



# CONSTRUCTION **SUPER**CONFERENCE **2021**

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# ETHICS IN CONSTRUCTION & ENGINEERING

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# UNDERSTANDING THE ROLE OF MORALS, ETHICS AND THE LAW IN ADVISING CLIENTS

- Sources of Guidance and Rules
- Philosophical Guidance
- Guidelines and Limits?
- Legal Ethics v. Business Ethics

# WHAT ARE MORALS, ETHICS AND THE LAWS?

- Morals refer to an individual's own principles regarding right and wrong.
- Ethics refer to rules provided by an external source.
- Laws are the systems of rules which a community recognizes as regulating the actions of its members, and which it may enforce by the imposition of penalties.

# THE CATEGORICAL IMPERATIVE

- The central philosophical concept in the moral philosophy of German philosopher Immanuel Kant.
  - “Act according to the maxim that you would wish all other rational people to follow, as if it were a universal law.”
  - “Sentient beings occupy a special place in creation, and morality can be summed up in an imperative, or ultimate commandment of reason, from which all duties and obligations derive.”

# THE “GOLDEN RULE”

- “Do unto others as you would have them do unto you.”
  - Treat others as you would like others to treat you;
  - Do not treat others in ways that you would not like to be treated; and
  - What you wish upon others, you wish upon yourself.
- The principle of treating others as one wants to be treated-applies in business and law practice. Can be considered an “ethics of reciprocity.”

# WHAT SHOULD GUIDE OUR ADVICE/ACTIONS?

- As people?
- As businessmen and women?
- As lawyers?
- What is the companies/client's culture?
  - Do you know? Is it your responsibility as the lawyer to know?
- Is the approach... “as much as the law allows” or some other limit?



# DISCUSSION QUESTIONS

- Do the lawyers in the room (in-house and outside) appreciate that our clients may want or need guidance both as to what is “legal” and what is considered “ethical” and understand that those may not align completely?
- Could your client/company be judging you for considering or not considering ethics and ethical implications in your advice to them?



# ETHICS AND MORALS IN CONTRACTING

- 3 main areas of application:
  - Contract Negotiation
  - Administration of Contracts
  - Negotiation and Mediation of Contract Claims

# CONTRACT NEGOTIATION

- The process through which two or more parties come to a legally binding agreement on the terms of their relationship
  - Duty to point out relevant law / legal inconsistencies?
  - Duty to point out ambiguities in the contract?
  - Insertion of “*Gotcha!*” or Superfluous Clauses?
  - Authorization and Enforceability Issues
    - is it acceptable to sign a contract knowing that there might be authorization or enforceability issues which could potentially render the contract void or voidable in the future?

# CONTRACT ADMINISTRATION

- The management of a contract upon execution and once the defined work begins.
  - The Rule of “Doing the Right Thing”
    - When is the “Right Thing” actually the “Wrong Thing”?
  - The Role of Good Faith and Fair Dealing
    - Public Contracts-Federal
    - Public Contracts-State
    - Private Entity Contracts
  - The “Reasonableness” Standard

# CASE STUDY

- Differing views on the obligation of good faith and fair dealing amongst states.
  - *Questar Builder's, Inc. v. CB Flooring, LLC*, 410 Md. 241 (Md. 2009).
    - General contractor terminated a subcontractor for convenience. Remanded to trial court in order to determine whether Questar breached the subcontract by not exercising its discretion to terminate in accordance with the implied obligation of good faith and fair dealing.

# CLAIM NEGOTIATION / MEDIATION

- Process where two parties in a conflict reach a settlement.
- Are there ethical constraints in Claim Negotiation and Mediation?
  - Public v. Private Contracts – does it make a difference?
  - Types of Ethical Issues that Arise:
    - Artificially Inflated claims or change order requests
    - Unsupported claims
    - Non-material deviations
    - Financial Concerns (bankruptcy threats, etc.)

# ETHICAL IMPLICATIONS OF ELECTRONICALLY STORED INFORMATION (ESI)

- ESI is data that is created, altered, communicated and stored in digital form
- Potential Legal Obligations and Concerns
  - Preservation and Protection
  - Spoliation and Sanctions
- Ethical Obligations and Concerns
  - American Bar Association (ABA) Rules
  - Individual State Rules

# FEDERAL LAWS REGULATING ETHICAL BEHAVIOR

- Federal False Claims Act (FCA)
  - 31 U.S.C. 3729
- Foreign Corrupt Practices Act (FCPA)
  - 15 U.S.C. § 789dd-1, et seq.
- The Sherman Act
  - 15 U.S.C. § 1-38
- Trade Sanctions and Executive Orders



# FEDERAL FALSE CLAIMS ACT DEFINED

- Penalizes those for false claims to the federal government
- Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval
- Knowingly, makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim
- Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government
- Conspires to violate a liability provision of the false claims act

# COMPONENTS OF FEDERAL FALSE CLAIMS ACT

- “Knowingly” is a key component, but not the safety net it sounds like.
  - Requires scienter-a state of mind
  - What is enough to qualify as “knowingly”?
    - Actual knowledge
    - Deliberate ignorance; or
    - Reckless disregard?

# EXAMPLES OF FALSE CLAIMS

- Billing for work not provided or completed or overbilling
- False certification of compliance with the contract
  - Buy American Act
- Submission of a misleading claim
- Obtaining the work through false statements or fraudulent conduct
  - Overstating qualifications/experience bid collusion
- Retention of overpayments/improper avoidance of back charges

# ACTION AGAINST FALSE CLAIMS

- Subject to *Qui Tam* action
  - A private party, a relator, is authorized to bring an action on the government's behalf for false claims. If the government joins the lawsuit, the case is unsealed, and the government and relator jointly prosecute the case.

# FOREIGN CORRUPT PRACTICES ACT

- 15 U.S.C. § 789dd-1, et seq.
- Law passed by Congress in 1977 to punish actions of bribery used to influence the decisions of foreign officials.
  - punishable by criminal and civil penalties; can be applied against both companies and individuals.
- Apply to issuers of securities registered on stock exchanges, companies organized under the laws of the USA, with its principal place of business in the USA, and any citizen or resident of the United States

# FCPA PRIMARY PROVISIONS

- FCPA has two primary provisions:
  - (1) anti-bribery provision which makes it unlawful for a US company or citizen, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business; and
  - (2) accounting provision which requires companies with securities listed on stock exchanges in the USA to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

# FCPA ELEMENTS FOR VIOLATIONS

- 5 elements under FCPA to make a crime:
  - (1) make a payment of, offer, promise, or authorize a payment of money or anything of value, directly or indirectly;
  - (2) to any foreign official, politician, party official, candidate for office;
  - (3) with a corrupt intent;
  - (4) for the purpose of influencing one of these person's official acts or decisions in violation of his or her lawful duty;
  - (5) in order to assist in obtaining or retaining business.



# KEY POINTS ON FCPA ELEMENTS

- “Foreign official” includes a broad category
  - All employees of non-U.S. national, state, provincial, and local governments-all departments and agencies and all levels. Employees in organizations which are government owned or controlled
- The FCPA applies to more than monetary gifts
  - “Anything of value” can be discounts, gifts, use of materials or facilities, entertainment, food and drinks, transportation, lodging, etc.
    - No *deminimis* threshold-value only matters to parties.

# FCPA PENALTIES

- Criminal: fines of up to \$2,000,000 for corporations, up to \$100,000 for officers, directors, stockholders, employees, and individual imprisonment up to 5 years
- Civil: fine of up to \$10,000 against any firm or officer, director, employee or agent of a firm, or stockholder, plus discretionary penalties.
- Famous FCPA Cases
  - Siemens Aktiengesellschaft (2008), KBR/Halliburton (2008), BAE Systems (2010), Total S.A. (2013)

# FCPA

- There are affirmative defenses.
- There are nuances.

# THE SHERMAN ACT

- Sherman Antitrust Act of 1890 is a federal statute which prohibits activities that restrict interstate commerce and competition in the marketplace
- Amended by the Clayton Act in 1914
  - Added unethical business practices including price fixing and monopolies, and upholds various rights of labor.

# ELEMENTS OF SHERMAN ACT

- General purpose and intent to prohibit all contracts, combinations and conspiracies that unreasonably restrain trade (Sherman Act Section 1), and prohibits monopolization and attempted monopolization (Sherman Act Section 5).
- Prohibited elements:
  - (1) anticompetitive agreements; and
  - (2) unilateral conduct that monopolizes or attempts to monopolize the relevant market.

# SPECIFIC BEHAVIOR EXAMPLES

- Bid Rigging/Price Fixing
- Disadvantaged Business Enterprise Program Manipulations-DBEs, WBEs, SDVOBs, etc.
  - Case Study – United States ex re. Tran v. Computer Science Corp., 53 F. Supp. 3d 104 (D.C. 2014)

# CASE STUDIES AND DISCUSSION EXAMPLES

- Bid rigging/Price fixing
  - *United States v. Vega-Martinez*, 949 F.3d 43 (1st Cir. 2020)
    - Municipality announced that it would hold an auction for bus transportation contracts. The Defendants came up with a scheme which involved explicitly deciding which companies would submit the high and low bids on each route. The evidence was sufficient to prove bid rigging.
    - Held to be a Sherman Act violation



# CASE STUDIES AND DISCUSSION EXAMPLES

## ■ Bid Shopping

- Bid shopping is the act of providing someone's bid to others to see if they can beat it;
- generally regarded as “not ok” / “unethical”
- Is it ok if it is done under a cost plus contract to try to get the Owner a better price?
- Is it required?

# CASE STUDIES AND DISCUSSION EXAMPLES

- Disadvantaged business program manipulations
  - *United States ex rel. Tran v. Computer Science Corp.*, 53 F. Supp. 3d 104 (D.C. 2014)
    - CSC bid on a task order under the Prime Contract including a “Small Business Subcontracting Plan” representing a minimum of 40% of the money paid out to subcontractors under the task order would go to qualified “small business concerns.” This was used mere pass through in which the small business concern subcontracted its work back out to a larger company.
    - Court refused to dismiss on the basis that there was potential FCPA liability.

# CASE STUDIES AND DISCUSSION EXAMPLES

- Liability for Misrepresentation or Tortious Acts in Settlement Discussions and/or Negotiations
  - Zealous Advocacy vs. an Attorney's Ethical Duty of Candor to the Tribunal
  - Claim Submissions
    - Are there false claims obligations in private contracting even in the absence of a private False Claims Act?
  - Settlement Discussions
    - Can “misrepresentations” in settlement discussions ever be actionable?

# CONCLUSIONS

- Important to understand the role of morals, ethics and law in both advising clients along with the associated guidance, laws, rules, regulations, and application in day to day practice.
- Resources are available to advise on any questions or concerns you might have.

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# Questions or Comments?

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The background of the slide is a composite image. It features a construction site at sunset, with silhouettes of workers on a building's steel framework and a large tower crane. Overlaid on this is a semi-transparent image of a person in a white business suit and a red patterned tie, with their hands clasped in front of them. The text is centered over the image in a white, bold, sans-serif font.

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