Ethics in the Construction Industry

Teaching Students Ethics in this 21st Century Global Market

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Abstract

This paper sets out to address the "thesis" that "Ethics" in the construction industry must be understood by our students graduating into this 21st century global market. Students graduating in this 21st century will move into global markets unlike any ever seen before. First we will have to define "ethics" as they apply to the construction industry and how they have changed since the industry has gone global. There have always been companies who worked international and knew how to accomplish a profitable job within ethical guidelines but today everyone will work in the international market and for companies that are not necessarily American companies. Due to tax laws and government restrictions, so-called American companies have moved out of the United States and become true international companies, not just American firms doing work overseas.

Then, there are the rules on "how to bid a job". These rules are changing and so is "what is acceptable during the bidding stage and what is not". Also, when working within the United States we have reasonably clear guidelines on the behavior of the professionals in the field. How does the global market effect professional ethics and licensure? We will look at the responsibilities of the licensed Professional Engineer and the Registered Architect and how they have changed since the market place has become global, not domestic or even local.

All right, the job is started, so what is the appropriate level of ethics with regard to Union vs. Management Ethics? Are there even unions overseas and do they work like they do in America? How does government regulation and/or interference change the ethical equation. While the job is running we will have to address the contractor’s ethics with regard to Change Orders and Safety. There is no OSHA in most countries. A professional may not be expected to protect the environment in some parts of the world. There may not be an equivalent to the American Arbitration Association.

I would also like to take a look at the differences between the ethics in Private vs. Public Work. Are they different depending on who’s money is being spent and how much political pressure is being applied? They certainly are in America. We’ll look at the question of owner’s ethics and are they different in a global market, and whether bonding and surety issues are different. In much of Europe, irrevocable letters of credit have replaced construction bonds but they come from international banks instead of surety companies.
Finally, this paper will address the issue of teaching students “Ethics in this 21st Century Global Market” and will include:

1. Classroom attitudes and the teacher’s responsibility.
2. Student’s individual responsibilities, personalities, and values.
3. Student’s cultural background and how it affects ethics.
4. The effect of communications on ethical decisions.
5. Leadership, power and politics with regard to ethics.
6. Peer review and peer attitudes about ethics.

**Ethics Defined**

Ethics (eth-iks) is defined as “1. a system of moral principles, by which human actions and proposals may be judged good or bad, or right or wrong. 2. the rules of conduct recognized in respect of a particular class of human actions. 3. moral principles, as of an individual.”

Simply put, professional ethics, for any profession, are a set of principles, ideas and attitudes on “what is right or wrong” that we use to control the way the profession is practiced. “Ethics are the moral standards used by people in making personal and business decisions.” Remember, a company is judged by its reputation which is a result of its integrity to the business world and its employees. The ethics of both the company’s leaders and employees make up how that company is perceived and whether they are seen as ethical or not. The set of moral standards that we use to guide our decision making are our ethics.

Ethics is used in determining what is right in a given situation and then following through with actions to implement what is right. Ah, if it were only that easy. Every decision has consequences and decisions are never black and white. They are almost always in the gray area. Also, the consequences are not always apparent and the recipient of those consequences can be many different people or organizations. There are three primary ethical directives: loyalty, honesty and responsibility. We will be called upon to be loyal to friends, family, organization, profession, et. al., and being loyal to one may mean being disloyal to another. These loyalties may be mutually exclusive. Honesty is telling the truth as you see it but it’s really much more. It involves not lying but also giving a true and complete representation of one’s self, our actions and our views. Responsibility requires taking ownership of the consequences of our actions and insuring no harm comes to someone because of those consequences.

Construction companies must gain and keep loyal customers, just like any other company. Their ability to acquire and maintain customers is directly related to how those customers see the company’s ethical standards from both management and employees. Remember, the corporate culture of a company is usually set by management and your customers feel they will be treated as the corporate culture dictates. In any given day, an employee will face numerous ethical dilemmas. In the construction business they will come in the fields of procurement, estimating, management, accounting, financial, customer relations, subcontractors, vendors and suppliers and more. A company’s reputation for unethical behavior will affect its ability to draw top notch employees. Ethics is treating everyone in a “fair” and “reasonable” manner and both are subject to wide interpretation. Unethical policies can damage the image of the company and destroy the morale of its employees usually starting a downhill slide to the eventual destruction of the
company. Most major construction companies have their own written code for their employees usually called “A Statement of Values or Code of Conduct.”

Ethics during Bidding

Most construction contracts, private or public, are determined either through negotiation or through open competitive bidding. In public work, all contracts are let through open competitive bidding. The process only works when ethical procedures are followed. These procedures are spelled out in the Associated General Contractors “Code of Ethical Conduct.”

This usually varies from state to state but they are all very similar. When contractors bid on work, they estimate the cost of the project, add indirect costs and profit and come up with a “single price” called a “lump sum” bid. Each contractor has his own set of drawings and specifications and works completely independent of all other bidders. The lowest qualified bidder gets the work.

When two or more contractors work together to determine who bids what, it is called collusion or bid rigging. When this happens, all the bidders not in the group of colluders are cut out of any chance of winning the job. Also, these colluders usually fix the price that will win the job and all the others bid higher than that price so the chosen contractor gets the job. To be in on this means that next time will be your turn to be low bidder and get the work but even then the bid is higher than it ought to have been. Collusion is unethical and illegal and contractors have gone to jail for this practice.

When a contractor is bidding, he usually needs input from subcontractors and suppliers. They bid to him and have their bid included in his overall lump sum bid. If he gets the job, they get the job. Bid shopping is taking a subcontractor’s bid and showing it to another subcontractor for the purpose of forcing him to give you a lower number since he’s just seen his competitor’s number. This practice, unlike collusion, is not illegal but highly unethical. General Contractors who do this soon find no subs want to bid to them and they are not trusted in the industry.

Sometimes, the drawings or specs are obviously poor or even wrong and the contractor sees this while he’s setting up his bid. He may choose to bid the job as is even though he knows it’s unbuildable and later make large sums of money on extras. This is acceptable to a small degree but considered by owners to be unethical if taken too far. An owner will not look kindly upon a contractor that takes too much advantage this way and will not give him work in the future.

Sometimes, a contractor has some inside information which gives him a “leg up” on this particular bid. The ethics of this are always questionable and in that gray area. If it’s insider information which he knows because he knows the area better than his competitors, it’s considered “smart” bidding. But if it’s insider information he has because he received it in an unethical manner (called privileged information), then this practice is frowned upon and considered unethical.

All of these unethical behaviors hamper the free market process and are directly responsible for construction prices that are higher than need be. Collusion is the process of fixing prices and this eliminates competition and leads to much higher job costs to the owner. However, an unbalanced bid does occur and is not illegal or unethical so long as it is not taken too far.
owner will usually allow some unbalancing of a bid but only to a reasonable extent. This is to avoid being charged money to cover borrowed money in the early stages of the job. Organizations of owners have a code that states “You must know the rules, institute effective compliance mechanisms, and exercise constant vigilance against violations.”

**Professional Ethics and Licensure**

Professional ethics and licensure is a touchy subject. All licensed professionals from engineers to architects to doctors and lawyers are licensed by the state they work in and that state along with that profession have a set of ethics standards and behaviors clearly spelled out in its code of ethics. Most professions are, at least at first, self patrolling and keep the ethics of their members clearly in hand. When a profession does not do this the state steps in and this is usually where unethical has become illegal.

Some of the areas that are affected by unethical behavior of a licensed professional are as follows:

1. Quality of the work
2. Conflict of Interest
3. Moonlighting and “No Show jobs”

The “Quality of the work” has two meanings. First, we talk about the characteristics of a product or service that bear on its ability to satisfy stated or implied needs and second, the fact that a product or service will be free of deficiencies. A licensed professional, either engineer or architect are often called upon to decide whether the quality of the work meets or exceeds the standards as set forth in the specification. Unethical decisions have been made from ignorance, neglect or dishonest greed. An unethical or dishonest decision by a licensed professional can lead that that professional loosing his/her license.

The same licensed professionals are called upon to make decisions in which they have a clear or not so clear “Conflict of interest” in the outcome. A “conflict of interest” is a situation in which a person, such as a public official, an employee or a professional, has a private or personal interest sufficient to appear to influence the objective exercise or his or her official duties. In other words, the person making the decision should recuse himself because he is affected by the outcome and cannot make a fair judgment. Moonlighting and “no shows” will be addressed later in this paper.

One of the areas where a professional steps into that gray ethical arena is covered by the NYS Ethics commission, Public Officer Law 73(8)(a)(i). This is called the “Two Year Rule”. It states “No person who has served as a state officer shall within a period of two years after the termination of such services or employment appear or practice before such state agency or receive a compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency.” This law was instituted to avoid persons in public work from setting up a situation which would lead to their own personal hiring due to the condition set by them before they terminated. In federal work, this is the admiral who retires and goes to work for the aircraft company who sells to the Navy. This law is difficult to enforce and is often challenged in the courts since it is truly in that gray ethical area. Unfortunately, most states
have exempted their political operatives such that most lobbyist come from former political position holders. Congressman and Senators, and their staffs, often leave the capital and come back as lobbyist immediately and at a much higher compensation.

**Contractor Ethics with regards to Change Orders and Safety**

Contractors have, for years been accused of unethical behavior when it came to “Change Orders” and ultimately in issues of “Safety”. This usually comes in the form of cheating on the value or necessity of the change order and sometimes leads to a less safe condition than that which was originally intended. Contractors have been accused of such things as bribery, kickbacks, whistle blowing, moonlighting, “no show jobs”, etc.

Bribery is a crime implying a sum of money or gift given that alters the behavior of a person in ways not consistent with the duties of that person. This includes offering, giving, receiving, and solicitation of any item of value to influence the actions of another. Bribes can be money, goods, property, preferment, privilege, or enrollment. In fact, anything of value, advantage, or promise. These are completely unethical and usually illegal. A popular type of bribe is the “Kickback”. That’s the “you scratch my back; I scratch yours” syndrome. Contractors and unions are often accused of this type of bribe. The Copeland Act of 1934 was explicitly called the “anti-kickback” law. Men showing up for work on the docks would place a toothpick in their hat for the “strawboss” to see. Each toothpick represented a dollar the man was willing to “kickback” in order to be picked.

Whistle blowing is a completely different mechanism. It is when an employee, or former employee, or a member of an organization reports misconduct to people or entities who have the authority and power to take corrective actions. Usually it is a violation of law or rules, and a direct or indirect threat to the public or someone else. The people who said the “O Rings” were insufficient at MortonThiacol Corporation were ignored as whistle blowers and the space shuttle Challenger exploded on take off in 1985. Whistle blowing usually involves an ethical compromise on quality, or fraud, or negligence. Sometimes there is a clear conflict of interest. People are afraid their jobs are in jeopardy if they tell. Today, whistleblowers are protected by law in order to allow a higher degree of safety for the public.

Moonlighting is the practice of performing an additional job which is separate from a person’s day job. The unions are usually accused of this practice. Another form of this is the “no show” job. The union often forces an employer to put fake people on the payroll. This is unethical and illegal but is still practices today. A variation of this is the falsifying of qualifications to get someone a job. Sometimes there is a substance abuse on the job issue, the pocketing of money for no work or the severe influence of drugs and alcohol on the job.

**Private vs. Public Work**

The ethics issue is really the same in private vs. public contracting. The difference is, in public work, the owner is spending tax payers money and not his own so there is far more restrictions. In either case, the owner and the contractor must “Form an ethics leadership team, raise the ethics bar and make it clear, and discipline offenders.” In both private and public work, the
ethics issue is glaring and any compromise on this issue is seen as letting the public down. There
is, for example, no such thing as “The Concept of Marginal ethics”. Ethics are dictated by the
industry and are not marginalized by circumstances. One way to avoid marginal ethical issues is
to weed out questionable contractors in the prequalification stage. It’s usually cleaner here than
later into the job. Sometimes, this is accomplished by requiring a certification to a membership
that demands strict compliance to professional codes. Some of these organizations are the
American Institute of Architects, (AIA) and the Association of General Contractors, (AGC).

In both types of work, the contractor and the owner participate in unethical behavior by playing
work schedule games tied to payment schedule. Sometimes the contractor will only schedule
work to be performed if it is in a lucrative payment position. Sometimes the owner will try to do
the opposite.

**Owner Ethics and Bonding Requirements**

So many owners feel their responsibility, once the job starts, is to pay progress payments. It’s
much more. The owner has certain duties which he must undertake in an ethical fashion. For
example, the owner has the duty to disclose any superior knowledge he has that the contractor
will need in order to perform under the terms of the construction documents. Failure to do so
will result in a breach of contract and the owner will be liable for any impact the lack of
knowledge imposes on the contractor.

Also, the owner has the duty to act in good faith and to deal fairly in all matters relating to the
contract. This includes, but is not limited to, the duty not to delay, interfere with or hinder the
contractor’s performance of the work under the contract. An example would be intentional late
payments.

The owner has the duty to provide timely access to the site, within the terms and conditions of
the contract and the reasonable expectations of the contractor under the requirements of the
contract. Also, the owner warrants that the construction documents are accurate, complete and
buildable.

The big issue during construction is always “who is holding up whom”. The owner or his
representative is required to render timely decisions and responses when the contractor raises a
question related to the prosecution of the work under the contract.

And, of course, the biggest issue is change-orders. When the owner directs the contractor to
perform work beyond the scope of the contract and refuses to execute a change order, a
“constructive” change order may be construed to have been committed by the owner to the
contractor.

The bonding requirements for a job are getting more complicated as of late. “Recent economic
fluctuations and unexpected increased losses have greatly affected the construction surety
industry. These fluctuations have raised costs and requirements for surety on new projects.
Changes in the economy, such as business conditions, interest rates, and growth prospects, have
led to contractor default. This increased risk has altered surety prices.”
The Miller Act of 1935 made bonding mandatory on public works projects. Since then, owners have required a bid bond and a performance bond on all public works and on most private work. The cost of these and other bonds fluctuates but has generally risen over the years until today’s bonds are a significant part of the bid. A contractor’s ability to get a bond from a surety company reflects his past history of not defaulting on the bond.

**Domestic vs. International Construction**

In domestic work, the owner will require a performance bond of 100% of the value of the work. In International work, the amount is usually about a 10% bond or a letter of credit. All the other ethical issues are the same such as bid shopping, change order games, payment games, unreliable contractors, and claims. Of course, all of these are tied together as an apparent effort of one party to profit at the expense of another. In domestic construction, bonds come from surety companies but overseas we use a “letter of credit” which comes from international banks instead of surety companies. It should be noted that although the ethical practices are different in different countries, the overall standard of ethics and decency are global and not provincial and we can teach these standards to our students. They will be workable even if they must be slightly modified to apply in another culture.

**Union vs. Management Ethics**

The subject of ethics in the dealings between unions and management is a lengthy paper unto itself. Suffice to say, the union movement was established in 1886 by Samuel Gompers when he started the American Federation of Labor (AFL). It was a reaction to the monopolistic behavior of the owners and, after great struggles, the union movement became the counterbalance to the management side. At first, management had its own way until the Sherman Anti-trust Act of 1890. By 1914 came the Clayton Act which allowed workers to organize and in 1932 came the Morris-LaGuardia Act (anti-injunction) which shifted the power to the union. The extent of unethical behavior between the unions and management was and still is so great that hundreds of laws have been passed to keep this under control. The term “unfair labor practices” has become a legitimate legal phrase to describe behavior on both sides. Some unfair labor practices by unions are as follows:

- The union cannot force you to join.
- Cannot influence the selection of union representatives.
- Cannot influence the employer to hire only potential union members.
- Union must bargain in “good faith”.
- Cannot have secondary boycotts.
- Cannot force company to recognize unauthorized union.
- Cannot force company to assign work to a different craft.
- Cannot force payment of excessive union dues.
- Cannot force a company to pay for services not performed.

Some unfair labor practices by management are as follows:

- Company cannot discriminate against union workers.
- Cannot interfere with formation of a union.
- Cannot harass a worker to join or not join the union.
• Cannot refuse to bargain in good faith.

These and other unfair labor practices have been argued and fought over since the beginning of the industrial revolution so many laws have been passed to address these issues. Some of these are as follows:

• 1890 Sherman Anti-Trust Act (1908 Supreme Court ruling)
• 1914 Clayton Act
• 1931 Davis-Bacon Act
• 1932 Norris-LaGuardia Act
• 1934 Copeland Act
• 1935 National Labor Relations Act
• 1938 Fair Labor Standards Act
• 1943 Smith-Connelly Act
• 1946 Hobbs Act
• 1947 Taft-Hartley Act
• 1959 Landrum Griffin Act
• 1962 Contract Hours Act
• 1963 Equal Pay Act
• 1964 Civil Rights Act

Teaching Students Ethics

Teaching students about ethics at the college level is just framing that which they already know into the context of their new found field of endeavor. They already know about the ethics of right and wrong and what their responsibility is toward the correct outcome. They were taught this by their parents long before we see them at the college level. We must show them how this applies to their field such as Construction Management. Also, there are many good organizations publishing guides for them to read such as the American Subcontractors Association (ASA), the American Society of Professional Estimators (ASPE), the Association of General Contractors (AGC) and, of course, the American Institute of Construction AIC (part of ACI).

We must explicitly build ethics, as a subject, into their curriculum. We must define ethics, show its relevance and integrate it into their curriculum. In a Construction Management program, it is particularly important since our business has a history of unethical behavior. We have done this by adding “ethics” as a lecture in two Construction Management courses and by requiring a research paper on the subject.

In the classroom, we must address attitudes about ethics showing that we declare their importance and that unethical behavior is not acceptable. The teacher’s responsibility is to show by action and words that unethical behavior is unacceptable. This starts with cheating and plagiarism. It must not be treated as a minor transgression. It cannot be shown to be “cool” to cheat. Hollywood movies and TV shows all show young people that it’s “cool” to cheat, to “get over” on someone or to beat “the man”. These are irresponsible and dangerous attitudes that will carry over into their work career and should be shown to be unethical.
Student’s individual personalities and values differ and we must see that and approach them differently. One of the responsibilities of the teacher is to help form those values consistent with the profession we are sending them out into. In order to accomplish this we must understand their cultural backgrounds and how that background affects ethics. A student from the middle east told me that, in business at least, “getting over on the other fellow” is boasted about and considered “just business”; no hard feelings. After some investigation, I find this to be only partially true. Culture does play a role. Also, students born elsewhere but then raised in America are culturally different from those born and raised elsewhere. When I was in private business, I encountered a similar issue. We designed and were to build a series of warehouses in Egypt under USAID rules and they are very specific about ethical behavior. We designed and fabricated the structural steel here in America and sent this to Alexandria, Egypt by ship with all the proper documentation. The steel remained on the dock with one problem in the paperwork or the other for 31 days and then our paper was declared “stale”. We went back to New York for new paperwork and a month later it happened again. We were told that the people receiving our steel are low paid bureaucrats and expect a “gratuity” which we, as an American company, did not do. We, the people who worked for this American firm, had signed a declaration saying we do not bribe anyone in any way. This protected the company but left the employee out on a limb. What to do? We hired an “expediter” with a large fee and he took care of getting our steel off the dock and into the country. Ethical or not?

Today, everything is affected by the rapid communication networks out there and this ability to communicate affects our ethical decisions. All information today is documented and recorded. Just ask any politician who ever said anything. The positive side of this is that we make our decisions with all the data we need to have. We seldom make an unethical decision because of lack of information. The negative side is that we are influenced by all this data and sometimes the data is incorrect. Not everything on the internet is correct or true.

Finally, there is a hierarchy even in our classroom between students so leadership, power and politics feed into ethics decisions. Peer review, peer pressure and peer attitudes feed directly into ethics. I find that the majority of the students talk and act ethically although my investigation turned up a larger than I thought group of students who admitted that cheating and plagiarism go on.

So what do we say to our students about ethics in a global society? The same as we always said. “Ethics are the moral standards used by people in making personal and business decisions.” Ethics are a personal choice. Nothing has changed because we have entered an international arena. We know the ethical decision we must make because it is within us not the arena.

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