مدیران حرفه‌ای صنعت ساخت

(بر اساس سندی از انجمن مدیریت ساخت آمریکا (CMAA))

فصل اول: راهنمای رفتار حرفه‌ای برای مدیران ساخت

بخش پنجم: پذیرش مسئولیت حرفه‌ای در قبال صنعت، جامعه و نسل آتی

ارائه دهنده:

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What we will learn?

- Introduction
- Advancing the profession
- Fair business practices
- Sustainability/resiliency
- Conclusion

CM selection process – Fee

- **Factors** that may influence the **CM's fee** include (but are not limited to):
  - Applicable laws and regulations;
  - Estimated construction costs;
  - Project or program duration;
  - Skills and number of required construction management staff;
  - The CM's authority and relationships to the other team members;
  - The CM's risk;
  - The form of contract (agency or at-risk);
  - The owner's scope; and
  - When the CM joins the team.

How about vendor procurement process?

Vendor procurement

- A CM uses fair business practices to manage the **vendor procurement process** on the owner’s behalf (when part of the CM’s scope of services).
  - Vendor procurement processes (selection of the design team, builder, etc.) may **vary depending** on
    - ✓ Jurisdiction where the CM is practicing,
    - ✓ Delivery method, form of construction management,
    - ✓ The owner’s requirements.
- The CM **understands** these processes and follows all applicable laws and regulations.

Vendor procurement

If providing vendor procurement services, the CM must also remember their obligation to avoid real or perceived conflicts of interest for themselves and the owner.

- The **most common conflict** of interest is when the CM and the owner's **interests** do **not align** or do **not appear** to align.

Vendor procurement

During vendor procurement, a conflict would appear if the CM or the owner is unable (or appears unable) to be objective with a bidder.

- For example, if the CM has a **personal or business relationship** with a bidder, this could **present a conflict**.

How the CM may help owner here?

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Vendor procurement

- The CM may help the owner manage procurement during the pre-design and procurement phases.
  - However, vendor procurement activities **may overlap** or **occur in a different order** in some **delivery methods**.
    - For example, in **design-build the designer and builder** are the **same** entity, so the CM may **combine activities** from pre-design and procurement.

Vendor procurement

- The CM
  - **Markets** the project or program and
  - **Generates interest** from entities that understand and are qualified to meet the owner's requirements.
  - **Follows** the **owner's prescribed methods** to contact designers, builders, suppliers, and consultants.

What the advertisement should include?

Vendor procurement

- The **advertisement** should include instructions to bidders that
  - **Explain** the procurement requirements and
  - **How to obtain** copies of the procurement documents.

- The **procurement documents** should help bidders understand the project/program.

Does the owner need pre-qualification?

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Vendor procurement

- Note that **certain procurements** may require some vendors to have s**pecific business enterprise** certifications/classifications.
- Also note that **many owners** require pre-qualification or pre-approval to **ensure** that **vendors meet** the owner’s requirements.
  - Pre-qualification or pre-approval are **not necessarily** project- or program-specific as **they may apply** to the owner’s entire construction portfolio.
    - ✓ However, **some owners** also **pre-qualify/pre-approve vendors** for types of construction and scopes of work.

Is bidding open to only approved vendors?

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Vendor procurement

- **Bidding** may be **open to**
  1. All interested parties or
  2. Only pre-qualified/pre-approved bidders,

     depending on

     1. Owner,
     2. Delivery method, and
     3. Legal requirements.

What is the advantage of selecting the CM early?

Vendor procurement – Pre-design phase

- The **advantage** of the owner selecting a CM early on (or having a CM on staff) is that the CM **may help** the **owner**
  1. **Develop** the project's or program's requirements and
  2. **Choose** a designer, if a separate design contract is necessary.

How the CM could help?

Vendor procurement – Pre-design phase

- If the owner requires, the CM **can**:
  - Help the owner develop RFQs and RFPs;
  - Advertise the project/program to the design community;
  - Help the owner interview candidates;
  - Evaluate shortlisted candidates;
  - Work with legal counsel to prepare the designer’s contract (which must clearly establish the designer’s responsibilities so that they do not overlap with the owner’s or CM’s duties);
  - Help negotiate a fair price with the selected designer; and
  - Notify unsuccessful bidders.

How about procurement phase?

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Vendor procurement – Procurement phase

- Like the pre-design phase, in the procurement phase the **CM can manage** systems, methods, and procedures for **acquiring** products and services that meet the owner's requirements.

- The CM can **help** the owner
  - Develop RFQs and RFPs,
  - Advertise the project/program,
  - Issue addenda,
  - Negotiate with bidders, and
  - Notify unsuccessful bidders.

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Vendor procurement – Procurement phase

- However, **by this point** the **team already** has partially or fully **complete** requirements and design specifications, so the CM **helps** **procure resources** to construct the project/program.

What points are important in pre-bid conference?

Vendor procurement – Procurement phase

- The CM **coordinates** any pre-bid conference(s) to **help bidders** understand the team's responsibilities and requirements.
- The CM should **conduct** the meeting and often **leads** a site visit.
- **Other team members** (such as the owner and designer) should also be present to **address any issues**.
- **After the meeting(s)**, the CM should use the **owner's prescribed method** to **issue** any necessary addendum to all potential bidders.
- The CM should **repeat** this process **when answering any** additional questions from potential bidders.

What points are important in bid opening?

Vendor procurement – Procurement phase

- The CM **may**
  - **Assist** the owner in receiving and recording bids at the formal bid opening and
  - **Perform** a thorough evaluation of all information in the bid.

- The CM **must**
  - **Understand** the owner's established procedures and
  - **Instruct** team members accordingly.

What points are important in pre-award conference?

Vendor procurement – Procurement phase

- The owner and CM should **conduct** a **pre-award conference** with the apparent successful bidder to **review** the pricing and scope of services.
- **Before signing** the contract, both parties should **fully understand** their responsibilities and commitments.
- The CM should **then follow** the owner's procedures to **notify** the successful and unsuccessful bidder(s).
- The CM or owner should **issue** a **notice to proceed** after owner approval and all parties **execute the contract**.

SUSTAINABILITY/RESILIENCY

Society

A CM recognizes that they are part of something greater than themselves because their projects/ programs use resources and provide infrastructure to society.

- The **built environment** is part of natural ecosystems and human communities, so the CM looks for ways to create **sustainable** and **resilient** infrastructure that
  - **Meets** the owner’s current needs,
  - Can **adapt to change**, and
  - Does **not harm** future generations.

When the process begins?

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Society

- The process **begins** on a project/program **when** the CM
  - **Helps** the owner to clarify the owner’s requirements,
  - **Establish** sustainability/resiliency as a guiding principle of design, and
  - **Ensure** that the design incorporates them.

Lead the team

- The CM should **help** the team

  understand the benefits, features, limitations, and implementation processes

  to **achieve** the owner's sustainability/resiliency requirements.

- To **lead the team** on a sustainable/resilient project or program,

  the CM **must understand**

  1. Changing regulatory environment,
  2. Emerging best practices, and
  3. Technological improvements

- If a CMAR,

  the CMAR **assembles a team** of trade partners and consultants

  who understand and commit to meeting the **owner's requirements**.

Rating system

- Note that **all CMs** should generally **understand** the most common rating systems for sustainable/resilient facilities in the marketplace.

- The **most common rating systems** in the United States are Leadership in Energy and Environmental Design® (LEED®) and Green Globes®.

  However, **not all owners** choose to pursue certification.

Is it all about certification?

Other than certification

- Finally, a CM **looks** for other ways within their organization to
  - Reduce waste,
  - Protect the environment, and
  - Withstand future environmental and human-made impacts.
- A CM **understands** that a facility's design and jobsite activities contribute to sustainability/resiliency,

  but that there are also **other opportunities** to promote these values in the industry.
  - *Examples include corporate policies that prohibit printing certain materials on paper and commuting programs for team members to "carpool" together to work.*

CONCLUSION

CM as a project or program manager

- A CM is a project management or program management professional who **leads** a **team** to accomplish a project/program in the built environment.

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CM as a leader

- A CM is a **leader** who
  - **Influences** many stakeholders and
  - **Coordinates** the team, ideally starting in the predesign phase.

- This **leadership** should be a **position of service** (not dominance) that **integrates** the individual elements of the delivery process into a **cohesive** and **collaborative** system.

- A CM has
  - High ethical standards,
  - Focuses on results (not just completing tasks), and
  - Exhibits technical competency.

CM as an agent of the owner

- A CM **helps** the owner (or client) fulfill their responsibilities under the **chosen** delivery system.
- A CM **always represents** the owner’s best interests, **regardless** of the delivery method or form of construction management.

- The CM **must**
  - **Understand** the owner’s needs and
  - **Control** a project’s/program’s cost, time, and quality within the defined scope (including both the quantity and quality of the work) to achieve the owner’s requirements.

CM ethical behavior

- Finally, a CM **avoids** actions

  that **promote** the CM's self-interest at the expense of

  industry, the public, and the needs of future generations.

- A CM
  - **Strives** to create a **diverse** and **inclusive** workforce,
  - **Follows** fair business practices,
  - **Remains** current with the latest industry trends, and
  - **Considers** the impact of their work on future generations.

مدیران حرفه‌ای صنعت ساخت

(بر اساس سندی از انجمن مدیریت ساخت آمریکا (CMAA))

فصل دوم: پیاده‌سازی رفتار حرفه‌ای در صنعت ساخت

بخش اول: مدیریت تدارکات قرارداد

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What we will learn?

- Learning objectives
- Introduction
- Introductory case study
- Ethical challenges
- Applicable standards
- Construction participant perspectives
- Questions and scenarios for practice

Learning objectives

- After learning this section, you **should be able to**:
  - **Describe** the **ethical challenges** that can occur during the process of submitting a bid or proposal for a project between
    1. A general contractor and a project owner,
    2. A general contractor and a project designer/CM, and
    3. A general contractor and subcontractors.
  - **Describe** the **ethical challenges** that can occur between a contractor and suppliers during the **bidding process**.
  - **Imagine** and **evaluate** **potential consequences** resulting from ethical decisions made during the contract procurement process.

INTRODUCTION

Types of contract & procurement processes

- The **two types of contracts** that we will discuss are those for
  1. Only construction services and
  2. Both design and construction (design-build) services.

- The **two types of procurement processes** that we will discuss are
  1. Bid and
  2. Negotiated

  procurement.

How usually owner selects GC?

Competitive or negotiated

- Project **owners** may choose to **select** a **general contractor** for a project by requiring prospective general contractors to submit
  1. Competitive bids or
  2. Competitive proposals for a **negotiated** selection process.

How they are submitted to owner?

Competitive or negotiated

- Competitive bids may be submitted on a
  1. Lump-sum or
  2. Unit-price basis or
  3. Combination of both.
- Negotiated proposals may use
  1. **Same methods** of **pricing**, or often,
  2. May use a **cost-plus** approach in which
     - i. **Most direct** project costs are reimbursable and
     - ii. **Other** contractor costs are included in the **fee**.

What is the case with DB contracts?

DB contracts

- **Design-build contracts typically** are awarded using a negotiated procurement process.

- Ethical issues can occur **during both procurement processes** as we will discuss in this section.

Let's review competitive bidding process!

Competitive bidding process

- In this process, a **project** is **described** in the bid documents, and **prospective contractors** are **requested** to submit bids or prices to construct the **described project**.

- Since **price** typically is the **criteria used** for award of bid contracts, the bidding process is seen as a **"market driven"** process in which the **lowest bid** represents the **"best value."**
  - This is not always the case because **sometimes contractors** submit low bids to win projects with the **expectation of recovering** their costs when **negotiating change orders** during construction.

Competitive bidding process

- During the **bidding process**, the project owner and **CM/project designer** usually conduct a pre-bid meeting with **prospective bidders** and **subcontractors** to **address any issues** that they have identified as a **consequence** of reviewing the contract documents.
- At the **conclusion** of the pre-bid meeting, **Project owner/CM**
  1. **Collects** the issues identified by prospective bidders and subcontractors and
  2. **Provides** responses to all prospective bidders in the form of a contract **addendum**.
  - The **use of contract addenda**
    1. **Ensures** that all prospective bidders are using the **same project information** when developing their bids and
    2. Ensures **fairness and equitable** treatment of all prospective bidders during the bidding process.

Let's review negotiation process!

Negotiation with competitive proposal process

- In developing a proposal for a project,

  a **contractor** must **adhere** to the instructions provided in the project owner's request for proposal.

- **Information requested** may include

  1. A price proposal,
  2. A construction schedule,
  3. Resumes of the contractor's project team,
  4. A quality control plan, and
  5. A safety plan.

- For a design-build project, the proposal generally also includes

  1. Design ideas or concepts and
  2. Resumes of the design team.

How the subcontractor selected?

Subcontractor selection with their bids or proposals

- When developing bids or cost proposals to submit to project owners, the **general contractors** decide
  1. Which scopes of work that they will perform with their own work forces and
  2. Which scopes of work will be subcontracted to specialty contractors.

How the subcontracts are evaluated?

Subcontractor selection with their bids or proposals

1. The subcontracted scopes of work are **organized** into **subcontract bid packages**, and
2. **Prospective subcontractors** are invited to submit quotations for each subcontract bid package.
3. The general contractors
   i. **Evaluate** the subcontractor quotations and
   ii. **Decide** which ones to select as a part of their bid or proposal preparation process.

How the subcontracts are awarded?

Subcontractor selection with their bids or proposals

- **Subcontracts** are **not awarded**, however,

  until the **general contractor** receives the contract from the project owner.

- **Even if** the general contract uses a cost-plus pricing structure,

  the **subcontracts** typically are awarded on a lump-sum basis.

What area we want to focus in this section?

Area of focus in this section

- There are **many legal issues** associated with the contract procurement process, such as
  1. Contractors **meeting** to **discuss** their bids and **deciding** which one would submit the **lowest bid** or
  2. Contractors offering **bribes** to be selected.

None of these legal issues are addressed in this course, however addressed in Contract Management Courses provided by ACEMI.

- We will **restrict our discussion** solely to ethical issues that may **occur** during the **contract procurement process**.

INTRODUCTORY CASE STUDY

Case #1

- A **project manager** for **Acme Construction** reviewed the **construction drawings and specifications** for the construction of a **shopping center** **prior to** attending a pre-bid job site tour.
  - During the review, the **project manager** identified two errors in the elevations provided in the drawings.
  - During the site visit, the **project manager** asked the project architect/CM about the **elevation errors** and was provided the **correct information**.
    - ✓ However, the project owner/CM did **not issue** an addendum to all prospective bidders **making** the **elevation corrections** to the project drawings.

Were the project owner's/CM's actions ethical?

Case #2

- The **site work** associated with the project was unit priced,
  - because a portion of the site contained **contaminated soil**
    - that needed to be **removed and replaced**,
      - **additional fill material** needed to be **imported**, and
        - a **large asphalt** parking lot constructed.
- In addition, **major utilities** were to be **installed** on the site.

Case #2

- During the review of the contract drawings,

  Acme Construction's **estimator** determined that the quantity shown on the unit price bid **sheet** for asphalt pavement was **considerably less** than what would be **required** for completing the project.

  - The **estimator** decided
    1. Not to notify the project owner/CM and
    2. To inflate the **unit price** for the asphalt bid item because of the **anticipated overrun**.

Was the estimator's action ethical?

Case #3

- **Quotations** were solicited from six prospective electrical **subcontractors** for the project.
- The **lowest quotation** was submitted by **Northern Lights Electrical Contractors**, but the **project manager** preferred to work with West Coast Electric.
- The **project manager** contacted the **owner** of **West Coast Electric** and
  1. **Provided** the quotation received from northern lights and
  2. **Told** west coast that they could have the job **if they revised** their quotation to a value less than that submitted by northern lights.

Was the project manager's action ethical?

Case #4

- The **shopping center structure** was to be constructed of **steel**.
- Acme’s estimator **solicited quotations** from three steel suppliers for the project.
- The **estimator** was **concerned** both about
  1. **Cost** of the steel and
  2. **Ability** of the suppliers to meet the required **delivery dates** established in the preliminary construction schedule.
- **Continental Steel** submitted the lowest quote but did **not guarantee** that they could meet the required **delivery dates**.
- The **salesman** for the steel supplier **indicated to Acme’s estimator** that

  if Continental Steel **received the supply contract** that they would **host the estimator** to a fishing trip.

What should the estimator do in this situation?

ETHICAL CHALLENGES

Ethical challenge: Errors in project documents

- The **bidding instructions** given to prospective bidders on a project typically require that the **bidder** consider
  1. All conditions described in the **contract documents** and
  2. All conditions that **can be observed** by physically **visiting the site**.

- **Liability** for hidden conditions **not described** in the documents or in a soils report typically is the **responsibility** of the project owner.
  - These would include
    1. **Buried utility lines** not shown on the drawings or
    2. **Contaminated soil** not described in the documents

Ethical challenge: Errors in project documents

- During a pre-bid conference on the job site, **representatives** of the **project designer** and the **project owner/CM** are present to
  1. **Describe** the project and
  2. **Collect** inquiries from prospective general contractors and subcontractors regarding the **contract documents**.
- To **ensure** that everyone who **participates** in the bidding process has the same information,

  the **project owner/CM** should collect all of the questions and issue a contract **addendum** providing appropriate responses to each question.

Is it unethical or illegal to provide answers only to the party who asked the questions?

Ethical challenge: Errors in project documents

- From the perspective of the **justice approach**,

  it is unethical to provide **answers only** to the party who asked the questions.

  - **Even though** the issuance of a contract **addendum late** in the bidding process may **necessitate delaying** the receipts of bids,

    it is the **ethical responsibility** of the **project owner/CM** to do so.

    - ✓ It may also **negate** the need to issuance of a change order after the contract has been **awarded**.

Ethical challenge: Bid shopping

- **Bid shopping** occurs when **general contractors** disclose to prospective subcontractors the price quotations received from competing subcontractors.
- The intent is to encourage subcontractors to **lower their prices**.
- Again, based on the **justice approach**, this is considered unethical

  because it **discloses** information that is confidential, and not available equally to all bidders.
- A **likely result** is subcontractors **refusing to work** with general contractors who use this practice.

What is the ethical approach?

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Ethical challenge: Bid shopping

- The subcontractors are **being asked** to provide their best price for a **specific scope** of work, and

  they **provide** the price to the general contractor with the expectation that their price will **not be shared** among their **competitors**.

  - **Often** subcontractors' quotations contain

    lists of specific inclusions and specific exclusions,

    which means that the scope of work addressed by each subcontractor **may vary.**

- This requires the general contractor to
  - **Carefully evaluate** each quotation and
  - **Select** the ones that provide the **best value** to the general contractor

Ethical challenge: Bid shopping

- **Another form** of bid shopping that is unethical is when a general contractor uses the quotation of one subcontractor in their bid,

  but selects different subcontractor to perform the work.

- For example, suppose **Allied Construction Company** is developing a **bid** for the construction of a high school and

  solicits quotations for the electrical work associated with the project.

  - **Capital Electric** submits the **lowest quotation** for the electrical work, and **their price** is **used** by Allied in preparing their bid to submit to the **project owner**.

Ethical challenge: Bid shopping

- **Allied receives** the contract for construction of the high school,

  but instead of awarding the subcontract for the electrical work to **Capital Electric**,

  they contact Southwest Electric and offer them the subcontract **if they will do the work** for **less than the price** submitted by Capital Electric.

- This **sharing** of Capital Electric's proposed price with another subcontractor is considered a form of bid shopping and is unethical.

- It is also **dishonest**, and therefore **violates** the approach of virtue-based ethics.

Ethical challenge: Receipt of favors

- Subcontractors may offer **favors** to general contractors in an effort to win a subcontract, and

  suppliers may offer **favors** to secure a contractor's business.

  Such practices may be unethical.

- Sometimes **suppliers offer** their good customers discounts for early payment of their invoices, and such practices are not considered unethical.
  - However, a supplier offering a **personal favor** to the contractor's employees would be considered unethical.

Ethical challenge: Receipt of favors

- **Whether or not** a **person's behavior** is **influenced** by the receipt of a favor, there is a **perception** that such actions may occur.

- **Anyone** involved in **making decisions** related to award of contracts or subcontracts **needs** to ensure that a no-favor policy is adopted.

- This may include tickets to athletic events, fishing trips, meals, or other social events.

*When **faced** with an **ethical situation**,*
*it is **best not to enter into a situation***
*where there is a perception of **favoritism** or **unfair advantage**.*

APPLICABLE STANDARDS

Roles of parties

- The **applicable standards** are to

  practice **good faith and fair** dealing in

  1. Solicitation of bids or proposals and
  2. Preparation of bids or proposals for construction projects.

- Project owners, CM, and designers need to **ensure** that

  all prospective bidders have the <u>same information</u> relative to project scope and conditions.

- **Any issues identified** by the <u>prospective bidders</u> during the bidding process

  need to be **resolved**, and

  the **information** provided to **all bidders**.

Roles of parties

- **Contractors** often are **more willing** to bring **issues identified** in the contract comments to the attention of **project owners**

  when a **negotiated process** is to be used to **select the contractor** to whom to award the contract.

- This is because the **criteria** to be used to select the **contract recipient** may include **several factors** in addition to price.

- In a **bid process**, the proposed contract price

  typically is the **primary criteria** for selecting the general contractor to whom to award the contract.

Roles of parties

- **Anyone engaged** in a contract procurement action needs to **avoid** the perception of favoritism by accepting any favors.
  - **This is true whether** the individual is employed by the project owner, the CM, designer, the general contractor, a subcontractor, or a supplier.
    - ✓ **Acceptance** of favors undermines the **perceived fairness** of the procurement action.

CONSTRUCTION PARTICIPANT PERSPECTIVES

Minimize the potential for bid shopping

- To **minimize** the **potential** for bid shopping, many government agencies and other project owners **require** that

  a **listing of major subcontractors** to be used on a project be **submitted**

  along with completed bid documents and proposals.

- This does **not reduce** the **potential** for bid shopping prior to submission of the bids,

  but it **does reduce** the potential for **bid shopping**

  after the contract has been **awarded**.

What would be the consequences for GC if bid shopping is used?

General contractors using bid shopping

- **General contractors** who conduct bid shopping may find that
  - **quality subcontractors** are **not interested** in working for them and
    - may **not respond** to the general contractor's solicitation for **subcontract quotations**.
- This is **particularly true** during periods when the **subcontractors** have adequate backlogs of work.
- **Specialty contractors** want **general contractors** to treat the quotations
  - that they submit as confidential information
    - that is **not shared** with their competitors.
- **How the subcontractors** are **treated** will greatly influence
  1. Their **interest** in working with a general contractor and
  2. The **price** that they request for their services.

Subcontractor relationship with general contractor used bid shopping

- Subcontractors **estimate** their cost of doing business with each general contractor and may **propose different prices** for similar bid packages from **different general contractors.**
- This practice is **not** considered unethical and is the **reason why** general contractors should **treat subcontractors fairly**.
- When a subcontractor has a **good experience** working with a general contractor, they often **propose very competitive prices** for subcontract scopes of work on **future projects**.
- If a subcontractor has **had bad experiences** working with a general contractor, they
  1. May **decline to submit** a proposal or
  2. May **request additional compensation** to offset an anticipated difficult working experience.

Negotiated selection

- Some **project owners** may choose to select general contractors for their projects using a **negotiated procedure**.
  - In this process, the **relationship** between the owner and contractor is **more collaborative** than it is in a bid procedure.
    - ✓ **The proposed construction schedule,**
    - ✓ Experience of the contractor’s project team,
    - ✓ The contractor’s reputation for quality work,
    - ✓ The contractor’s safety record, and
    - ✓ Other factors

    may be **used in addition** to project cost in the selection process.

QUESTIONS AND SCENARIOS FOR PRACTICE

Questions and scenarios

- Evaluate the following scenarios.

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Q&S #1

- **Near the end** of the bidding process for the construction of a hotel,

  a project owner **received a written inquiry** from a prospective bidder regarding some missing information on the **structural drawings**.
- The **owner consulted** the structural engineer for the project to determine the **requested information** and

  provided the **information** to the prospective bidder.
- **Not wishing** to delay receipt of bids for the project,

  the project owner **decided not** to issue an addendum to the contract documents.

❖ *Were the actions of the project owner ethical?*

❖ *How would you have handled this situation?*

Q&S #2

- **Continental Constructors** received a contract for the construction of a **hospital**.
- During the bidding process, Continental **received quotations** for the mechanical scope of work from six subcontractors.
- **Five** of the quotations were **solicited**, and the sixth was unsolicited.
- Continental selected the **lowest quotation** from among the five solicited quotations, because they had a **previous unsatisfactory** experience with the subcontractor who submitted the **unsolicited quotation**.
- However, the **unsolicited quotation** was the **lowest price**.

❖ *Was it unethical for Continental Constructors to **not select** the lowest price quotation?*

❖ *What would you have done in this situation?*

Q&S #3

- You are **finalizing** the **bid** for the construction of a **middle school**, and
  you **notice** an **omission** in the bid for **exterior painting**.

- You insert an estimated amount to **cover** scope of work.

- **Your company** is **successful** in receiving the contract, and
  you contact a **painting subcontractor** and tell them that **they can** have the **subcontract** for the painting work
  if their **price does not exceed** the **amount** that you estimated.

❖ *Are you treating the painting subcontractor **ethically**?*

Q&S #4

- You are the **estimator for Excel Mechanical Contractors** and have received **requests for quotation** from five general contractors for the mechanical scope of work associated with the construction of a research facility.
- **You evaluate** the scope of work and your past experiences in working with each of the general contractors.
- **You choose** to submit **different prices** on each of the quotations provided to the general contractors.
- The reason for the different prices was **your perceptions regarding** how you would be **treated by each of the general contractors**.
  - *Was submitting different prices to each of the general contractors ethical?*
  - *Why or why not?*

Q&S #5

- **Henry Smith** is the **project manager** for a **design-build contractor** that has a **contract** for the design and construction of a new academic building for a major university.
- During a **design review**, the **project architect** briefed the university's representative on the **materials selected** for the interior finishes of the building.
- Later, Henry determined that the floor covering selected was not within the budget estimated for the project.
- He directed the **project architect** to make a **change to select a more economical carpet** and did **not notify** the university's representative.
    - *Were Henry Smith's actions ethical?*
    - *What action would you have taken?*

مدیران حرفه‌ای صنعت ساخت

(بر اساس سندی از انجمن مدیریت ساخت آمریکا (CMAA))

فصل دوم: پیاده‌سازی رفتار حرفه‌ای در صنعت ساخت

بخش دوم: مدیریت قراردادهای ساخت و موافقت‌نامه‌ها

ارائه دهنده:

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What we will learn?

- Learning objectives
- Introduction
- Introductory case study
- Ethical challenges
- Applicable standards
- Construction participant perspectives
- Questions and scenarios for practice

Learning objectives

- After reading this section, you should be **able to**:
  - Describe the **ethical challenges** that can occur during the administration of a **construction contract** between
    1. General contractor and a project owner/CM, and
    2. General contractor and a subcontractor.
  - Describe the **ethical challenges** that can occur between contractor and a supplier during the administration of a purchase agreement.
  - **Imagine** and **evaluate** **potential consequences** resulting from **ethical decisions** made during **administration** of contracts and purchase agreements.

INTRODUCTION

Introduction

- When a project owner and a contractor **sign** a construction contract, the **responsibilities** of each party are **limited** to **those prescribed** in the contract documents.

What does that mean?

Owner and contractors

- The project owner agrees to
  1. Provide information
  2. Compensate

  the contractor for the **scope of work** described in the contract.
- The contractor agrees to **complete** the project **described** in the drawings and specifications within the specified duration.
- **Few general contractors** actually **perform all** of the work required to complete the project; instead, they usually **select specialty contractors** to perform selected scopes of work as subcontractors under the **terms and conditions** of their **subcontracts**.

General contractors and subcontractors

- **Both** general contractors and subcontractors **purchase** construction materials from suppliers by means of purchase orders or agreements.

The contractors and subcontractors **provide** the contract specifications to the supplier to **enable the supplier** to

1. **Determine** which **products** meet the specification requirements and
2. **Provide** the **information** to the general contractors and subcontractors.

What if materials approval needed?

Materials approval

- If the **contract stipulates** that the material must be approved by the project designer, the **contractor** must provide a **submittal** that either
  1. Contains a sample of the material or
  2. Manufacturer's information

  demonstrating conformance with the contract specifications.

What happens when materials approved?

Materials approval

- Once the **material has been approved** by the project designer,

  the **contractor or subcontractor**

  1. Determines the quantity required and
  2. Issue a purchase order to the supplier requesting the cost for the approved materials.

- The contractor or subcontractor **then approves** the purchase agreement ordering the required materials.
- A **purchase agreement** basically is a supply contract for the acquisition of construction materials.

What area we want to focus in this section?

Area of focus in this section

- There are **many legal issues** associated with administration of construction contracts and purchase agreements.

- **None** of these **legal issues** are addressed in this course.

- We will **restrict our discussion** to ethical issues that may occur during the administration of these contracts and purchase agreements.

INTRODUCTORY CASE STUDY

Case #1

- **Continental Construction Company** has been awarded a contract for the construction of a **medical office building**.
- During the **development of a bid** for the project,

  the **construction company's project manager** decided to **hire a subcontractor** for the electrical scope of work.
- During the **bidding process**, the company **estimator** solicited quotations from **five** electrical contractors.
- The best-value quotation was received from **Capital Electric**, and

  their **quotation** was used by **Continental's estimator** in developing the **winning bid** for the project.

Case #1

- **Continental's project manager** had **good experience** with Olympic Electric and would like to **use them** on this project.
- **Olympic** had submitted a quote for the electrical work, but it had been **10% higher** than the price **submitted by Capital.**
- The **project manager** contacted the owner of Olympic Electric and

  told him that Olympic would be awarded the electrical subcontract **if** they agreed to perform the work at the price quoted by **Capital Electric**.

❖ *Were the actions of Continental's project manager ethical?*

Case #2

- The **contract** that **Continental signed** for the construction of the office building **allowed the submission** of materials that deviated from the specifications

  as long as the **contractor**

  1. **Indicated** such deviations on the submittal documents and
  2. **Provided** a justification for the deviation.

Case #2

- The **mechanical subcontractor** on the project **proposed to use** a **fan unit** that did not comply with the contract specifications.
- The **subcontractor** did **not indicate** on the submittal documentation that the **proposed fan unit** was a deviation from the contract specifications.
- **Upon reviewing** the subcontractor's submittal, **Continental's project engineer** recognized that the proposed **fan unit** did **not conform** to contract requirements, but **chose to forward** the submittal to the project designer without comment.

❖ *Were the actions of Continental's project engineer ethical?*

Case #3

- The **project owner** decided to **make some changes** in the layout of the building lobby and
  asked Continental’s project manager for a **cost proposal** for the **additional work.**
- The **project manager** reviewed the **additional scope of work** and
  estimated that the **direct cost** for the work would be **$500,000.**
- Project indirect cost, company overhead, and profit
  would **add $100,000** because **executing** the change order would **delay the project completion** by **one week**.

Case #3

- **Work** on the project was **already ten days** behind schedule for **other reasons**, and the **project manager** decided to include the overhead cost and potential liquidated damages liability due to that delay to the **change order cost**, which he estimated to be **$150,000.**
- Thus the **cost** that **project manager submitted** to the project owner for the change order to the additional lobby work **was $750,000**.

❖ *Were the project manager's actions ethical?*

Case study #4

- Construction has been **under way** on the project for five months, and **Continental Construction** has been **experiencing cash flow problems** on the project.
- The **company's project manager** decided to **mitigate** the cash flow problem by not paying subcontractors for the work that they had performed **until 45 days after** the general contractor receive payment from the project owner for the work.
- In effect, the **project manager** was using the **money owed** to the subcontractors to fund the **general contractor's cash flow issue**.

Was the project manager's action ethical?

ETHICAL CHALLENGES

Award of subcontracts

- In **developing** a **bid or proposal** for a construction contract, the general contractor's estimator typically **invites multiple specialty contractors** to submit quotations for each subcontract work package.
- These **quotations** are **evaluated**, and the **best value** subcontractor is selected for each **subcontract work package**.
- If the **general contractor** is selected for **receipt** of the construction contract, the specialty contractors submitting the best value quotations are offered subcontracts for the project.
- *From the perspective of the justice approach, contacting other specialty contractors and telling them the quotations provided by their competitors is a form of bid shopping and considered unethical.*

Errors in submittal documentation

- When **engineers and architects** **prepare** their designs for a construction project,

  they **rarely specify** single products or materials to be used on the project.
- They typically **prepare specifications** that describe the types of materials or products that are **acceptable**.
- To **ensure** that the materials and products selected by the contractors **conform** to the design intent,

  the **construction contract** **requires** the submission of product samples or manufacturers' literature describing the proposed materials or products.

  - These are known as **submittals**.

Errors in submittal documentation

- The **submittals must** be approved by the designer **before** the contractors issue purchase orders or the acquisition of the proposed materials or products.
- **To avoid delay** of the project, the general contractor's project team needs to ensure that

  all proposed materials and products fully conform to contract requirements.

1. If a **deviation** is proposed, it **must be highlighted** in the submittal documentation.
2. If **deviations** are not noted, the **submittal** may be disapproved or unacceptable materials may be purchased for the project.
   - If **unacceptable materials** are purchased and installed,

     the general contractor will be **required to replace** them at the **contractor's cost.**

Pricing of change orders

- **During the construction** of a project,
  1. **Project owner** may wish to **change** some aspect of the project or
  2. There may be some **discrepancy** in the contract documents.
     - In **either case**, the result would be a **change to the contract**, known as a **change order**.
- The **project designer** typically prepares the change order, and the **general contractor** is asked to submit a cost for executing the additional work.
- **Estimating** the **direct cost** of the work usually is **not difficult**.
- **Estimating** the **impact cost** on the **planned execution** of the project, however, may be more difficult.

Pricing of change orders

- The **contractor's project manager** needs to ensure that the **proposed change order cost** includes only
  1. Direct cost of doing the work,
  2. Indirect or overhead cost,
  3. Profit, and
  4. Any impact cost of doing work out of sequence.

- It is **dishonest**, and therefore **unethical** based on the <u>virtue approach</u>, to include **costs that are not** the result of the **change order**.

False claims

- Sometimes a **contractor** encounters **conditions** while executing a construction project that **were not depicted** in the **contract documents**.
- The **contractor** typically places the **project owner on notice** and **requests** a change order to cover the additional costs incurred.

1. If the **project owner declines** to issue a change order, the **contractor** may file a claim for **additional compensation**.
2. **Sometimes** contractors **inflate** their costs when submitting their **claims**.

- ❖ Submitting a **false claim** is an illegal action under the False Claims Act if the project owner is part of the federal government.
- ❖ Submitting a false claim is unethical whether the **project owner** is a private entity or state or local government.

Payment to subcontractors

- **Because many general contractors subcontract** major portions of a construction project, the **work of the subcontractors** is **critical** to ensure a successful project.
- When working for a general contractor, the **subcontractors expect** to be treated fairly.
- This means **ensuring** that the **job site is ready** for each subcontractor **when they are scheduled** to arrive on site and **ensuring** that **they are paid** in a **timely manner**.
- The **subcontractors** must pay their employees prior to receipt of payment from the general contractor,

  but usually pay for their construction materials **after receipt** of general contractor's payment.

Payment to subcontractors

- The **subcontractors' requests** for payment are **included** in the **general contractor's monthly request** for payment to the project owner.
- **Once** the **general contractor receives** payment from the project owner,
  the **subcontractors** need to be **paid**.
- The **subcontract document** may provide for some **retention**,
  but the **remainder needs to be paid** promptly to enable the subcontractors to **manage their cash flow**.
- **Withholding retention funds** beyond satisfactory contract completion
  is also **unethical** and
  can **cause cash flow problems** for the subcontractor.

Material purchasing

- Just as the **situation** with **subcontractors**,

  suppliers should be treated in an ethical manner.
- A **general contractor** may **solicit quotations** from **three concrete suppliers** for concrete to be delivered to a project site.
- **Each quotation** should be treated as **proprietary information**.
- From the perspective of the **justice approach**, it is not ethical to provide competitors' cost proposals in an effort to **obtain** a better price from a preferred provider.
- **Suppliers** also need to be paid in a timely manner, just like subcontractors.
- **Some suppliers** may offer discounts for early payment,

  but many purchase orders state that the contractor will pay for the materials once payment has been received from the project owner.

Payment requests for cost-plus contracts

- **Cost-plus construction contracts** typically have two cost components:
  1. A cost-reimbursable component for project-related costs and
  2. A fee component for company overhead and profit.

- In some cost-plus construction contracts, there is a **third component**:
  a **lump-sum amount** for project **indirect or overhead costs**.

- If project **indirect costs** are considered **reimbursable**, **some general contractors** seek to **transfer some company overhead costs**,
  such as cost estimating and cost accounting,
  to the **project** so that they can be considered as reimbursable costs.

Payment requests for cost-plus contracts

- Since the cost estimating and cost accounting costs were included in establishing the **fee component**,

  it is unethical to **transfer company overhead costs**

  to the project and request that they be considered project indirect costs.

APPLICABLE STANDARDS

Payment requests for cost-plus contracts

- The applicable standards are to **practice good faith and fair** dealing in the administration of construction contracts and purchase agreements.
- General contractors need to be **fair in the selection** of subcontractors for their projects and not engage in bid shopping.
- Subcontractors and suppliers need to be **treated fairly** during project construction and **paid in a timely manner**.
- Subcontractors and suppliers' willingness to work with a general contractor is greatly **influenced** by their perspectives of **how they will be treated** by that contractor.

Payment requests for cost-plus contracts

- **Any documents submitted** to general contractors or submitted to project owners by general contractors

  must be **completed accurately** and

  contain all of the information required by the **contract**.

- **Not providing** complete information

  1. May **delay** the processing of the documents or
  2. May result in **improper decisions** being made.

- Change orders and claims need to be **correct** and

  not include requests for reimbursement for unrelated issues.

CONSTRUCTION PARTICIPANT PERSPECTIVES

Delivery quality

- When **project owners select** general contractors for construction projects,
  they **expect** the contractors to **deliver quality** projects
  that **conform** to the contract requirements by the **dates specified** in the contracts.
- To be **able to meet** the project owners' **expectations**,
  general contractors **rely on**
  1. **Subcontractors** to perform selected portions of the projects and
  2. **Suppliers** to provide the needed construction materials.
- To **ensure that quality** subcontractors and suppliers are willing to work with a general contractor, the **contractor needs** to treat them fairly.

Material submittals

- Project owners expect general contractors to **comply fully** with all contract requirements.
- The **contract specifications identify**
  1. **What material submittals** are required for the project and
  2. Contain descriptions of **what materials are acceptable** for use on the project.
- If deviations are to be **proposed**,

  they must be **clearly identified** in the submittal documentation.
- **Failure to identify** deviations **violates** the terms of the contract,

  but it also is **unethical**.
- It may result in the contractor **purchasing** and **installing** improper materials that later will need to be **replaced** at the **contractor's cost.**

Change orders and claims

- Project owners expect that change orders and claims are **priced fairly**.
- They realize that changes in the scope of work often have cost impacts and may have schedule impacts.
- **Contractors** are **expected** to
  1. Assess the impact of the change order on the planned construction of the project and
  2. **Only include** costs associated with the change.
- **Adding unrelated costs** is not ethical and may result in a dispute regarding the cost of the change order.

QUESTIONS AND SCENARIOS FOR PRACTICE

Q&S #1

- **Eastern Construction** has a contract for the construction of a **data center**.
- During the construction of the building, the **contractor found** that the electrical and mechanical **drawings** contained several conflicts with the structural drawings.
- **Eastern's project manager** submitted several Requests for Information (RFI) to **determine** how to resolve the conflicts.
- **Upon analyzing** the responses to each RFI, the **project manager determined** that **Eastern would incur additional costs** as a consequence of the **additional work** to be performed.
- To **seek compensation** for the additional work, the **project manager submitted** a request for a change order to the project owner, which **was refused**.

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Q&S #1

- Since the **contractor** had **incurred** unanticipated cost due to the **design conflicts**, the project manager **submitted a claim** to the **project owner** in accordance with the **claims procedures** contained in the construction contract.
- **Eastern's electrical subcontractor** had incurred **additional cost** due to unanticipated material price escalation for electrical materials that were **not related to the change** in electrical scope of work.
- The **project manager** decided to **include that additional cost** in the claim for **additional compensation** for the design conflicts.
  - *Were the actions of the project manager ethical?*
  - *How would you have handled the situation?*

ACEMI

Q&S #2

- During the **excavation for the foundation** for an office building, **Western Construction** **encountered** a buried fuel tank and a natural gas line that were **not shown** on the contract drawings.
- The **contractor's project manager** placed the project owner on **notice** of the unanticipated fuel tank and gas line.
- **Because** of **extra work** associated with the fuel tank and gas line,

  Western's project manager requested a change order.
- The **project owner agreed** and requested a cost for the extra work associated with removal of the fuel tank and the gas line.

Q&S #2

- The **project manager** **knew** that a **mistake** had been **made in estimating** the amount of **concrete for the foundation**.
- She **decided to add the cost** of the **additional concrete** to the cost of removing the fuel tank and gas line and proposed a **price of $100,000** for the change order.
  - *Were the actions of the project manager ethical?*
  - *How would you have handled the situation?*

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Q&S #3

- Pacific Builders has a design-build contract for the design and construction of a medical office building.
- Major subcontractors were selected during the contract procurement process to enable collaboration with designers during design development.
- The design-build contract was awarded using a negotiated procurement process involving the submission of lump-sum cost proposals.
- Building performance criteria were specified in the request for proposals and have been incorporated into the design-build contract.
- Prior to starting construction of the project, the completed design was submitted to the project owner for review and approval.

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Q&S #3

- During procurement of the building envelope materials by the envelope subcontractor, it was determined that the lowest price for the desired materials exceeded the project budget allowance.
- To stay within the budget, Pacific Builders' project manager directed the envelope subcontractor to find alternative materials that would meet the budget allowance.
- In making the decision, the project manager did not discuss the situation with the project designer or project owner.
  - *Were the actions of the project manager ethical?*
  - *How would you have handled the situation?*

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Q&S #4

- Capitol Constructors has a contract for the construction of a sewage treatment plant. Because the contractor was selected early during design development, the construction contract is priced as cost-plus-fixed-fee.
- Direct and indirect project costs are considered as reimbursable based on payroll data and paid invoices from subcontractors and material suppliers.
- The fee covers company overhead and profit.
- Capital Constructors' safety director plans to visit the project site every two weeks to ensure proper safety procedures are being followed.

Q&S #4

- Even though the safety director’s salary is part of the company overhead, Capital Constructors’ project manager has decided to include 25% of the safety director’s salary as part of project indirect costs and request reimbursement from the project owner.
  - *Were the actions of the project manager ethical?*
  - *How would you have handled the situation?*

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(بر اساس سندی از انجمن مدیریت ساخت آمریکا (CMAA))

فصل دوم: پیاده‌سازی رفتار حرفه‌ای در صنعت ساخت

بخش سوم: مدیریت روابط با کارفرما

ارائه دهنده:

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دانشگاه Illinois Tech آمریکا

What we will learn?

- Learning objectives
- Introduction
- Introductory case study
- Ethical challenges
- Applicable regulations and standards
- Construction participant perspectives
- Questions and scenarios for PRACTICE
- Notes

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Learning objectives

- After reading this section, you should be able to:
  - **Describe** **ethical challenges** that can occur between a **contractor and client**.
  - **Explain** the difference between a gift and a bribe.
  - **Imagine** and **evaluate** potential consequences resulting from **common ethical** decisions in **contractor-client relationships**.
  - **Recognize** the **statutes** that **regulate relationships** with representatives of **federal agencies.**

INTRODUCTION

Who is owner?

- Project owners are a diverse group.
- An owner may be
  - Federal, state, or local agency;
  - Publicly held or private corporation;
  - Municipal authority, such as a school district or local transportation authority;
  - Utility company;
  - Non-profit organization; or
  - Individual developer.

Is owner also a construction manager?

Owner and construction manager

- Owners **may** have substantial experience in **managing construction projects** and contracts, or

  may have **none at all.**

- The **ideal** owner / contractor relationship is built on a **foundation** of mutual trust;

  unethical behavior by either side can erode that trust and lead to

  - Suspicion,
  - Blaming,
  - Justification of further unethical decisions, and
  - Possibly legal action.

FMI survey with CMAA

- **Consulting firm FMI** in conjunction with the **Construction Management Association of America (CMAA)** has conducted numerous surveys of construction project owners about their perceptions of and experiences with a variety of topics and issues, including risk management, project delivery, technology, and ethics.

How the owner selects contractors and CM?

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FMI survey with CMAA

- In the **2005 Sixth Annual Survey** of Owners, FMI/CMAA asked owners:
  - **What characteristics** do you use to choose the right construction manager and **contractor** for your project?
    - ✓ **Setting aside** the cost constraint,

      the **number one factor** that influenced the **owners' choice** of construction manager or contractor was trust and integrity.
    - ✓ **Other important factors** for owners were the **contractor's ability** to
      1. Control schedule and cost,
      2. Experience level, and
      3. Communication and leadership skills.

What were the core values of companies selected?

Company's core values

- Integrity is commonly listed among a **company's core values**.
- The Table shows the **core values** for four **companies who have repeatedly** been among those honored by the **Ethisphere Institute** as the **World's Most Ethical Companies.**
  - Note that instead of integrity**, CH2M Hill** lists respect, which is a **consequence** of acting with **integrity**.

Core values of companies selected from Ethisphere Institute's "World's Most Ethical Companies" (https://worldsmostethicalcompanies.com)

Granite Construction	*Parsons*	*Fluor*
Safety Integrity Excellence Inclusion Sustainability	Safety Quality Integrity Diversity Innovation Sustainability	Safety Integrity Teamwork Excellence
www.graniteconstruction.com	*www.parsons.com*	*www.fluor.com*

What does integrity mean here?

Integrity

- Integrity is often described as **“walking your talk.”**

- In his 2002 book *The Integrity Chain, author Ralph James* lists things that he would do to **demonstrate integrity**.

How build trust between you and your client?

Integrity

- This list can also be viewed as **simple rules** for building trust between you and your client:
  - Show up on time to meetings.
  - Follow up on action items.
  - Don’t make promises you can’t keep.
  - Act consistently.
  - Don’t cover up bad news.
  - Don’t look for scapegoats to take the blame.
  - Know your policies and procedures.
  - Go through proper channels instead of looking for ways to game the system.

What happens when trust and integrity are weak?

Weak trust and integrity

- When trust and integrity are **weak**,

  owner–contractor relationships can become **adversarial**.

- **Each may attempt** to **gain the upper hand**

  by **engaging** in unethical or even illegal practices.

- If unethical actions occur at **top management** levels,

  there is a **risk** that **these practices** may become a way of **doing business** for that organization.

Contractor and owner who don’t trust each other

- A **contractor who doesn’t trust** an owner to award contracts fairly **may try to obtain** a preferred status by giving his client a gift or favor (**unethical** and **possibly illegal**).
- An **owner who doesn’t trust** her contractor may withhold payment or cut costs on **change orders**.
- A **contractor who doesn’t receive** fair or timely payment may try to **compensate** by **overbilling**.

- *Some examples of unethical practices between contractors and clients are presented in this section.*

INTRODUCTORY CASE STUDY

Case

- A **contractor learns** that the head of the local Department of Public Works, who signs off on all major procurement for the County, **owns a vacation home nearby**.
- **This official** has **many friends** in the **contracting community** who frequently drop by and **help out on home improvement** and remodeling projects.
- **Some of these contractors** have even **donated supplies** along with their own labor.
- **Our contractor** has been **invited** to a **"work party and barbecue"** on the upcoming weekend to **help build a new fire pit** at the official's vacation home.
- She is **concerned** that if she **doesn't participate**, her company will be at a **disadvantage** when it comes time to bid on Public Works projects.
    - *Can our contractor help out at the work party?*
    - *Can she bring along some of her employees to help too?*
    - *What other choices might she have?*

ETHICAL CHALLENGES

Introduction

- In the following paragraphs, we will discuss some of the **common ethical challenges** encountered in contractor–client relationships,

  beginning with the issue of **gift giving**, which was illustrated in the introductory case study.

Gift giving

- Particularly when a **large client offers** the potential for **ongoing projects**,

  a **contractor** may feel a **need to**

  1. **Set himself apart** from the **competition** somehow,
  2. **Attract** attention, or
  3. **Gain favor** with that client.

- **Many contractors** have sought ways to gain **"a foot in the door"** with an **important client**

  in order to be placed on **short lists** to be able to bid or propose on work.

Why the contractor does this?

Differentiation

- A **contractor** can **differentiate herself** from the **competition** naturally **over time** through **outstanding performance**, earning a reputation for integrity, quality, safety, and value.
  - However, in the **short term**, and in the absence of a relationship that has been **built over time**, there can be a **temptation** to look for a short cut.

Short cut

- A **personal relationship** with an owner or an owner's employee might present an **opportunity** for either party to take a short cut.
- There's an **important distinction** between
  1. **Friendly** working relationship and
  2. Taking **unethical advantage** of that relationship

  to gain a **competitive edge** or **financial reward.**

How about family or personal relationship?

Short cut

- Typically, there is **no ethical issue** when an employee accepts a gift when it is **clear that the gift** is motivated by a family relationship or personal friendship **rather than** the position of the employee.
  - ✓ *However, in this case, both parties must be especially sensitive to perceived conflict.*

Is it acceptable to get a gift?

Acceptable gift

- **Some companies** allow gift giving to clients or potential clients.
  - The ethical challenge is being able to **determine when** a gift is acceptable and appropriate.
  - The **legal challenge** is being able to distinguish the difference between a gift and a bribe.

How?

Gift giving to bribery

- The following **two conditions** transform gift giving to bribery:
    1. If the gift **predisposes** the recipient to **favoring** the **interests** of the gift giver;
    2. If the **value** of the gift places the gift giver in a **privileged position**.

What is the definition of the gift?

Gift giving to bribery

- A **good definition** of a **gift** is something of value given without the **expectation of return.**
- In general, token gifts, meals, and entertainment are **allowable**
    1. **If acceptance** is not illegal and
    2. If the **gift** is clearly **appropriate** under the **circumstances**.

What circumstances?

Gift giving to bribery

- In addition, it should also be possible, acceptable, and appropriate for the gift to be **reciprocated**.
  - That is, a gift should **not be given**

    if it is **clearly beyond** the ability of the recipient to return an equivalent gift.

    - ✓ *For example, it is typically **not unethical** to pay for a client's meal*

      ***if the client** has the opportunity and the **means to reciprocate** at another time.*

How about people in government?

Gift to government

- There are additional **important considerations** if your client is an employee of a *federal, state or local government, or a public agency.*
  - Federal government employees are **restricted by law** from accepting gifts over **certain dollar thresholds**.
  - Federal regulations state that **no single gift or item** to a representative of the federal government should
    - exceed a **value of $20**, and

the **annual limit** for more than one gift is limited to $50.00.

This is illustrated in Box 8.1.

Gift to government

Box 8.1 Gift or Bribe? *United States v. Hoffman*

In *United States v. Hoffman*, (2009), the appellate court upheld a gratuities conviction based on an indictment alleging that the defendant had given a government employee a set of golf clubs for or because of that government employee's role in rating the contractor's performance under a contract with the United States Army Corps of Engineers.

Russell Hoffman was a vice president at Surdex Corporation, and project manager for a two-year contract for aerial photography and mapping services that was awarded in 1996. William Schwening was the Army Corps of Engineers' primary point of contact for the project. Schwening was also responsible for completing a performance evaluation report grading Surdex's performance under the contract.

The primary evidence consisted of email correspondence between Hoffman and Schwening in which statements by Schwening somewhat jokingly implied that he was delaying Surdex's performance evaluation until he received a new set of golf clubs. Hoffman subsequently sent Schwening a set of golf clubs that were paid for by Surdex. The fact that it was the company that purchased the clubs rather than Hoffman, suggested that the gift was given for a business purpose, and not based on a friendship between the two men.

The jury acquitted Schwening on all counts but convicted Hoffman. Although Hoffman appealed, the conviction was upheld because the gratuities statute states that the government need only establish that a gift was given with the *intent* to induce or reward an official act, regardless of whether that act occurred or whether the gift was accepted.

Source: www.governmentcontractslawblog.com

Gift to government

- State or local governments may have **similar restrictions**.
- **Even a token gift** as simple as a contractor-branded cap or coffee mug may **pose a problem** for a public employee.
- **Not only may** the gifts exceed the allowable value limits, but a government employee **wearing your company's T-shirt** or carrying around a mug with your **logo** could **create an appearance** of impropriety or conflict of interest.

How could we reach a conclusion?

Checklist to find out the gift is unacceptable

- If you can answer **"yes" to any** of the following questions, then chances are, the gift is unacceptable:
  1. Is the gift illegal?
  2. Is the gift cash?
  3. Does the gift exceed a modest value?
  4. Could the gift give the appearance of an unfair business advantage?
  5. Is the gift prohibited by the recipient's employer?
  6. Would public knowledge of the gift cause embarrassment or reflect negatively on the individual gift giver, the individual's company, or the recipient?

Taking negatively about a competitor

- Another **short cut** around establishing a trustworthy reputation through performance is to offer the client negative or harmful information about the **competition**.
  - One way this can happen is **when employees** move from one contractor to another,

    bringing with them **“insider”** or **proprietary information**.
    - ✓ **Proprietary information** that can damage a competitor might include **knowledge** about upcoming changes in key personnel, financial or legal problems, or issues with jobsite training and procedures.
  - *Is it unethical for a contractor to share this kind of information with a client, or is she just looking out for her client’s best interest?*

There are several potential consequences to consider.

Taking negatively about a competitor

- Whether you are the contractor thinking about **divulging** information, or the client who is **receiving** the tip, it's important to consider the source of the information,
  1. **How** the source **came** by the information, and
  2. The **motivation** of that source.

What questions should be asked?

Taking negatively about a competitor

- **Both** should be asking themselves:
  1. How **current** and **accurate** is the information?
  2. Has it been **verified** or is it a **rumor**?

- The **contractor** should be asking himself:
  - What do I think **I can gain by telling** this to the client?
- The **client** should be asking herself:
  - **Why** is this **contractor choosing** to give me this information **at this particular time?**

What is the viewpoint of the contractor?

Taking negatively about a competitor

- From the viewpoint of the contractor,

  the **tactic** of talking negatively about the competition is truly a **shortsighted** approach.

  - Contractual relationships **differ** from project to project.
  - **Today's competitor might be**

    tomorrow's construction manager, or subcontractor, or joint venture partner.

- Is the contractor willing to **end all possible future work** with this competitor for a **better shot** at the **current project**?

What is the viewpoint of the owner?

Taking negatively about a competitor

- From the viewpoint of the client,

  knowing that a **contractor has revealed** confidential information about a competitor may **seriously impact** the sense of trust

  that an owner has with that contractor.

- **Revealing information** about a competitor may also have the **result of the owner** requesting additional requirements of all **bidders**, and

  thus may **backfire** on the company revealing the information.

In short, it is best practice for all parties to be ***responsible for their own*** *due diligence concerning their potential clients, contractors, and partners.*

What about contractor's means and methods?

Client taking advantage of the owner-contractor relationship

- **Naturally**, owners seek to obtain the best **ideas and approaches** that will make their **projects successful**.
  - However, once in **possession of proprietary information** regarding a contractor's means and methods, **clients must respect** this information as intellectual property and **not divulge** confidential information from one contractor or architect to another.

What other parties should do here?

Client taking advantage of the owner-contractor relationship

- At the same time, **if** such information is **offered** to a **contractor or architect** for review,

  the **ethical response** would be for them to **refuse** to see it.

- **Some unethical behavior** on the owner's side is attributed to inexperience.

- When **inexperienced** owners choose to act as their **own construction manager**,

  serious issues and **misunderstanding** can arise.

Overbilling and overcharging

- When the opportunity arises, a **contractor may seek** to make more money on a project by
  1. **Overcharging** on changed work, or
  2. **Overbilling** for work that is running under budget.
  - *What is the downside for the contractor to overcharging?*
  - *He may recoup some money, but at what cost to his reputation?*
  - *Is some overcharging permissible if it is reasonable and fair?*
  - *If overcharging is allowed or encouraged, what does that communicate to employees about the values of the company?*

What if the owner cut the percentage?

Overbilling and overcharging

- In another situation, an owner may have an **unwritten policy** of automatically cutting a percentage of every proposed change order,

  causing the contractor to respond by **padding** each change order for negotiation purposes.

  - This approach sends a **signal to the contractor** that the **owner is expecting** the contractor to overcharge, and further,

    that the **owner is accepting** this as a **standard way** of doing business.

How the owner and contractor think about this?

Overbilling and overcharging

- From the contractor's standpoint,
  1. It is **unethical** for an **owner to withhold payment** for work done and
  2. **Contractor** is **justified in overcharging** to maintain a positive cash flow.

- From the owner's standpoint,
  1. **Contractor** is acting **unethically** by **overcharging** for work not done and
  2. **Owner** must **withhold payment** to compensate.

- *How can this standoff be resolved?*
- *Is an ethical code relative, that is, can an action be ethical in one situation and unethical in another?*

How to analyze this?

Overbilling and overcharging

- Table shows one way of analyzing this situation.
- **Each possible action** is based on a core value and has potential consequences that can be designated as a benefit or a risk.
- The **basis for the decision** is
  1. Whether the **benefits** of the action outweigh the **risks**, and
  2. If the **outcome is aligned** with the **contractor's core values** and code of conduct.

Table 8.2 Scenario contractor has an opportunity to overcharge for work done on a project

Action	*Core value basis*	*Potential benefits*	*Potential risks*
Do not overcharge	• Honesty • Integrity • Trust	• Enhance reputation in the contracting community • Build goodwill with the owner	• Don't make as much money
Overcharge	• Improve the company's bottom line	• Make more money on the current project	• Damage reputation • Lose current and possibly future clients • Set a precedent within the company for overcharging

Overbilling and overcharging

- It is important to **remember** that just because an action **can be justified**, it **isn't automatically** or **necessarily** ethical.

Scenario contractor has an opportunity to overcharge for work done on a project

Action	*Core value basis*	*Potential benefits*	*Potential risks*
Do not overcharge	• Honesty • Integrity • Trust	• Enhance reputation in the contracting community • Build goodwill with the owner	• Don't make as much money
Overcharge	• Improve the company's bottom line	• Make more money on the current project	• Damage reputation • Lose current and possibly future clients • Set a precedent within the company for overcharging

Overbilling and overcharging

- Some **contractors** have defined overbilling as rebalancing or front-end loading the payment schedule to place

  1. **Higher value** on work **performed early** in the project and
  2. Lower values on work to be completed near the end of the project

  so that the **contractor does not incur** a seriously negative cash flow.

Is it similar to overcharging?

Overbilling and overcharging

- This is a **completely different** situation than overcharging for work not done, and should **not by all rights** be called **overbilling**.
- Front-end loading the schedule of values, **when limited** to a few planned early completion activities, is a **common and generally accepted** practice that should be negotiated and agreed on by the contractor and the owner.
- Inexperienced clients may require some **education on front-end loading** to **fully understand why** the practice is necessary.

Responsibilities needed to improve

- In the **2005 survey** of owners mentioned at the beginning of this course, FMI/CMAA asked **owners** what responsibilities they felt they themselves **needed to improve**.

Responsibilities needed to improve

- Their **top answers** were:
  1. Making timely decisions.
  2. Requiring good project definition.
  3. Communicating clear work scope.
  4. Providing leadership for project collaboration.
  5. Communicating clear business goals to design and construction team.

APPLICABLE REGULATIONS AND STANDARDS

Introduction

- Earlier in this section, we discussed some the **ethical implications** of gift giving and overbilling.

- **These actions** have **even more serious consequences** if they **cross over the line** from unethical to illegal, as in cases of **bribery and false claims**.

- There are a **number of statutes** that address these illegal actions.

Federal bribery statute

- Bribery of public officials is addressed in **Title 18, Section 201 of the U.S. Code**.

https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title18-section201&num=0&edition=prelim

18 USC 201: Bribery of public officials and witnesses
Text contains those laws in effect on April 17, 2024

From Title 18-CRIMES AND CRIMINAL PROCEDURE
PART I-CRIMES
CHAPTER 11-BRIBERY, GRAFT, AND CONFLICTS OF INTEREST
Jump To:
Source Credit
Miscellaneous
References In Text
Prior Provisions
Amendments
Effective Date
Short Title
Executive Documents

- The law specifically **prohibits anyone** from giving or promising **anything of value** to any public official,
  1. Either directly or indirectly,
  2. With the intent to influence that official to act in violation of his or her public duty.
- It also prohibits public officials from seeking **something of value** in **return for influence.**

What does the word “intent” mean?

Federal bribery statute

- **Notice** that the law uses the word **"intent."**
  - It's **not necessary** for a public official to **accept the gift**.
  - **Any gift** given with the "intent" to **influence that official** may be considered a bribe.
- Because the law is so **strict in its language**,

  contractors working with any public official or representative,

  even if that person represents a public entity **other than the federal government,**

  must be aware of actions that may even appear to involve improper gift giving.

False claims act

- False claims against the **U.S. government** are addressed in Title 31, Section 3729 of the U.S. Code.
- The **law prohibits** knowingly presenting false or fraudulent claims for payment or approval.

https://www.govinfo.gov/app/details/USCODE-2010-title31/USCODE-2010-title31-subtitleIII-chap37-subchapIII-sec3729

https://www.law.cornell.edu/uscode/text/31/3729

False claims act

- Actions that can be prosecuted under the False Claims Act include:
  1. Mischarging labor hours and
  2. Using excessive unit prices.
  3. Other common aggressive billing practices include
     a) Charging for hours not worked,
     b) Invoicing for documents not produced, and
     c) Misrepresenting the need for additional services.

What if the owner accepts this?

False claims act

- On the **owner's side**,

  clients can be prosecuted for **certifying payments** for contractors who have

  1. Submitted inflated bills and
  2. Approving work that is not completed.

An example is shown in next Box.

False claims act

Box 8.3 False Claims: *Morse Diesel International v. United States*

During 1994 and 1994, AMEC Construction Management Inc. (ACMI), which was known as Morse Diesel International at the time, was awarded four federal construction contracts: two related to the Eagleton Courthouse in St. Louis, MO; one for construction of the U.S. courthouse and federal building in Sacramento, Calif.; and a fourth for renovations to the U.S. customs house in San Francisco. Morse Diesel submitted false bond reimbursement claims to the U.S. Government. According to counterclaims filed in the U.S. Court of Federal Claims, in addition to the submitting false bond reimbursement claims, ACMI's parent company also received kickbacks from the company's bond broker. After a lengthy litigation process, the United States recovered more than $19 million from ACMI to resolve the allegations of fraud, false claims and kickbacks. The United States sought damages and penalties under the False Claims Act, the Anti-Kickback Act and common law theories.

Source: www.justice.gov/opa/pr/2009/February/09-civ-085.html

Anti-kickback act

- The **federal Anti-Kickback Act** of 1986 is contained in Title 41 Sections 8701–8707 of the U.S. Code.

https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title41-section8701&num=0&edition=prelim

https://www.law.cornell.edu/uscode/text/41/subtitle-IV/chapter-87

Anti-kickback act

- A **kickback** is **compensation** of any kind directly or indirectly accepted by a **public official** from a vendor, contractor, or subcontractor for the **purpose of influencing** the award of a contract.
- Kickbacks can include money, fees, commissions, gifts, or gratuities.
- We can **differentiate** between a bribe and a kickback by looking at examples.

Anti-kickback act

- When a **contractor gives** a **gift to a public official** with the intent to influence the official's decision in the contractor's favor, that's a **bribe**.

- When a **public official** makes a decision in a **contractor's favor**, and then receives a portion, percentage, or cut of the monetary or other benefit, that's a **kickback**.

CONSTRUCTION PARTICIPANT PERSPECTIVES

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