BOOK REVIEWS

LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS. By *Justin Sweet*. St. Paul: West Publishing Co., 1970. Pp. 953.

The legal profession has felt the need for a competent legal scholar to assemble cases and materials in a definitive work devoted to private construction—construction for owners other than the state and federal governments. The construction industry constitutes the largest industry in the United States,[1] accounting for 10% of the Gross National Product.[2] The industry, however, is not without problems. Between 1962 and 1966, there were 11,725 business failures among construction contractors, 6,785 of these involving subcontractors. Infancy death is an unhappy aspect of the construction business where the average business life of a construction contractor is 7 years, and over the past 50 years, 49% of the construction contractors who began business survived for no longer than 2½ years while 63% failed after 5½ years.[3] Thus, the construction Goliath would appear to have a rather vulnerable Achilles' heel and to require constant ministering by the legal profession.

Lawyers involved with federal procurement, including government construction, have been the beneficiaries of a number of excellent legal works. Perhaps the most academically sound and comprehensive is by Nash and Cibinic,[4] but also useful is McBride and Wachtel's nine-volume work.[5] Loose-leaf services[6] provide a compilation of decisions by the various appeals boards and the courts.[7]

Legal literature devoted to construction in the private sector, which, volume-wise, is more than double that of the public sector,[8]

1. DEPARTMENT OF COMMERCE, UNITED STATES INDUSTRIAL OUTLOOK 1971, Appendix A (1971). Construction volume for 1971 alone is anticipated to reach 109 billion dollars. *Id.*

2. Levinson, *The Hard-Hats, the Davis-Bacon Act, and Nixon's Incomes Policy*, 22 LAB. L.J. 323, 327 (1971).

3. Statistical information furnished by Robert H. Strickland, Executive Secretary, and M.L. Strong, III, Director of Public Relations, Georgia Branch, The Associated General Contractors of America, Inc.

4. R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW (rev. ed. 1969).

5. J. MCBRIDE & I. WACHTEL, GOVERNMENT CONTRACTS (1963).

6. For instance, see GOV'T CONT. REP.

7. The law of federal procurement has been fleshed out and made palatable to the contractor and the general practice lawyer through the efforts of Federal Publications, Inc., publisher of, among other works, THE GOVERNMENT CONTRACTOR (a summary and critical analysis of federal procurement cases) and THE GOVERNMENT CONTRACTOR BRIEFING PAPERS (which concentrates on practical solutions to problems in federal procurement).

8. 17 Construction Review, April, 1971, at 2.

however, is slim indeed by comparison. While there have been works published dealing primarily with private construction,[9] these works have been narrow in scope and treatment. Perhaps the finest of this genre is LAW FOR ENGINEERS,[10] but the passage of time has largely eroded its current usefulness.

Against this background, therefore, Professor Sweet had the opportunity to make substantial contributions to the legal literature of construction, not only for the engineer and architect, but for the contractor and his lawyer as well. Whether because of personal choice and predilection or because the task simply was too demanding, Professor Sweet has only partially met this need. His apparent purpose in writing the book was to provide an introduction to the law as it affects the architectual and engineering professions or the "design professional" as Professor Sweet uses the term collectively, and viewed from this limited perspective, he succeeds quite well. Certainly the "design professional" is provided insight into those aspects of his profession where law will have a decided impact. The "design professional" is given guidelines and advice on the type of association to form in pursuing his profession, on serving as an expert witness in court and arbitration proceedings, and even on collecting his fee from a reluctant client—if a collection agency is employed, he should use one "that has a reputation for firm, but not outrageous, bill collecting tactics."[11]

The book suffers from a lack of organization. Many of the same legal principles are introduced in different contexts and in different sections of the book. The organizational scheme is disconcerting when for example, at various places in the book, the reader is told that earlier sections "should be read at this point."[12] In other instances, Professor Sweet will not refer to prior sections of the book but will merely discuss the same points as were made earlier. For instance, the concept of "substantial performance" is discussed in essentially the same language in the context of payment for substantial performance by the "design professional"[13] and payment for substantial performance by the contractor.[14] The same repetitious

9. *See, e.g.*, W. SADLER, LEGAL ASPECTS OF CONSTRUCTION (1959); I. WERBIN, LAW FOR CONTRACTORS, ARCHITECTS, AND ENGINEERS (1961).

10. L. SIMPSON, LAW FOR ENGINEERS (1958).

11. J. SWEET, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS 800 (1970).

12. *Id.* at 422.

13. *Id.* at 147.

14. *Id.* at 466.

treatment is given to the concept of "specific performance."[15] The organizational scheme of the book could be much improved by a unitary treatment of applicable legal principles.

A more fundamental criticism of Professor Sweet's work, however, involves, not what he wrote, but what he did not write. Since the title promises, among other things, treatment of the "legal aspects of . . . the construction process," the book contains a serious imbalance by its failure to treat, objectively and in depth, the most basic legal problems involved in the "construction process." Only six out of forty chapters are devoted to those problems out of which far and away the great bulk of litigation arises—surety bonds, contract interpretation, changes, subsurface problems, delays, and payment problems. Indeed, even in this cursory treatment, there appears to be an underlying general suspicion of contractors. Those lawyers representing contractors who have attempted to resolve and compromise honest disputes between owners and contractors would find puzzling, on two counts, Professor Sweet's statement that:

> Finally, the construction business is so competitive that many contractors are too stubborn (or cannot afford) to compromise, and insist on litigation to resolve disputes.[16]

Common sense would dictate that the contractor, or any litigant, with a serious cash flow problem would be the party most desirous of settling a claim and receiving the immediate economic benefit. Further, criticism of a litigant utilizing our judicial system to resolve disputes seems misplaced.

Also, Professor Sweet appears out of step with the prevailing judicial and industry sentiment in his treatment of one of the most pressing of all construction problems—whether an owner or contractor should bear the cost of overcoming unknown adverse subsurface conditions. He states:

> If neither party is at fault, perhaps it is equitable to split the added cost equally. If the job required expenditures of $10,000 more than it would have taken had the subsurface been as anticipated or represented, there is no reason why the amount of adjustment could not be $5,000.[17]

However, the American Institute of Architects,[18] in providing for an

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15. *See id.* at 219-20, 571.

16. *Id.* at 301.

17. *Id.* at 436.

18. A.I.A. Document A-201, General Conditions of the Contract for Construction (1970). *See also* Department of Defense, Standard Form 23A.

equitable adjustment for differing site conditions, or changed conditions, implicitly acknowledges that it is to an owner's advantage—whether a governmental agency or a private owner—to insure that contractors should not place a contingency in their bids for the unknown. If site conditions are not as anticipated, a contractor should be compensated only for the additional expense in overcoming the differing site conditions. By contractually promising an equitable adjustment, owners attempt to eliminate contingencies in construction bids and resultant windfall profits, which might occur absent such a promise.

The Court of Claims, holding that cautionary or exculpatory language could not be read to negate the promise of an equitable adjustment in the event "changed conditions" actually were encountered,[19] made the point very well:

> [T]he parties in making their contract did not intend that the cautionary language of the specifications should turn the process of bidding on a Government contract into a pure speculation. We thought that such a literal interpretation of the contract, in a case where the parties were, obviously, laboring under a mutual mistake as to vital facts when they made it, would, in the particular case, be unfair to the victim of the interpretation, and in the long run, ruinously costly to the Government.[20]

Professor Sweet, throughout the book, appears to treat with an uncritical eye the "design professional,"[21] and those standard contracts developed by the "design professional," particularly the American Institute of Architects' standard forms of contract. One cannot help but agree with Judge Smith's statement about the A.I.A. standard construction contract:

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19. Chernus v. United States, 75 F. Supp. 1018 (Ct. Cl. 1948).

20. *Id.* at 1019. More recently, in Foster Const. C.A. & Williams Bros. Co. v. United States, 435 F.2d 873, 887 (Ct. Cl. 1970), the court reaffirmed the underlying philosophy of *Chernus* by adopting its trial commissioner's view that:

> The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.

21. Except for a few isolated cases, *e.g.*, Audlane Lumber & Builders Supply, Inc. v. D.E. Britt Associates, Inc., 168 So.2d 333 (Dist. Ct. App. Fla. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965), and United States v. Rogers & Robers, 161 F. Supp. 132 (S.D. Cal. 1958), architects have been able to avoid liability to contractors for increased costs arising out of construction through invoking the privity of contract bar.

> No project of this scope with the attendant pressures on everyone concerned could possibly be completed in accordance with the literal scheme envisioned by an architect-drawn agreement. In truth, even the A.I.A. standard contract would require a battery of Philadelphia lawyers on the firing line each day. Under it, everybody is liable save the architect.[22]

Professor Sweet has written a book which will be of special benefit to the "design professional." One cannot help but hope that in subsequent editions Professor Sweet will enlarge his vision and use his unquestioned scholarship to author a more balanced and complete work to assist not only the fledgling "design professional" but all of those who are concerned and deal with "the construction process."

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22. J.A. Jones Construction Co. v. Greenbriar Shopping Center, Civil No. 10625 (N.D. Ga., June 17, 1971).

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