive environment, coupled with the inherent uncertainty of the construction process, partially explains why construction companies rarely find favor on Wall Street or with non-management investors.").

21. Exxon Mobile sat atop the Fortune 500 in 2006, reporting a before-tax profit of \$18.2 billion for the third quarter of the 2006–2007 fiscal year. *Fortune 500 Largest U.S. Corporations*, FORTUNE, Apr. 17, 2006, at F-1; Exxon Mobile Corp.'s Income Statement, <http://finance.yahoo.com/q/is?s=XOM> (last visited Oct. 25, 2007). By comparison, the Bechtel Group, Engineering News-Record's top U.S. contractor had sales of \$20.5 billion for all of 2006 based on 2005 revenue, Gary J. Tulacz, *The Top 400 Contractors*, ENGINEERING NEWS-REC, May 22, 2006, at 60; BECHTEL, BECHTEL REPORT 3 (2007), <http://www.bechtel.com/AnnualReport/2007Report.pdf>.

22. See 2 BRUNER & O'CONNOR, *supra* note 20, § 7:10.

23. *Id.* § 7:179.

24. See *id.* §§ 7:17–:18.

25. *Id.* § 7:10 (quoting Max Abrahamson, *Risk Management*, 2 INT'L CONST. L. REV. 241, 244 (1984)).

26. See Carl J. Circo, *Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry*, 58 FLA. L. REV. 561, 601 (July 2006) [hereinafter *Contract Theory*]. "Building contractors specialize in managing construction risks . . . . By trade and experience, they are well-equipped to evaluate those risks and to establish fees based on the nature and extent of the construction risks they assume by contract." *Id.*

27. See 2 BRUNER & O'CONNOR, *supra* note 20, § 6:1. Even the CM delivery system discussed throughout this article does not add an additional element to the

Traditionally, these elements are cast in three distinct characters. The customer element, represented generically by “the Owner,” is central to all construction.<sup>28</sup> Under a traditional framework, the Owner gathers the remaining elements under two separate contracts, forming the compartmentalized tripartite arrangement of traditional construction delivery.<sup>29</sup>

Over time, these elements have mixed together in countless ways<sup>30</sup> to efficiently allocate and spread the risks inherent in pushing back rivers, scratching roads through wilderness, and raising skyscrapers from marshes.<sup>31</sup> In the process, the compartmentalization of the tripartite system has dissolved as markets find more efficient formulations for transferring risk.<sup>32</sup> As this continues to occur, the three primary elements further blend into various hues and reallocate themselves amongst hybrid parties.<sup>33</sup>

Construction management is an example of this market influence. Construction management emerged from “the perceived weaknesses and inefficiencies” of the traditional tripartite

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construction process. *See id.* § 6:57. Instead, the CM absorbs some of the designing and building tasks traditionally carried out by architects and general contractors, respectively. *Id.* The same is also true for design-build delivery: although an owner contracts design duties to the builder, the builder will still have to tap a designer, either through subcontract or direct employment, to develop construction documents that achieve the Owner’s objectives. *See id.* § 6:15.

28. *See id.*

29. *See Contract Theory, supra* note 26, at 565 (describing the design-bid-build process and the Owner’s separate contracts with the architect and builder).

30. *See* Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 NEB. L. REV. 162, 168 (2005) [hereinafter *Specialty Designs*]. “Only feasibility and imagination limit the possible variations in project delivery systems.” *Id.*

31. *See generally* 2 BRUNER & O’CONNOR, *supra* note 20, §§ 7:1–14 (discussing the allocative and distributive principles for construction risk).

32. *See, e.g., Specialty Designs, supra* note 30, at 206–07 (discussing the need to re-allocate specialty design risk to subcontractors because the architect is not best suited to bear such design responsibility).

33. *See* Hart, *supra* note 1, at 218 (presenting a prominent American architect’s view of CM delivery as an intermediate stop on the way to permanently dissolving the conflict-boundaries separating builder, Owner, and architect). Compare Gary J. Tulacz, *The Top 100: Owners Demand Broader Services*, ENGINEERING NEWS-REC., June 13, 2005, at 28 (describing the lack of standardization fueling an ever expanding hybridization of delivery models and the need to define the nature of construction management), with Conner, *supra* note 16, at 5 (“The catalyst for [construction management] has been the owner’s determination to force the construction industry to regard a highly fragmented series of discrete decisions and events as a single process.”) (quoting Edward W. Davis & Lindsay White, *How to Avoid Construction Headaches*, HARV. BUS. REV., Mar.-Apr. 1973, at 87, 93).

approach.<sup>34</sup> These weaknesses became apparent with technological developments in the industry,<sup>35</sup> the demand for greater control over project costs and schedules,<sup>36</sup> and design professionals seeking to avoid their traditional liability as master builder.<sup>37</sup> Extremely high interest rates and inflation in the 1970s added to the dissatisfaction and led owners to search for ways to speed up the construction process.<sup>38</sup> Fast-track construction, along with multi-prime contracting and construction management, emerged from this crucible.<sup>39</sup> Construction management was developed to serve as the Owner's jungle guide in an intense building environment.<sup>40</sup> Indeed, a close reading of B.C. Hart's 1972 article reveals processes that later grew into fast-track and design-build.<sup>41</sup> Further, the bouncing baby Hart spoke of was more accurately the construction management blanket wrapped around these nascent fraternal twins.<sup>42</sup>

A major problem with the original construction management model was that while CMs were experts at forecasting and managing costs, they never provided a means of guaranteeing those costs to the Owner.<sup>43</sup> The Owner found this problematic because it

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34. JUSTIN SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING, AND THE CONSTRUCTION PROCESS 451 (3d ed. 1985).

35. See *Specialty Designs*, *supra* note 30, at 206.

36. *Id.*

37. See Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1080 (1979).

38. See DANIEL S. HAPKE, JR., DESIGN AND CONSTRUCTION CONTRACTS: REPRESENTING THE OWNER 55 (1987).

39. *Id.*

40. See Hart, *supra* note 1, at 219. "What has changed . . . is the role of the owner. The construction manager is the Owner's tool, invented by the owner out of his own need and in one sense a kind of makeshift device invented to fill the obvious gaps in the construction process." *Id.* (quotation omitted).

41. See *id.* at 218–19.

42. *Id.* A current example of this nepotism between design-build, fast-track, and CM is the I-35W bridge rebuild project. To achieve a safe—but expedient—rebuild of the bridge, the Minnesota Department of Transportation (Mn/DOT) announced plans for a design-build delivery. See Mn/DOT, I35W Bridge Replacement – Rebuild Plans, <http://www.dot.state.mn.us/i35wbridge/rebuild/pdfs/bridge-replacement-overview.pdf> (last visited Oct. 22, 2007). Nevertheless, in what little information that is available about the upcoming project, Mn/DOT describes benefits that could just as easily be classified as fast-track. For example, the agency lists overlapping design and construction activities as a design-build benefit, even though this is also achieved through fast-track construction without single-sourcing design and construction. See *infra* text accompanying notes 113, 117.

43. See *id.* at 220.

needed to forecast cash flows and secure lending.<sup>44</sup> But because the CM approach had always been about serving the Owner,<sup>45</sup> the CM-at-risk was soon created to provide the Owner the Guaranteed Maximum Price,<sup>46</sup> or GMP, feature it desired.<sup>47</sup>

C. *Protecting the Pennies*

A severe side effect results from allowing market forces to shape the construction delivery process. By leaving the classification of these market evolutions to superficial and irregular criteria, the industry provides courts with a confusing mix of contradictory definitions and non sequiturs, in addition to the already complicated process of deciding construction cases.<sup>48</sup> As explained below, no standard definition for CM-at-risk or GC/CM exists, nor does clarity as to how these processes differ from a typical general contractor (GC) managing fast-track construction.

For example, an industry-standard CM-for-fee form contract does not expressly provide for the agency relationship typically intended between the Owner and CM.<sup>49</sup> At the same time, other form contracts allowing the CM to participate in construction do not expressly disclaim the agency relationship.<sup>50</sup> Thus, courts and arbitrators are left to read between the lines of the contract,

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44. *Id.*

45. *Id.* at 219.

46. GMP is defined as:

a) A fee arrangement between the client and the architect whereby the total remuneration payable to the architect for services rendered is restricted to a pre-agreed maximum.

b) A fee arrangement between the client and the contractor whereby the total amount payable to the contractor for the construction of the project is restricted to a pre-agreed maximum.

FREEMANWHITE, DESIGN & CONSTRUCTION LIST OF TERMS 3, <http://www.ordesignandconstruction.com/Glossary%20FreemanWhite0804.pdf>.

47. See Conner, *supra* note 16, at 9.

48. See I BRUNER & O'CONNOR, *supra* note 20, § 1:2 (“[C]omplexities in construction have created difficulties for some judges and many juries in gaining sufficient understanding of the factual basis of construction disputes to fairly decide the issues . . .”).

49. See AM. INST. OF ARCHITECTS, AIA DOCUMENT A201 (1997), *available at* [http://www.engin.umich.edu/class/cee431/AIA/05.04.05\\_A201\\_SAMPLE\\_encrypted.pdf](http://www.engin.umich.edu/class/cee431/AIA/05.04.05_A201_SAMPLE_encrypted.pdf).

50. See AM. INST. OF ARCHITECTS, AIA DOCUMENT A121 CMC / AGC DOCUMENT 565 (2003), *available at* [http://www.ci.durham.nc.us/agendas/2007/cm20070116/80718\\_3692\\_111708.pdf](http://www.ci.durham.nc.us/agendas/2007/cm20070116/80718_3692_111708.pdf); AM. INST. OF ARCHITECTS, AIA DOCUMENT A131 CMC / AGC DOCUMENT 566 (2003).

reflecting on the parties' interactions and taking cues from an industry, which only provides further confusion.<sup>51</sup>

Litigating over risk allocation in construction contracts alone is expensive.<sup>52</sup> Adding an ill-defined relationship between the parties only exacerbates this transaction cost.<sup>53</sup> Moreover, repeatedly using the single term "construction manager" in widely-varying contracts poses interpretation problems for courts and arbitrators. It creates the perception that all contracts intend the same relationship, and it increases the likelihood that courts will apply some misunderstood standard far different from what the parties would have selected *ex ante*.<sup>54</sup>

This danger, however, also reveals an opportunity. Judges and arbitrators are most efficient when they can resolve contract disputes using commercial and economic common sense without the need to take evidence.<sup>55</sup> To this end, the more a judge or arbitrator knows about the economic function of the contract, the greater the likelihood of an efficient result.<sup>56</sup> Thus, the market benefits by providing the judge or arbitrator with a cohesive idea of the CM's purpose and the economic advantages the CM provides to construction.

### 1. *Allocating Tort Liability*

An advantage also exists with regard to tort liability. A builder is often drawn into tort litigation through Restatement (Second) of Torts section 414.<sup>57</sup> In *Kelley v. Howard S. Wright Construction Co.*, for instance, the Supreme Court of Washington recognized the GC's

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51. See Walter F. Pratt, Jr., *Afterword: Contracts and Uncertainty*, LAW & CONTEMP. PROBS., Winter 1983, 169, 171 ("If the language of the contract cannot be made certain . . . then courts can turn only to the conduct of the parties or to the habits of the industry for guidance in construing the language.").

52. See Center for Public Resources, *Preventing and Resolving Construction Disputes*, 9 ALTERNATIVES TO HIGH COST LITIG. 182, 183 (1991).

53. See Pratt, *supra* note 51, at 171 ("If neither the parties nor the industry have developed useful patterns, then the courts will be left without any standard, and litigation will produce only further uncertainty.").

54. See *id.* at 171-72. ("Although the result might be that the 'contract' is enforced, the norms might be very different from the ones that the parties themselves would have chosen.").

55. Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1605 (2005).

56. *Id.* The efficiency results from a lower cost in maximizing the joint surplus of the contract, *ex ante*. *Id.* at 1591.

57. RESTATEMENT (SECOND) OF TORTS § 414 (1965).

authority to influence and control the entire jobsite,<sup>58</sup> and subsequently found the GC owed a general duty of care to the subcontractors' employees.<sup>59</sup> The *Kelley* court based its decision on section 414's requirement to provide a safe workplace where the GC retains control of some part of the work.<sup>60</sup>

On the other hand, comment c to section 414 requires that the contractee retain "at least some degree of control over the manner in which the work is done."<sup>61</sup> And, as comment c points out, no duty exists where the contractee retains only the general right "to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations . . . or to prescribe alterations and deviations."<sup>62</sup> The Supreme Court of Washington used this comment in *Kamla v. Space Needle Corp.* as the basis for circumscribing a contractee's liability for injuries to the contractor's employee.<sup>63</sup> In a similar case, *Hennig v. Crosby Group, Inc.*, the court held that the Owner's right to inspect work was not sufficient to create a duty to its subcontractor's employees.<sup>64</sup>

Notwithstanding an arrangement similar to *Kamla* or *Hennig* where the CM only manages contract performance, courts will likely make the same assumption as they did in *Kelley*. Thus, if the industry cannot show a clear delineation between a CM's duties and a GC's duties, then CMs will continue to be treated as GCs. Thus, the message must be clear: the general liability appropriate for a GC's building enterprise is inconsistent with a CM's decidedly non-entrepreneurial service to the Owner. CMs fit into the exceptions of section 414;<sup>65</sup> their toolboxes are cluttered with contract clauses and deviation notices, not blowtorches and jackhammers. At their most efficient, CMs retain only the right to stop or order correction of work not complying with the contract.<sup>66</sup>

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58. 582 P.2d 500, 505–06 (Wash. 1978).

59. *Id.* at 506. Minnesota courts have not rigidly applied section 414 to general contractors in the same way as Washington courts. Yet, Minnesota has generally recognized that contractees can be liable where they retain "some measure of control over the project." *Conover v. N. States Power Co.*, 313 N.W.2d 397, 401 (Minn. 1981).

60. *Kelley*, 582 P.2d at 505; accord RESTATEMENT (SECOND) OF TORTS § 414 cmt. b (1965).

61. RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965).

62. *Id.*

63. 52 P.3d 472, 475–76 (Wash. 2002).

64. 802 P.2d 790, 792 (Wash. 1991).

65. See *supra* notes 61–62 and accompanying text.

66. Alan B. Stover, *Construction and Design Contracts*, in CONSTRUCTION LAW §

Narrowing courts' expectations of control will bring the CM's legal duty in line with its limited, negative control over subcontractors. Over time, this may help reduce inefficiencies caused by insurance over-coverage and paying subcontractors to indemnify activity outside the CM's scope of liability.

## 2. *Encouraging Safety*

Moving construction management away from *Kelley* encourages CMs to participate in their projects, rather than sit in their trailers, paralyzed by the fear of limitless liability. Safety is paramount on any jobsite, but holding CMs accountable because they observed an unsafe practice will only cause CMs to pluck out their eyes.

For example, in *Thill v. Modern Erecting Co.*, the Supreme Court of Minnesota found direct liability under section 414 where the GC actually observed the work that ultimately injured the plaintiff.<sup>67</sup> The court later sharpened this holding in *Larsen v. Minneapolis Gas Co.*, finding a GC's failure to observe the negligent work resulted only in vicarious liability.<sup>68</sup> Accordingly, where indemnification was applicable and the tortfeasor-subcontractor remained solvent, the unseeing GC was absolved of any responsibility to the plaintiff.<sup>69</sup>

This see-no-evil approach chills proactive, safety-conscious activity. Instead, the CMs should be encouraged to provide a peer review of their subcontractors' safety practices, to stop work when those practices are deemed insufficient or back charge the contractor for making them sufficient, and to augment the contractors' safety efforts as the CM chooses. To encourage development of this extra layer of safety, the sole responsibility for safety must fall on the contractor and any action by the CM is an added bonus.

While this same rationale could be applied to workers' compensation insurance, lobbying for such reform is beyond the scope of this article. It is, however, sufficient to say that clearer CM liability allows greater consistency in how construction management delivery is used. In addition, as the liabilities become clearer, the CM model becomes more precise at spreading risk and fewer transaction costs exist to dissuade use of the model.

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3.08(1)(b) (Steven G.M. Stein ed., 2007).

67. 272 Minn. 217, 226, 136 N.W.2d 677, 684 (1965).

68. 282 Minn. 135, 143-44, 163 N.W.2d 755, 761-62 (1968).

69. 282 Minn. 135, 148, 163 N.W.2d 755, 764 (1968).

### III. THE AGENCY MANIFESTO

In construction management's first decade, risk-bearing was not determinative of agency *vel non*. In fact, the position endorsed in this article was once the accepted form of construction management.<sup>70</sup> Perhaps the separate agency-CM and CM-at-risk labels created an either/or perception: either the CM was an agent under the first label or the "at risk" tag attached to the second label, which implied something outside of fiduciary relationships.<sup>71</sup> Of course, this perception is wrong. Basing a CM's compensation on performance measures, such as meeting a GMP, does not destroy the agency relationship.<sup>72</sup> Nevertheless, distinguishing between a CM's purely advisory role and its use to distribute risk is helpful in subcategorizing CM delivery. Thus, such distinctions should return to their original purpose, which is to define the CM's fee arrangement.

#### A. Agency *vel non*

Creating an agency relationship requires a manifestation of assent between an agent and a principal that the agent will perform

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70. See Note, *supra* note 37, at 1080 (describing the CM's role as providing the Owner technical and business advice; budgeting, scheduling and procuring contractor work; and coordinating, inspecting, and overseeing contractor work to insure its conformity with the construction documents).

71. The industry ultimately bifurcated the CM model so that anything not fitting neatly into the "pure" CM model of flat fee and professional services akin to an architect was swept into "CM-at-risk." See Conner, *supra* note 16, at 8. At the same time, the "pure" model became known as "agency-CM" because of its unique and readily identifiable agency relationship with the Owner. See John I. Spangler & William H. Hill, *The Evolving Liabilities of Construction Managers*, CONSTRUCTION LAW., Jan. 1999, at 30. To avoid any implication, however, that some CM deliveries may not involve an agency relationship, this Article embraces the industry moniker for agency-CM, "CM-for-fee." See Gary J. Tulacz, *Top 100 CM-for-Fee Firms*, ENGINEERING NEWS-REC., June 12, 2006, at 40 (using the "CM-for-fee" designation to account for sales from agent-CM services).

72. In addition to the arguments presented later in this Article, both courts and the Restatements address this issue. In *IPSCO Steel, Inc. v. Blaine Construction Corp.*, for instance, a CM under a GMP contract was required to reimburse its principal for construction costs exceeding \$182 million. 371 F.3d 141, 144 (3d Cir. 2004). During subsequent settlement of a subcontractor default, the court of appeals required that the CM act in the best interest of its principal, even if that meant exposing itself to a greater penalty under the GMP arrangement. *Id.* at 148-49. See also RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b (2006) (allowing the principal to "structure the basis on which an agent will be compensated so that the agent's interests are concurrent with those of the principal").

for the principal's benefit and subject to the principal's control.<sup>73</sup> Industry commentators, however, have used irrelevant criteria to expel CM-at-risk from the sphere of agency. For instance, instead of simply applying the criteria above, one commentator arrived at a CM-for-fee relationship by reasoning that the Owner accepts risk of delay, poor performance, and unexpected cost. Thus, the CM must be merely an agent.<sup>74</sup>

The placement of risk, however, is clearly not a criterion for the agency-principal relationship. For example, an attorney engaging clients on a lump sum basis accepts pricing-risk without compromising the agency relationship. The attorney manifested consent to act under the control of the client.<sup>75</sup> In addition, the attorney consented to work for the client's benefit, not the attorney's benefit.

Commentators also believe that because a CM holds trade or supplier contracts, the CM is not an agent.<sup>76</sup> Additionally, these commentators find that guaranteeing the price of a project through a GMP<sup>77</sup> places the CM "at risk."<sup>78</sup> Hence, such CM arrangements cannot overlay an agency relationship with the Owner.<sup>79</sup> No agency criterion exists, however, to support either conclusion.

### 1. *Contracting Directly with Subcontractors*

With regard to the CM entering into contracts, the issue is not as simple as the CM contracting with a subcontractor. The issue is

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73. RESTATEMENT (THIRD) OF AGENCY § 1.01.

74. See Stover, *supra* note 66, § 3.08(1)(b).

75. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2006). Indeed, the professional norms of the attorney-client relationship provide the attorney implied authority in carrying out the attorney's work, without disqualifying an agency relationship. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

76. See 2 BRUNER & O'CONNOR, *supra* note 20, § 6:13; Stover, *supra* note 66, § 3.08(1)(b); SWEET, *supra* note 34, at 385-86; Spangler & Hill, *supra* note 71, at 30.

77. See 2 BRUNER & O'CONNOR, *supra* note 20, § 6:82. Under a GMP, the builder assumes the risk of the costs exceeding a maximum price. *Id.*

78. See *id.* Bruner and O'Connor, however, find that holding subcontracts is all that is necessary to remove the CM from the agency approach. See *id.* § 6:13. Significantly, commentators ignore perhaps the most efficient version of CM: serving at the Owner's pleasure and for the Owner's benefit; providing expert advice; spreading risk; entering into contracts at the Owner's discretion; managing contracts; and doing so without an opportunity for entrepreneurial profits. Bruner and O'Connor refer to this as a brokerage arrangement. See *id.* § 15:19.

79. See *id.* § 6:59.

whether the CM is acting for the benefit of the Owner. Agents regularly bind principals through third-party contracts.<sup>80</sup> Agents can become a party to the contract by guaranteeing the principal's performance<sup>81</sup> or entering into a contract that excludes the principal altogether.<sup>82</sup> Industry customs, such as the lawyer assuming primary liability for debts incurred in the course of serving a client, may also make the agent primarily liable.<sup>83</sup> Additionally, federal statute can reverse the default rule and require express language to bind the government principal.<sup>84</sup> While this certainly puts the agent "at risk," the agency relationship remains so long as the agent acts on behalf of the principal.

Mistaken confusion over "at risk" may also stem from assuming parity between GCs and CMs contracting with subcontractors. When a GC contracts with a subcontractor to perform an obligation under the GC's contract with the Owner, the GC is at risk for that performance, regardless of what happens to the subcontractor.<sup>85</sup> Moreover, the Owner has no recourse against the subcontractor for non-performance.<sup>86</sup> When CMs contract for the

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80. RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006).

81. *See id.* § 6.01 cmt. d. Where an agent acts with actual or apparent authority and enters into a contract with a third-party, the agent and third-party can agree the agent will be a party to the contract. *Id.*

82. *Id.* cmt. b (reasoning that a third-party does not "manifest assent to an exchange with the principal" where an agent, acting on behalf of the principal, enters into a contract excluding the principal as a party, and thus, the principal is not a party to the contract). It is important to note, however, that this does not abrogate the principal's duty to indemnify the agent for contracts entered into on the principal's behalf. *See id.* cmt. d. Thus, while the third-party may only have a cause of action against the agent, the principal is not excused from the litigation. *Id.*

83. *Id.* cmt. d (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 30(2)(b)). The rationale behind this rule is that industry custom indicates that the third-party relies on the lawyer's creditworthiness, not the client's. *Id.*

84. *United Bonding Ins. Co. v. Catalytic Constr. Co.*, 533 F.2d 469, 473-74 (9th Cir. 1976) (Kennedy, Circuit Judge) (finding the Assignment of Claims Act requires the United States contract in its own name in order to receive protection under the act).

85. 9 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 779D (interim ed. 2002). *But see* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.4 (3d. ed. 2004) (discussing the modern trend in some courts to allow actions between subcontractors and between the Owner and subcontractor under an intended beneficiary analysis; noting that this analysis is particularly prevalent in multi-prime contracting, which CM arrangements often mimic).

86. CORBIN, *supra* note 85, § 779D (reasoning that because "[t]he [O]wner is neither a creditor beneficiary nor a donee beneficiary," the Owner "has no right against the subcontractor, in the absence of clear words to the contrary").

benefit of the disclosed Owner, however, CMs do not guarantee the performance of the subcontractor.<sup>87</sup> Instead, the agents are only liable if they entered into the contract without authority<sup>88</sup> or if by entering into the contract, they breached their duty of care, competence, and diligence.<sup>89</sup> Accordingly, the Owner's primary recourse is against the subcontractor.<sup>90</sup>

## 2. *Guaranteed Maximum Price*

With regard to GMP, commentators need look no further than the attorney-client relationship for an example of pricing risk not affecting agency status. The attorney-client relationship is the quintessential agency relationship.<sup>91</sup> Lump sum fees and contingency arrangements, however, are readily allowed.<sup>92</sup> In both cases, the attorney's fee is at risk, and, in both cases, the attorney remains the client's agent.

A CM operating under a GMP is no different. The so-called CM-at-risk will not earn its fee if the project is not completed within the guaranteed price.<sup>93</sup> But like the attorney assuming the risk under a fixed cost or contingency arrangement, the CM can still continue to act on behalf of the Owner and subject to the Owner's control. Thus, CM-at-risk remains an agency relationship.

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87. RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006). This can be modified, however, by agreement with the third-party. *Id.* cmt. b ("An agent who enters into a contract on behalf of a disclosed principal does not become a party to the contract and is not subject to liability as a guarantor of the principal's performance unless the agent and the third party so agree."). The Owner and CM can also modify the CM's liability through contract. *See id.* cmt. d.

88. "An agent has a duty to take action only within the scope of the agent's actual authority." *Id.* § 8.09(1). But even if the CM did not have actual authority from the Owner, if the Owner manifested apparent authority to the third-party, the Owner and third-party are joined in contract, and the CM must indemnify the Owner. *See id.* § 6.01 cmt. b.

89. *Id.* § 8.08. Additional duties can also be created through the Owner-CM contract. *See id.* § 8.07.

90. *See id.* § 6.01.

91. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch.2, topic 1, introductory note (2000) ("A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties"); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 14-16 (providing the attorney-client analog to forming an agency relationship and the duties that relationship imputes).

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(a), (c) (2006).

93. *See, e.g.,* IPSCO Steel, Inc. v. Blaine Constr. Corp., 371 F.3d 141, 148-49 (3d Cir. 2004) (requiring CM to effectuate a settlement in the Owner's interest at the expense of the CM's own profitability).

An argument may exist that attorneys under a fixed fee proposal guarantee a proportionally smaller amount of risk under their direct control and expertise. Conversely, the CM is asked to guarantee staggering risks largely outside the CM's control. Thus, the disproportionate risk precludes such an attorney–client analogy from justifying a CM's ability to act as the Owner's fiduciary under a GMP arrangement. This argument not only ignores agency formation and function,<sup>94</sup> it also reveals misconceptions about how the CM assembles the GMP. Moreover, such reasoning obstructs the Owner from the greater protection afforded by the agency relationship.

The practical reality of GMP pricing is that the contractor rarely assumes any more risk than the attorney who commits to a fee *ex ante*.<sup>95</sup> The less that is known about the costs or final design of the building, the more protective the GMP will be of the contractor.<sup>96</sup> Further, the GMP is not set in stone. The contractor can justify an upward adjustment based on typical change order arguments<sup>97</sup> or it can rig the GMP with so many qualifications that nearly any reasonable argument would justify an increase.<sup>98</sup> In essence, the GMP is not a reasonable substitute for fixed-price contracting.<sup>99</sup> Rather, the risk of exceeding the GMP is so low that

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94. It neither pays regard to the agent's assent to work for the Owner's benefit nor his assent to work under its control. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). Moreover, this argument wholly ignores the agent's ability to guarantee performance and distribute risk. See, e.g., *id.* § 6.01 cmt. d (discussing the agent's ability to guarantee contract performance), see, e.g., *id.* § 8.07 (allowing the principle to require the agent to carry insurance and utilize indemnity provisions in its subcontract arrangements). See also *IPSCO Steel*, 371 F.3d at 144 (recognizing CM retained agency relationship despite entering into subcontracts and being responsible for cost overruns); *Sanborn v. Kelly*, 618 N.Y.S.2d 146, 148 (N.Y. App. Div. 1994) (recognizing CM retained agency relationship despite duty to insure Owner against loss).

95. See Stover, *supra* note 66, § 3.08(1)(b) (“In effect, the contractor/CM has little at risk unless it has offered a [GMP] in advance of obtaining bids from the specialty trade contractors.”).

96. See Gary J. Tulacz, *More Public Agencies Look to CM to Protect Against Risk in Hot Market: But Who Is Really 'At Risk' from Price Changes in CM-at-Risk?*, ENGINEERING NEWS-REC., June 12, 2006, at 42.

97. See Stover, *supra* note 66, § 3.08(1)(b) (“[T]he [GMP] is subject to upward adjustment for any of the reasons that a contractor working on the basis of a stipulated sum would be entitled to a change order increasing the contract price.”).

98. See Tulacz, *supra* note 96, at 42 (discussing CMs' use of contract assumption narratives and increased contingencies to insulate themselves from GMP risk).

99. Under a fixed price contract, the contractor is not excused or “entitled to

the GMP functions more like a cost plus fixed-fee arrangement.<sup>100</sup>

Furthermore, if an arms-length contract implicates the Owner-contractor relationship, the Owner's only protection from abuse is an implied covenant of good faith and fair dealing.<sup>101</sup> But, if agency duties are properly recognized as inuring to the CM-at-risk, then the Owner is further protected from self-dealing because the CM is held to the selfless standards of a fiduciary.<sup>102</sup> Therefore, as hard dollar subcontracts begin crystallizing the once-budgetary GMP, the Owner receives the same pricing guarantees that it would receive under a GC arrangement. The only difference is that the guarantee arises from a broader aggregate of risk-diverse contracts because the CM is not performing any of the work. Most importantly, the Owner's interests remain primary, meaning the Owner has an additional layer of assurance that the GMP buyout must proceed solely for the Owner's benefit, an assurance not provided when an arms-length GC oversees the GMP.

### 3. *Self-Performing Work*

Finally, some commentators describe CM-at-risk as a delivery in which the CM ultimately uses its own construction forces.<sup>103</sup> This is not so alarming in respect to agency because the contractor—in

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additional compensation" unless the Owner breaches an implied warranty of adequate design. *See* *United States v. Spearin*, 248 U.S. 132, 136 (1918).

100. Cost plus fixed-fee (CPFF) reimburses the contractor for costs and pays a fixed-fee typically based on a percentage of the estimated construction costs. *See* STUART H. BARTHOLOMEW, *CONSTRUCTION CONTRACTING: BUSINESS AND LEGAL PRINCIPLES* 32 (1998). GMP uses the same format, except that the estimated construction cost represents the Owner's maximum liability, with the contractor agreeing to cover any overages. *Id.* at 33. Of course, if the maximum construction cost is not set at a competitive price for the work, and arms-length transactions provide little duty to set this competitive price, the GMP functions no differently than a CPFF arrangement.

101. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

102. RESTATEMENT (THIRD) OF AGENCY §§ 8.01–.11 (2006) (holding an agent liable to the principal for breaching fiduciary duties of loyalty, including self-dealing, disclosure, care, acting within authority, providing information, and obeying instructions). It should be noted, however, that contract and custom can modify these duties. *See id.* § 8.01 cmt. b.

103. *See* *Stover*, *supra* note 66, § 3.08(1)(b) (defining the CM-at-risk as providing advisor service prior to construction, then constructing the project in part by using its own forces); *see also* SWEET, *supra* note 34, at 385 ("CMs may contract on their own with specialty trades, a system that makes them look very much like prime contractors.").

employing its own forces—does not manifest assent to the Owner’s benefit and control. Instead, this definition is alarming because it utterly destroys any clear distinction between construction management and the traditional tripartite system. Moreover, it wholly overlaps the definition of GC/CM. In fact, much of the bewildering confusion addressed here originates from this issue seeping its way into form contracts and state law.

The evolution of construction management may be partially to blame. Prior to 1991, the respective professional organizations for architects and general contractors provided their own standard contracts for construction management arrangements.<sup>104</sup> Forms published by the American Institute of Architects (AIA) envisioned the CM as an adviser, while forms from the Association of General Contractors (AGC) saw the CM as a builder.<sup>105</sup> But when AIA A121/CMc-AGC Document 565 was jointly issued by the AIA and AGC in 1991, it presented a reconciled construction management persona. Under the 2003 revision, the standard contract required the CM to perform preconstruction services<sup>106</sup> and to set a GMP.<sup>107</sup> It also allowed the CM to commence work using its own forces.<sup>108</sup> This single arrangement has been labeled both as CM-at-risk or GC/CM.<sup>109</sup>

As if that “confused language” was not enough to topple the tower, legislatures have indiscriminately adopted both labels. For instance, in Massachusetts, providing preconstruction services under a GMP while self-performing work creates a “CM-at-risk,”<sup>110</sup> but in Washington, those same elements create a GC/CM.<sup>111</sup> As Bruner and O’Connor correctly point out, these self-styled distinctions are all just shadings of the traditional tripartite system.<sup>112</sup> Whether the image of a self-performing CM or a GC who provides preconstruction services is preferred, arranging fast-track

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104. 1 JUSTIN SWEET & JONATHAN J. SWEET, SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS § 9.08, at 256 (4th ed. 1999).

105. *Id.*

106. AM. INST. OF ARCHITECTS, AIA DOCUMENT A121 CMc / AGC DOCUMENT 565 § 2.1 (2003).

107. *See id.* § 2.2.

108. *See id.* § 2.3.2.1.

109. Kenig, *supra* note 3, at 67.

110. MASS. GEN. LAWS ch. 149A, § 2 (West 2007).

111. WASH. REV. CODE § 39.10.210(6) (2007).

112. 2 BRUNER & O’CONNOR, *supra* note 20, § 6:13.

delivery<sup>113</sup> with a GC under a GMP contract accomplishes the same result.

Therefore, these imprecise definitions of CM-at-risk (or GC/CM) are misleading. To set construction management apart, an agency bright line must be drawn. By thinking of CMs in their natural function as agents, and realizing layers like GMPs and subcontracting are not mutually exclusive of agency relationships, resolves confusion over construction management's application and provides Owners a clearer understanding of its advantages.

Ohio provides an example of this more meaningful agency distinction. Under Ohio law, the CM retains substantial discretion and authority in planning, coordinating, and managing the construction project, but does not perform any construction work.<sup>114</sup> The statute facilitates an agency relationship simply by removing the CM's temptation to help itself to an extra portion of tax revenue.

By contrast, Minnesota's provisions for a CM-at-risk not only allow the CM to bid and perform trade work,<sup>115</sup> they also allow the CM to act as a gatekeeper to the bidding process by deciding who can bid and how bids are reviewed.<sup>116</sup> This statutory empowerment to control the bidding process may encourage CMs to take advantage of their competitors. Moreover, it discourages competition. Few subcontractors will seriously bid work on a jobsite already festooned with the competition's trademarks and logos.

### *B. Replacing the Master Builder*

Comparing CM statutes—like those in Massachusetts, Washington, and Minnesota—illustrates how legislatures have overlooked the proper function of construction management. Given construction management's Owner-centric advantages, it also illustrates the missed opportunity for states to improve their building efficiency, including making design-build a viable public contracting option.

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113. Fast-track delivery begins construction activities before design of the project is complete. *See* Stover, *supra* note 66, § 3.01(1)(c).

114. OHIO REV. CODE ANN. § 9.33(A) (West 2004).

115. MINN. STAT. § 16C.34 subdiv. 3(e) (2006).

116. *Id.* (allowing the CM-at-risk and commissioner to determine the selection criteria and list of qualified firms, provided they do not impose unnecessary conditions beyond reasonable requirements).

While design-build allows an Owner to allocate substantial risk to the builder and eliminates the need to referee feuds between the architect and contractor<sup>117</sup> (the design-build architect owes its contractual duties to the builder),<sup>118</sup> it leaves the Owner without a skilled representative to look out for its interests.<sup>119</sup> Much like the GC/CM problem, the builder's enterprise risk cuts off any possibility of a fiduciary relationship between the Owner and the builder or the builder's designer. Although states like Washington and Minnesota find the balance of this trade-off to be beneficial,<sup>120</sup> it reduces their taxpayers' options in terms of leverage over the design-builder. Instead of a builder or designer bound by additional fiduciary duties owed to the government-owner, the design-builder can act entirely in its own interests, bound only by the terms of the contract and a duty of good faith and fair dealing.<sup>121</sup>

Furthermore, the traditional design-build model is based on the unproven premise that self-performed work is more efficient than subcontracted work. In a competitive market, however, the traditional design-builder cannot obtain labor or materials any cheaper than can a subcontractor. Consequently, if the CM provides the management expertise and risk spreading capability traditionally touted by the design-builder, all that remains is buying out packages of craftwork and materials. If the Owner's desired level of performance is readily available in the subcontractor

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117. See 2 BRUNER & O'CONNOR, *supra* note 20, § 6:34 (pointing out that allowing the Owner to contract solely with one party "gives the owner 'a single point of responsibility' for design and construction services"). Design-build arrangements are contracted at arm's length to procure a design and its construction from the same source. *Id.* Design-build is a common permutation of the traditional tripartite system. *Id.* § 6:15. The Owner seeks to diminish its exposure to the construction process by combining the architect and builder. See *id.* § 6:34. From a practical standpoint, this eliminates the Owner's involvement in design constructability disputes. See Mark C. Friedlander, *A Primer on Industrial Design/Build Construction Contracts*, CONSTRUCTION LAW., Apr. 1994, at 3. From a legal standpoint, this provides a single source of liability from which the Owner may pursue or defend a claim. *Id.*

118. See Linda Chiarelli & Lawrence Chiarelli, *The Role of the Construction Manager on a Design/Build Project*, CONSTRUCTION LAW., Apr. 1995, at 58, 61-62.

119. 2 BRUNER & O'CONNOR, *supra* note 20, § 6:15.

120. See WASH. REV. CODE ANN. § 39.10.300(1) (Westlaw through 2007 legislation) (allowing the use of design-build contracts on public works, subject to limitations on project type and cost); see also MINN. STAT. § 16C.32 subd. 2 (2006) (allowing the use of design-build contracts on public works, subject to an evaluation of price and design).

121. See *supra* text accompanying note 101.

market at a competitive price, (a very real possibility, considering the traditional design-builder's craftwork is competing with other similarly situated subcontractors) then the premise of self-performing efficiency fails. Thus, state laws that attach a design contract to a relationship incapable of both fiduciary responsibility and economic efficiency create a losing arrangement for all parties involved.

Alternatively, if a state such as Minnesota adopted a CM-driven, design-build statute, government builders such as Mn/DOT would have a construction expert and fiduciary advisor throughout the design and construction process without losing the capability to fast-track a project. Because the CM would assemble the GMP from an aggregate of the hard-dollar subcontracts the CM entered into—and the CM would agree to indemnify the government entity from any economic claims arising from design inadequacy<sup>122</sup>—Minnesota could allocate the same risk at competitive prices. What ultimately emerges, then, is similar to a multi-prime contract,<sup>123</sup> except the CM holds the subcontracts and Minnesota building officials are not called on to oversee or administer construction progress. Thus, in a single contract, the CM assumes distributive responsibilities for design, management, and risk, while the Owner receives a fiduciary representative.

Admittedly, buying out craftwork in this manner likely loses some economies of scale otherwise realized in the traditional design-builder's limited vertical integration. But as long as the Owner or government finds the added cost is less than the benefit of a knowledgeable agent dedicated to putting the Owner's needs above its own, and the Owner finds value in spreading risk across a greater number of companies, the arrangement is efficient.

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122. Even in the absence of specific contract language, the CM must indemnify the Owner against claims arising from the CM's own negligence. *See* RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (2006) (discussing the agent's duty of care to the principal). Moreover, an agent must act in accordance with the express terms of the agency contract. *See id.* § 8.07. And although the Owner has a duty to indemnify the CM for acting within the CM's authority or for the Owner's benefit, *see id.* § 8.14, this duty can be modified by contract, *id.* cmt. b. Thus, the contractual overlay of the design-build agreement can customize the indemnification scheme between the parties without disposing of the agency relationship.

123. Under multi-prime contracting, the Owner contracts directly with trade contractors to perform work. *See* 2 BRUNER & O'CONNOR, *supra* note 20, § 6:14.

## IV. CONCLUSION

The construction industry can outline in sixteen divisions each material and process used to assemble a building, but when it comes to standardizing project delivery, mass confusion ensues. Contracting relationships today take many forms; however, these are mostly variations on design-bid-build or design-build. Only the construction management approach offers the Owner an agent who is also a construction expert.<sup>124</sup> By drawing a bright line around agency, participants carve out a class of contracts based on the unique legal and commercial implications of a master builder and agent.

Further, such a bright line warns those who may otherwise stray into the shackles of an unwanted agency relationship. While contract language that systematically denies benefit or control running to the Owner militates against an agency relationship, such language is not determinative.<sup>125</sup> The parties' actions can just as easily impute the agency duties of a principal.<sup>126</sup> Thus, clearly defining the appropriate use for CM arrangements and its entrance criteria helps parties understand what manifestations to avoid if agency liability is not desired. Moreover, it helps judges and arbitrators understand the common economic context in which an agency relationship might be used, and thus, when the parties' actions are most likely manifestations of such a relationship.

As a corollary to the bright line, any self-performed work disqualifies the CM label. Consequently, GC/CM clearly cannot fall within the CM classification—the agency principles of CM make it a jealous sort. Ideally, a clearer label for GCs providing preconstruction and expert builder advice should be used; however, the label is so ingrained that quarantining this type of arrangement to GC/CM is satisfactory if it means eradicating self-performance from the CM-at-risk category.

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124. See SWEET, *supra* note 34, § 21.04(D). "Program management," a close cousin of construction management, provides the Owner with an agent that analyzes the Owner's building needs as the Owner contemplates its next capital project. See 2 BRUNER & O'CONNOR, *supra* note 20, § 6:11. While this model is practically identical to CM, it focuses more on advising the Owner what to build, not how to build it. *Id.* Thus, it was not considered in this construction delivery discussion.

125. RESTATEMENT (THIRD) OF AGENCY § 1.02.

126. *Id.* § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct."). This manifestation can be any conduct "by a person, observable by others, that expresses meaning." *Id.* cmt. b.

Although construction management has been around for forty years, it still accounts for only a fraction of the building industry.<sup>127</sup> While many factors may account for its failure to catch on, high transaction costs and a resulting perception of inefficiency are the likely culprits. Drawing the agency bright line proposed here is a step toward reducing this friction and providing Owners and the industry with a workable delivery system.

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127. In 2005, the combined CM-for-fee and CM-at-risk revenue from the top firm in each category was \$7.4 billion. *See* Tulacz, *supra* note 71, at 41, 43. By comparison, the single largest contractor's non-CM receipts in the U.S. were in excess of \$14 billion. *Id.*; *see also* Tulacz, *supra* note 21, at 60. *But see* Spangler & Hill, *supra* note 71, at 30 (contending that construction management has become a preferred delivery method over the years).