

BECOMING ETHICAL: A CONTRACTOR'S DILEMMA

By Thomas L. Rosenberg

In a recent article, I raised the issue of construction ethics. Specifically, how does the construction contractor act when faced with ethical dilemmas? Do we bid shop? Do we front load pay applications? As a subcontractor, do we provide different prices to various contractors in order to impact the award of a contract? Do we bid knowing about defects in plans so it can form the basis of a claim later? These were some of the issues raised in the article. While circumstances and arguments can impact our reaction to the above and can modify our conduct, there are times when we face circumstances that compel us to ask the question: Is my conduct in conformance with my ethical values?

THE ETHICAL APPROACH

For many, ethics is no more than the Golden Rule: I want to be treated in the same manner that I treat others. Ethics is often defined as dealing with what is good and bad, and the moral duty and obligation to be ethical. Ethical approaches can be rule-based, outcome-based, or care-based. A rule-based ethical approach asks if the action would be accepted as a universal rule of conduct. An outcome-based approach asks if the action would result in the most happiness for the greatest number of people. A care-based approach asks if the action would be acceptable to me if I was the recipient of the action.

So as leaders of construction companies, how do we act ethically? How do we build trust through our own leadership? Many will say that trust involves telling others what you know, respecting others by depending upon them, understanding what others tell you, supporting others to speak up, and taking responsibility for mistakes. It often means being positive, professional, communicative, listening more than speaking, and being accountable.

THE MAKING OF A LEADER

A leader in a construction company owes duties to many. He or she owes duties to fellow managers, stockholders, or owners of the company. He or she owes duties to customers, employees, subcontractors, suppliers, and even the community at large. How do we comport these multiple duties into our actions? This is the ethical concern that we have. In considering it, one must question does a decision I make fit within my personal values? Does it fit within this organization's values? Many times in considering an act or decision we make, we should look at whether we could go public with our decision and would we be proud to defend it to our family, to our colleagues, and publicly.

Leaders of construction companies are the shapers of an organization's climate and culture. They define the values that are important to the organization. They mold or create the

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systems to encourage proper behavior. Leaders must always act as they say and we see leadership most greatly performed during a crisis situation. During a crisis do we manage with honesty and candor?

In my work on construction ethics, I have viewed many construction companies' websites. Some of the larger, multinational construction companies list their ethical programs or core values on their websites. They address the culture of the company and how they support or cultivate ethical conduct. They have standards of ethical compliance, be it statutory obligations such as the False Claims Act, Foreign Corrupt Practices Act, or other matters, as well as addressing conflicts of interest. Other companies make a statement about the ethical fiber of the company. And, others demonstrate through the content on their websites that they apply the Golden Rule to their daily activities.

ETHICAL PERSPECTIVES

Putting this into a practical perspective raises many questions. In a recent article, I set forth several fact patterns to analyze. We can also look at the subject of risk and risk shifting, and whether or not all actions at risk shifting are ethical. Do you examine your contract provisions and determine if they are fair to everyone or are there "gotcha" provisions in order to preclude legitimate claims from others? Are pay-if-paid, and no damages for delay clauses, and the like ethical? For many of us, we would say absolutely yes. They place my subcontractor on my team and together we look to payment from the owner and to complete the work without delay. Others would say they shift risk to parties least capable of managing risk.

Lien waivers are a subject of contention these days. In some states, lien waivers are strictly governed. In other states, they are not or regulations on waivers are limited to public projects. I have recently seen lien waivers that waive all future claims on a project, meaning that for partial payment of a pay application early in the project, you waive rights to assert liens later in the project if payment is not made. State law and case law can govern this scenario in some states, but is it ethical for a contractor to include such a provision?

We receive geotechnical reports on soil conditions that tell contractors the report is not a contract document to be relied upon and that the contractor, if desiring to do so, can take soil borings prior to submitting a bid. Sometimes owners say

this knowing that it is impossible to take the soil borings for numerous reasons. Is this ethical?

START WITH THE GOLDEN RULE

Can you put together an ethics statement for my company? Yes. A cursory review on the Internet can provide a starting point. It starts as stated above, with the

Golden Rule: I want to be treated in the same manner as I treat others. From there it is up to the contractor to establish procedures, processes, and a level of conduct acceptable to it.

Ethics are hard in the competitive construction world we live in. We all want to be viewed as highly ethical contractors not as something else. ■

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