

# ASA's THE CONTRACTOR'S Compass

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## Focusing on **Ethics**

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## FEATURE

### *Fifty Shades of Grey—Ethical Considerations for the Construction Industry*

by Laura Cataldo

The construction industry is plagued with ethical challenges—many of which make the news and cast a dark shadow on our industry. Bid rigging, bid shopping and over-billings happen regularly in the construction industry and the fact is that while these actions are legal, they are not necessarily ethical.

Ethics is defined as a code of morality—a system of moral principles governing the appropriate conduct for an individual or a group. Professional societies like the American Bar Association, National Society of Professional Engineers or American Medical Association have Codes of Ethics for attorneys, engineers or doctors that define the acceptable values and behaviors of their profession. Trade associations, like the American Subcontractors Association, have been challenged when adopting, let alone enforcing, ethical provisions due to the potential to restrict competition among members. The Federal Trade Commission's concern is that Codes of Ethics have the potential to violate anti-trust laws.

#### **What Is Your Shade of Grey?**

Ethical guidelines and standards are often not discussed or undefined in our industry. Many issues in the construction industry are not necessarily black or white and many contractors need help understanding the “shades of grey” often encountered. Here are four

recommendations for you to consider in defining your company's ethical guidelines:

1. Discuss the “line in the sand” between legal and ethical.
2. Educate employees on ethical standards.
3. Establish a Code of Conduct.
4. Enforce adherence to the Code of Conduct.

Ethics are a reflection of a company's culture and values. The best way to define your ethical standards is to engage in internal conversations to define what is and is not acceptable. These topics could include:

- Bid Shopping
- Intellectual Property
- Confidentiality
- Over-Billings
- Acceptance of Gifts
- Safety
- Shortcuts

Let's consider the common ethical dilemma of bid shopping. Bid shopping occurs when a contractor uses the lowest bid received to pressure other contractors or suppliers to submit even lower bids. Sometimes this happens after a bid has been submitted. Contractors and their trade associations have historically condemned the practice of bid shopping yet it remains legal and continues to plague the industry. Why?

Some will profess that bid shopping is a fine example of the free market system, designed to give opportunities to companies willing to make the extra effort to submit lower

priced bids. They view bid shopping as a matter of survival—either turn in the lowest bid or don't win the work. If you are the lowest bid for the winning team, you are happy. Some states now require that the names of subcontractors be included in the base bid as a way to minimize the chance of bid shopping after contract award.

In many states this is not the case so it is important that your company engage in a discussion to define your position on bid shopping. Defining your company position on bid shopping could include:

1. Tracking general contractor performance and past history with bid-worthy qualifications:
  - a. Sufficient time to review documents.
  - b. Demonstration of project financing.
  - c. Prompt availability of addendum.
  - d. Time-frame for submitting bids (at least four hours before).
  - e. No unapproved substitutions.
  - f. Prompt award of contracts.
  - g. Payment procedures and schedule.
2. Contract amendments that impose a penalty for refusal to accept bid after project award.
3. Refusing to change bid once submitted unless for warranted scope change.
4. Refusing to bid to general contractors with a history of bid shopping.

Once your company defines your position on an ethical dilemma, it is critical that everyone involved in the process understands the “shades of grey” that you are willing to accept. If acceptable ethics are not understood within an organization, people will push the limits. For example, you may have an estimator that chooses to ignore the guidelines and resubmits a number at the last minute because he or she is bonused on successful bids. This leads to poor public perception of the company and industry, low morale and decreased company loyalty.

A great resource to use for these discussions is the “Guidelines for a Successful Construction Project” prepared by ASA, AGC, and ASC. This resource cites best practices for the construction industry in areas such as bidding, preconstruction, contract administration and project close-out.

Many companies today are including a Code of Conduct in their employee manual. A Code of Conduct is a personal commitment to follow the company’s ethical guidelines and creates a framework for addressing ethical issues. The American Institute of Constructors and Construction Management Association of America both offer models that you can use as an example.

Some key concepts you may want to consider for a Code of Conduct are:

- Obey the applicable laws and regulations governing our business conduct.
- Be honest, fair and trustworthy in all your company activities and relationships.
- Avoid all conflicts of interest between work and personal affairs.
- Foster an atmosphere in which fair employment practices extend to every member of the organization.
- Strive to create a safe workplace and to protect the environment.
- Sustain a culture where ethical conduct is recognized, valued and exemplified by all employees.
- Support the dignity of each individual, encourage professionalism, nurture innovation and reward achievement.

Consistent following of ethical standards by everyone in the company is critical. Everyone in the company (including the president) should be held to the same level of accountability. The employee handbook should define the disciplinary policies that will be utilized for those that fail to follow the Code of Conduct.

### **It’s About Building Trust**

Without sound ethical decision making, it is difficult to build trust with your owners, fellow contractors or employees. Without trust, it is nearly impossible to enter into mutually beneficial partnerships.

It is just as important for contractors to drive home good ethics to retain and grow good people in our industry, as well as improve public perception. One of the major challenges that our industry faces is low public perception. This is thanks in part to the media image of the construction industry. How

many shows on Dateline have you seen that portray the contractor as the merciless thief, stealing from little old ladies? It is so wonder that many parents do not encourage their children to work in this industry—seemingly plagued with ill-intent.

Jimmy Gill from Louisiana State University was quoted as saying, “There are no ethics in construction. There are ethical people in construction.” Your reputation is the most valuable asset you have. You must treasure it, nurture it and defend it through ethical behavior.

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