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Construction SuperConference - 2016

Ethical Issues Facing Construction Counsel

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ARTBA American Road & Transportation Builders Association

I. Presenters

■ Moderator

- Stephen B. Shapiro – Partner, Holland & Knight LLP

■ Panel

- Michael G. Di Paolo – Senior Vice President & General Counsel, Skanska USA Civil Inc.
- Stephen M. Gray – Associate General Counsel, Zachry Industrial, Inc.
- Joseph G. Portela – General Counsel & Senior Vice President, Dragados USA
- Jennifer (Jenn) Shafer – Director of Dispute Resolution/Legal, Risk Management & Government Affairs, Black & Veatch Companies
- Ben W. Subin – Partner, Holland & Knight LLP
- Logan Hollobaugh – Senior Counsel, Claims Management and Corporate Litigation, Chicago Bridge & Iron

II. Overview

- Supporting Proposals for New Contracts
- Requests from Senior Management or Business Units
- Considerations Related to Joint Ventures
- Ethical and Compliance Obligations in Multiple Jurisdictions
- Ethical and Privilege Considerations in Litigation and Disputes

III. Supporting Business Development and Proposals for New Contracts

A. Ethics and Compliance

- In supporting new contract pursuits, what can counsel do to:
 - assure that individuals involved in business development understand ethical and compliance rules;
 - help the company comply with ethics rules associated with doing business with public owners and foreign governments;
 - prevent collusion and anti-trust violations, particularly when the contractor intends to use an affiliated entity as a material supplier?

IV. Ethical Issues Created by Requests from Senior Management or Business Units

A. Audits and Reporting

- How does counsel address pressure from management to overpromise or under promise the outcome of claims or disputes in internal reporting?
- How does counsel address pressure from management to guarantee the outcome of claims and disputes in reports to outside auditors?
- How does counsel address pressure from management to overpromise or under promise the outcome of claims and disputes to Boards of Directors or Investors?
- Do these pressures change for publically traded companies?
- How do you explain these ethical issues to management that is based in foreign jurisdictions?

IV. Ethical Issues Created by Requests from Senior Management or Business Units (*continued*)

B. Ethical Considerations of Representing Related Entities

- Representing affiliated companies with potentially competing interests:
 - Negotiating subcontracts and purchase orders among related entities for which the attorney serves as counsel
 - Legal and management decisions that could negatively impact one or more affiliated entities with competing interests
 - Reports to senior management that could negatively impact one or more affiliated entities with competing interests
 - Claims and disputes among affiliated entities (zealous representation in the disputes process)
 - Providing advice to a concessionaire or contractor on a P3 project when the concessionaire and contractor are subsidiaries of the same corporation
 - Providing advice to affiliated entities when counsel is assigned to a shared services company or holding company

IV. Ethical Issues Created by Requests from Senior Management or Business Units *(continued)*

C. Ethical Considerations of Counsel Serving on a Board of Directors

D. Ethical Considerations for In House Counsel of an Employee Owned Company

V. Ethical Considerations Related to Joint Ventures

- **How should counsel address potentially competing interests in advising a joint venture?**
 - Duty to confer with all joint venture partners
 - Duty to disclose information that could be adverse to an in house counsel's employer
 - Obligations change when counsel's employer is designated as the "lead" member of the joint venture?
 - Disputes among one or more joint venture partners
- **Considerations for outside counsel, particularly when the outside counsel has a long term relationship with one or more of the joint venture entities**

VI. Ethical and Compliance Obligations in Multiple Jurisdictions

A. Identifying and Complying with Applicable Ethical Requirements

- How does counsel identify applicable ethics rules (applicable to attorneys, non-attorneys and corporations) in multiple jurisdictions and keep up to date with changes?
- What can be done to assure that junior attorneys, business units and project management understand their ethical obligations and comply with applicable requirements?
- Are there particular challenges in doing business in foreign countries?

VII. Ethical and Privilege Considerations in Litigation and Disputes

A. Judicial Procedures vs. Corporate Obligations and Objectives

- In jurisdictions where in-house and outside counsel can be sanctioned for failing to comply with discovery rules, how does counsel address federal and state court discovery rules with corporate confidentiality and cost savings objectives?
- How does counsel satisfy legal hold obligations when their IT and Finance departments want to reduce costs, reuse equipment and limit storage?
- How does counsel deal with potentially competing ethical obligations to provide reports on the status of ongoing disputes, complying with protective orders and confidentiality agreements and attempting to maintain discovery protections afforded by the attorney-client privilege and attorney work product doctrine?

VII. Ethical and Privilege Considerations in Litigation and Disputes *(continued)*

A. Judicial Procedure vs. Corporate Obligations and Objectives

- How does counsel deal with settlement decisions when it simultaneously represents affiliated entities in an ongoing dispute?
- In situations where counsel project management have different objectives than corporate management, how does counsel address the ethical dilemma when litigation strategy or decisions adversely impact the project team or the corporation?
- When faced with the situation where the corporate client and individual corporate employees are facing criminal investigations, what can be done to assure that the corporation and individual corporate employees are adequately represented?

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