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COBRA 2008

The construction and building research conference of the Royal Institution of Chartered Surveyors

Held at Dublin Institute of Technology, 4-5 September 2008

ISBN 978-1-84219-434-8

12 Great George Street
London SW1P 3AD
United Kingdom

www.rics.org/cobra

September 2008

All papers submitted to COBRA were assessed by expert panel, drawn from the construction and building research community, The conference organisers wish to extend their appreciation to the members of the panel for their work, which is invaluable to the success of COBRA.

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Promoting Ethical Improvement in the Construction Industry – a Single Professional Code?

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ABSTRACT

Professional ethics is currently a high profile topic within the construction industry. Whilst the members of key professional bodies have established ethical codes a more recent phenomenon is the increasing numbers of contractors promoting ethical codes as part of their literature. This paper examines the benefit of promoting a single ethical code for the construction industry using the Society of Construction Law's Statement of Ethical Principles. This is followed by a wider discussion about the relevance of ethics to the industry and the different situations in which ethical considerations apply. Studies from the UK, USA, Australia and South Africa establish the extent of the problem in respect of unethical and illegal behaviour. Enforcement activity in European Union and United Kingdom, including the current Office of Fair Trading investigations are also considered. The drafting of the Ethical Statement is considered and its terms discussed. Amongst the conclusions reached is the observation that ethical codes do not operate in a vacuum and that the promotion of a single code will only bear fruit when seen as part of a larger raft of measures including longer term relationships and collaborative working and a higher profile for ethics in training/education.

Keywords: professional, ethics, enforcement, code, unethical behaviour

Introduction

Ethics is defined as the moral principles by which a person is guided.[i] In the context of the behaviour of professionals the same source expands its definition to the duties owed to the public, to each other, and to themselves in regard to the exercise of their profession. This is often described as "doing the right thing" and in the construction context ethical behaviour is measured by the degree of trustworthiness and integrity with which companies and individuals conduct business.

The core of professionalism has been described as the possession and autonomous control of a body of specialised knowledge, which when combined with honorific status, confers power upon its holders[ii]. The exercise of this control by the respective professional bodies is often manifested in the promotion and enforcement of an ethical code[iii]. There has been debate amongst the writers of journal articles on whether some professionals are "more ethical" than others[iv]. The proper analysis would appear to be that the closer a professional is to the harsh realities of business as indicated by their position in the supply chain; the harder it is to maintain ethical standards.

This last point makes the assumption that ethics has a role to play in general business practice. The mere term "business ethics" has been called an oxymoron[v]. In recent times there appears to be a greater consensus on this issue and it is now commonly recognized that the general concepts of ethics are applicable to business, on the grounds that business exists not solely to suit certain individuals, but because business serves society and, in addition, meets collective and social needs[vi]. In other words, the altruistic spirit of a genuine profession cannot be achieved without an ethics component[vii]. The most recent expression of this altruistic/social agenda has been evident in the promotion and regulation of sustainability and environmental aspects of the construction industry's activity.

There are conflicting opinions as to whether or not the adoption of such codes results in improved ethical conduct. Some commentators suggest that codes of ethics can never be more that "window dressing" and thus self-serving as simply public relations efforts[viii].

Be that as it may, the situation is not helped by the confusing proliferation of different pronouncements on ethics. The engineers, architects, surveyors, lawyers and construction managers directing and implementing each stage of the construction process have their own ethical codes. The question has emerged as to what is the appropriate ethical code to be used when multi-disciplinary construction work is being undertaken.[ix] The answer to that question led to the creation of the Society of Construction Law Statement of Ethical Principles[x]. The content and application of this single industry code are considered later in this paper.

The Scale of the Problem

It has been said that the cause of ethical failure in an organisation can often be traced to its organisational culture and the failure on the part of the leadership to actively

promote ethical practices[xi]. Whilst personal ethics are a reflection of beliefs, values, personality and background, any propensity a person may have towards ethical conduct is strongly influenced by the value systems reflected by their employing organisation. This often results in one's personal sense of what is right and wrong becoming buried amongst an organisations' non-observance of professional ethics. The problem that faces any professional community has been identified as being one of ethical quality control within the constituent organisations. [xii]

Surveys have been carried out into the ethical state of health of different construction industries. An Australian study[xiii] demonstrates the popularity of the use of ethics codes. Of the 31 people surveyed most subscribed to a professional code of ethics (90%) and many (45%) had an ethical code of conduct in their employing organisations. Despite this high incidence, for half the respondents the subject of ethics never cropped up in business meetings.

A South African study[xiv] based on the work done in Australia surveyed 63 professionals a large proportion of which were governed by ethical codes. A new suite of professional Acts promulgated in 2000 in South Africa had boosted the profile of ethics. An important consequence of the new legislation was the official recognition of construction management as a "professional" discipline.

The approach taken by the South African study was to ask respondents about the incidence of unethical behaviour, in particular collusive tendering. The results were shocking but not untypical. The responses indicated that 100% of the construction managers questioned had either witnessed or experienced collusive tendering, with 88% of Quantity Surveyors in the same position. Over half of the architects questioned had also seen such collusion. Overall this figures amount to 79% of total respondents being involved with unethical behaviour. Neither was the incidence of unethical behaviour reducing. When asked whether the problem had increased in the last ten years 32% said yes 64% stayed the same only 4% felt it had decreased.

In the analysis of the results the authors identify the severe depression in the South African construction industry during the period and suggest that local contractors may have formed groups to spread the work in an attempt to see off financial disaster.

Unsurprisingly, this practice was not successful - the number of insolvencies remained constant throughout the period.

An American study in 2004 collected the thoughts on the ethical state of the industry from 270 architects, engineers, construction managers, general contractors and subcontractors[xv]. When asked if they had experienced, encountered or observed construction industry related acts on transactions that they would consider unethical in the past year 84% answered yes and 34% said they had experienced unethical acts many times. 61% said that the construction industry was "tainted" by unethical acts.

Amongst the top five most critical issues selected by respondents were "bid shopping". This practice - whereby main contractors disclose competing sub-contractors prices seeking further discount – was identified as unethical by 90% of respondents. Respondents seemed to stop short of saying the industry was full of criminals – 44% disagreed that the construction industry was tainted by prevalent "illegal acts". Quite where the line is drawn between illegal and unethical would have been an interesting follow up issue to explore.

The American study highlights another key issue which is people's different understanding of what the rules are and what is right/wrong in any given situation. The example given in the paper is reverse auctions, where open tendering procedures are used and the winning tenderer is the one who gives the lowest price when the hammer falls. Although currently out of fashion in the UK, American clients view reverse auctions as important and valuable in the procurement process. The contractors disagree and see them as unethical. But if the bidding rules are clear and up front for all parties, is ethics still a question?

This last point is further demonstrated by some sound bites taken in the American survey about the dominance of contractual arrangement over any ethical considerations:

"A contractor is free to do whatever is necessary to make money on a project, as long as he is observed to meet the terms of the contract he holds with the owner"

"There in no ethical violation as long as the activity is within the contractual requirements. The contract must trump any social code of conduct in my view."

The proper analysis on this point would appear to be that practices such as reverse auctions and an overly contractual approach to relationships can invite the contractor to engage in unethical behaviour by restricting profit margins at a non-viable level and inviting opportunistic behaviour. The movement away from these features in the United Kingdom and towards collaborative contracting demonstrates the additional ethical benefits that can be achieved when a realistic approach to profit margins is accepted by clients.

What of the United Kingdom and the state of its own industry? The position was revealed in a survey in 2006 by the Chartered Institute of Building[xvi] of 1,404 respondents from a variety of sectors within the industry. The approach taken by this study was to invite the respondents to say whether they thought certain practices such as cover pricing and collusion were "very corrupt" or "moderately corrupt". Substantial differences in perception existed as to the corruptness of each practice. On the whole, a lower incidence of corrupt behaviour was reported than in the other surveys. 49% of the respondents thought that corruption as "not common at all" or "not very common".

All of the studies discussed tackled the issue of how to address the problem. The American survey is typical - even though 85% of respondents thought there should be an association-enforced industry-wide code of ethics, only 30% agreed that adding regulations concerning ethical behaviour was a good idea. An overwhelming response in the United Kingdom survey thought the government were not doing enough to tackle corruption. However, there was much less of a consensus about what constitutes corruption and the respondents acknowledged that this issue must be tackled in the first instance.

What is discernable from these four studies is that ethical codes are popular in the industry but notwithstanding this the incidence of unethical behaviour is extremely high. Further, no consensus exists on exactly what constitutes unethical behaviour and

what should be done about it. Perhaps an industry wide adoption of the following suggested approach would be the best way to ensure a more ethical approach:

"If your business decisions and motives were published on the front page of a large circulation newspaper the day after you make your decision, and you still feel comfortable, then do it". [xvii]

Assuming that business decisions continue to remain in the private rather than the public domain, another solution is needed.

The Single Code

The studies described in the last section demonstrate that a code alone does not necessarily ensure that professionals will behave ethically on a day-to-day basis. This is particularly true at the contractor/sub-contractor level. The temptation for contractors and others in the industry to be unethical can be seen to be almost irresistible when they get caught in a compromising situation. Whether this behaviour is labelled as cutting corners or applying leverage to the supply chain, the potential for unethical behaviour is massive.

This point is made by Neill Stansbury, Chairman of Transparency International (UK) "The majority of contractors who do engage in corrupt practices tend to do so not because they want to, but because they feel they are forced to by the way the industry and the political environment operate." [xviii]

What then can a single code offer? Professor Uff has been one of the leading lights in the creation of the code and describes it as "the first line of defence against corruption"[xix] . Another heavily involved in the drafting of the code was His Honour Judge Thornton for whom the benefit of the code was that "there would be an appreciable reduction in poor designs, shoddy workmanship, delays, claims, excessive charging, cost overruns and disputed claims."[xx] Both men seemed to appreciate that the task they set themselves was not an easy one. His Honour Judge Thornton described the task of creating the code as "bold, difficult and somewhat presumptuous" as well as "brave, pioneering and highly desirable."

The Society for Construction Law set up a group in 2003 to consider the question of ethics in the construction industry. In doing so The Society, consistent with its objective 'to promote the study and understanding of construction law'[xxi], aimed to stimulate discussion and debate and increase awareness and understanding of ethical matters. In addition the Society set itself the objectives to inform and guide (that is, influence) construction law professionals, and provide a standard against which others may review compliance.

The Statement of Ethical Principles

Ethical conduct is the compliance with the following ethical principles:

1. **Honesty** - act with honesty and avoid conduct likely to result, directly or indirectly, in the deception of others.
2. **Fairness** - do not seek to obtain a benefit which arises directly or indirectly from the unfair treatment of other people.
3. **Fair reward** - avoid acts which are likely to result in another party being deprived of a fair reward for their work.
4. **Reliability** - maintain up to date skills and provide services only within your area of competence.
5. **Integrity** - have regard for the interests of the public, particularly people who will make use of or obtain an interest in the project in the future.
6. **Objectivity** - identify any potential conflicts of interest and disclose the conflict to any person who would be adversely affected by it.
7. **Accountability** - provide information and warning of matters within your knowledge which are of potential detriment to others who may be adversely affected by them. Warning must be given in sufficient time to allow the taking of effective action to avoid detriment.

These principles were written to apply to the work of all professionals working in the construction industry, whatever their original qualification or affiliation and to individuals, whether they work for or on behalf of an independent professional or as a partner, associate, director or employee of a firm or company.

It was intended that the statement of good practice is in addition to any other professional code that may apply. Further, the statement of good practice was seen as

part of and additional to contractual and other duties taken on under the civil law and potential breaches of the criminal law.

The Code identified unethical conduct as deliberate or reckless disregard for the ethical principles, as they would apply to the ordinary standards applicable to the activity being undertaken by reference to the recognised practice in that profession.

The Terms of the Code

His Honour Judge Thornton identified that help was at hand in drafting the code in the form of the Seven Principles of Public Life identified by the Nolan Committee set up in 1994[xxii] . These principles set out the bench mark of acceptable behaviour in the public sector. The principles were amended for the purposes of the Code on the basis of construction being a commercial activity and were regrouped as follows: fair reward (instead of selflessness) fairness (instead of openness) reliability (instead of leadership), integrity, objectivity, accountability and honesty.

For the code to be useful as a first line of defence then its practical applicability to the industry needs to be considered. The seven qualities with examples of the type of conduct they seek to render unethical and guidance offered on how to set the appropriate ethical standard are discussed here.

Honesty

It comes as no surprise to see honesty at the top of the statement of ethical principles. As the international studies demonstrated, the industry has a very poor record and reputation in this regard. Examples of dishonest behaviour are given as bribery, claims fraud, collusive tendering, kickbacks and the preparation of forged documents to support claims. The problems of the almost endless possibilities for dishonest behaviour are exacerbated by the high possibility of getting away with it.

The guidance suggested by the code is for the appropriate behaviour on discovering corrupt practices would be for the recipient to report the matter to the appropriate criminal investigating bodies and professional and trade associations. Clearly, taking such a step would be unpalatable for those not wishing to jeopardise their positions within organisations where a culture of non-observance of ethical considerations exists.

Fairness

This is an area where the ethical statement departs from the standard legal obligations seen in the English law tradition. This tradition is comfortable with notions of reasonableness but not relatively unfamiliar with the notion of fairness. Guidance on what constitutes fairness in the myriad of situations in which it could be called into question is something the code's authors aim to produce over time. The establishment of a duty of good faith in English law would go a long way towards fulfilling this brief.

Fair reward

A major obstacle to achieving this ethical goal is the complexity of the industry's payment provisions and their ready facility for price alteration. The practices such as interim payments, the valuation of variations and incomplete and undefined scope of works and quantities open the way for unethical conduct before, during and after the work is performed. Specific examples of unethical conduct in this regard include devising tenders with inadequate definitions of work scope and risk allocation. The interim claims and valuations are often paid late at each layer of the supply chain and are subject to unfair cross claims.

The authors of the code envisage giving guidance to identify what information should ordinarily be provided with regards to risk allocation, scope of work, rate and valuation breakdown and claims details.

Reliability

This ethical principle can be simply put as having the ability to do the work one is hired for and to have the skills to which one professes. The guidance to be made available on this principle would set out how, in what circumstances and with what degree of detail a construction professional can be described. The difficulty of this task is not made any easier by the blurring of distinctions between the professions and the prevalence of multi-disciplinary practices.

Integrity

This principle embodies a sentiment expressed earlier in the paper in recognising the overall objective of construction being the production of safe, reliable, useable and affordable construction. This is only achievable if the professionals concerned can look beyond their own or their client's narrow agenda.

His Honour Judge Thornton identifies that the heart of this issue is risk identification, management and assessment. He cites late or non-disclosure of information (including design

information) to tenderers as examples of bad practice. The suggestion is that the code could identify general principles that should govern a tender draftsman, tenderer, designer, specifier, claims draftsman and claims evaluator in their tasks or risk identification and assessment.

Objectivity

Closely linked to the subject of integrity is the requirement for objectivity and the ability to avoid situations in which conflicts of interest may occur. The legal profession has long been aware of the dangers of conflicting interests on behalf of the clients for whom they act. Other professions have not been so active in recognising the potential for unethical behaviour in this area. The key to this is identifying where individuals are putting themselves in potentially compromising situations and to seek to avoid the damage, real or apparent, that might be done by the situation.

The guidance given in this connection is that rather than avoiding these situations altogether, the simple raising of concerns between the project team might be enough to instil this ethical principle. The guidance to the code should attempt to address conflicts of interest at each stage of the process from first inception to the final award of an arbitrator, principally by conducting a conflict review.

Accountability

This ethical principle is linked to objectivity and integrity in that it deals with going further than the remit of your particular role to deliver what is required and the need on occasion to provide a warning or information. Again this is a difficult area in so far as English law is concerned as no general duty to warn exists. The mischief that this statement is designed to avoid is the propensity for professionals to err on the side of caution and distrust their dealings with one another. In the guidance to the code it should be possible to produce a list of principles which identify when and how the scope of a professional's duty should be spelt out. A clear message from the judiciary on the circumstances in which a legal duty to warn will be upheld would aid clarity.

In the writer's view the Statement of Ethical Principles has a good deal to commend it. It is comprehensive, concise and of universal applicability to the industry it seeks to ethically improve. The benefits of replacing existing ethical codes with the single statement are self-evident. Adoption and promotion of the code would alter the perception of ethics from being a private matter with loose references to one of many professional codes to a single readily identifiable source. The Society of Construction Law has stated its willingness to work in

conjunction with professional bodies and others in the industry are pursuing allied initiatives. Work is currently ongoing to produce the guidance notes and examples of ethical conduct mentioned above.

Tellingly, the Society did not feel able to take on a role of the regulation or the imposition of sanctions for breach of the ethical code. The justification for this was that a significant change would be needed to the constitution of the Society. Rather than an enforcement role, His Honour Judge Thornton proposed that the relevant parts could be incorporated into rules of conduct of the professional bodies, into Standard Methods of Measurement and standard forms of contract. This approach has much to commend it in terms of the Statement becoming a seal of ethical approval whereby the signatories to these documents incorporating the statement achieve an ethical accreditation.

Whilst it makes sense to promote the statement and compliance with it in this manner with the question remains as to whether or not it will make a difference or become "window dressing" as has been the experience with other ethical codes.

Other Recent Drivers towards Ethical improvement

One way of promoting ethics is to crack down on those incidences where unethical behaviour transgresses into breaches of the criminal law. The relevant enforcement bodies within the European Union and the United Kingdom have recently been busy in this regard.

The European Commission unearthed a cartel amongst lift manufacturers discovered to be operating in Germany, Belgium, Luxembourg and the Netherlands in operation between 1995 and 2004[xxiii]. In scenes reminiscent of James Bond films mobile phones drops, code words and secret rendezvous came to light during the investigation. The fines imposed totalled 992 million Euros handed out to some of the leading names in lift manufacture, installation and maintenance. Judgment like these send a clear message of deterrent to others but it is extremely worrying when the biggest players in an industry sector are implicated in these investigations. If household names are operating in the manner then what is happening in the rest of the industry?

On a national level, enforcement activity in the United Kingdom is carried out by the Office of Fair Trading (OFT). In 2004 the OFT successfully prosecuted nine roofing contractors in the West Midlands who had agreed to fix the prices of repair, maintenance and improvement

through collusive tendering, and fined those responsible nearly £300,000 in total.[xxiv] The efforts of the OFT to combat corruption continue and over the last three years the OFT has been carrying out an investigation into bid rigging. In April 2008 Statements of Objections were laid against 112 Construction Companies, many amongst them being market leading names. To date in the investigation 40 firms have admitted the charges and 37 firms have applied for leniency. The remaining companies have until the end of June 2008 to answer the charges made. The allegations will then be made public and the detail will be open to scrutiny.

One theme that is bound to arise out of the investigation is ignorance of the law in this area. Another is the variance in degrees of people's perceptions of wrongs having been committed. There is an interesting debate to be had around the question of whether the practice of submitting cover prices is illegal. For a busy contractor not wishing to fall foul of a pushy client the practice of submitting a cover bid would not seem unreasonable. The realisation that this practice can lead to a fine of up to 10% of their annual turnover would be a startling one. If the contractor ran his business in a manner consistent with an ethical code then there would have been no doubt as to whether the practice was illegal or otherwise.

Conclusions

The prosecutions and convictions made in those situations where unethical behaviour transgresses into criminal activity are one way to promote ethical improvement. The chances of being caught have been raised by recent moves but only to a very small degree. Furthermore those engaged in criminal acts are aware of the consequences and often consciously choose to run the risks involved. The existence of an ethical code is unlikely to make a difference to those instances of unethical behaviour.

Where it can make a difference is in the situations where there is unintentional ethical transgression where people lack the necessary guidance. The purpose of the single code is to let professionals know when they are in breach of the statement. Furthermore, the Statement can give individuals a reference point with which to question their organisations' behaviour or to call for clarification from the organisation on exactly what is and what is not ethically acceptable. Clearly, the status quo will not be changed overnight given the prevailing entrenched attitudes in evidence in some parts of the industry.

Beyond this point it is probably unrealistic to expect further ethical improvement in the industry through either the promotion of a code or the enforcement of related criminal

sanctions. For further improvement one must look to the adoption of systems of collaborative working in the industry. The participants in longer term trust-based relationships as are now common in some parts of the industry would find it much easier to sign up to the statement of ethical principles – it is what they would be doing in any event to achieve their stated objectives.

The Statement of Ethical Principles emphasises the importance of risk identification and allocation to the proper function of the construction industry. These subjects are also at the heart of collaborative working. Both these ways of working seek to avoid situations where professionals have no realistic choice other than to act unethically. In this analysis ethical improvement is delivered through a reduction in the situations where it appears necessary to seek an advantage at someone else's expense

Quite apart from the financial cost, waste and inefficiency of unethical conduct there are knock on effect in terms of damaging the industry's reputation. This may result in a struggling to recruit newcomers to the industry in the future. More should be done by those delivering construction courses within the higher education system to promote ethics. Learning more about ethics using the Statement as a teaching aid should empower students to actively question any dubious practice they might see at work and thereby benefit the industry in the long term. The question for the students should be – what sort of an industry do they want to pass on to the next generation?

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