Allied Constructors:
Ethics in Project Planning and Execution
Teaching Notes for Instructor
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Preface

This case study is supposed to expose the students to ethical decision-making in construction management, and its reflection on their professional conduct, which in turn has its impact on the image of the construction industry as a whole. This case will attempt to build on knowledge acquired through construction management education and practice. It briefly lists some of the contractual issues that might have an impact on a decision. The body of the case study provides a narrative of facts and actual responses, allowing for the instructor and the students to evaluate the course of action and the decisions resulting thereof, and exploring alternative decisions by assuming different roles and addressing the issues from different perspectives. The instructor can assist the students by disseminating the information in a gradual way, dividing the class into teams, each assuming the responsibility of one of the parties to the project, and asking the students to justify their decisions accordingly.

The case study can be discussed in different course settings including such classes as:

- Estimating
- Scheduling

[1] From the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations
- Construction contracts and documents
- Or a comprehensive capstone class encompassing all of the students’ academic experience.

It is strongly encouraged that instructors avail themselves of resources to familiarize students with the federal and state laws pertaining to the subject matter of this case study. The AGC Education and Research Foundation, an entity established by members of the AGC of America, adheres to the following anti-trust policy AGC of America Antitrust Policy, which should be supplied to all students:

**AGC Policy on Antitrust Compliance**

AGC of America will conduct its affairs in strict compliance with the antitrust laws. No AGC activities shall create even the appearance of a violation of the letter or spirit of the antitrust laws.

**Don’ts:**

- Don’t discuss prices, pricing methods, terms or conditions of sale, territories or customers with competitors.
- Don’t discuss pricing practices or strategies with competitors, including methods, timing, or implementation of price changes.
- Don’t discuss discounts or rebates with competitors.
- Don’t discuss price advertising or cooperative advertising practices with competitors.
- Don’t discuss with competitors what is a fair, appropriate, or “rational” price or profit margin for suppliers, distributors, or retailers.
- Don’t discuss with competitors whether or not to deal with certain customers or in certain markets, countries, or channels of trade.
- Don’t discuss with competitors, suppliers, or customers cutting off or not dealing with certain companies.
- Don’t agree with customers about minimum resale prices, or exert coercion on customers to resell at a certain price.
- Don’t refuse to sell one product to a customer unless the customer agrees to buy a second product or service.

**Dos:**

- Do know the purpose of Association meetings.
- Do ask for an agenda if you do not receive one with your meeting notice. If you have any questions about any agenda items, contact an attorney before attending.
- Do request that counsel be present at any Association discussion that involves potentially competitively sensitive information.
- Do seek legal review of any “code of ethics,” “industry guidelines,” “standards,” or the like which are sponsored by the Association.
**Learning Objectives**

By the end of the discussion of the questions posed in this case study, students should be able to:

1- Identify different project stakeholders and the impact of their decisions on the project outcomes.

2- Recognize ethical behavior and develop awareness of compromising situations leading to unethical decisions.

3- Implement a proper communications strategy leading to better sharing of information which will result in better decision-making.

4- Recognize that many issues that are considered to be unethical are perceived by the construction industry to be acceptable practice. It is important for students joining the construction workforce to recognize these inconsistencies as they progress through their professional careers.

**Case Synopsis**

The role of the instructor in the use of this case study is to be a facilitator, presenting the background information about the scenario or case, together with any supporting documents, and allowing for the students to start the discussion, assuming the roles of different project participants and presenting their case from the perspective of that participant. Role-playing is a tested tool allowing for creative debates to take place, with the instructor moderating these debates and illustrating the ethical and legal status of the elements to the argument. Allowing for the same group of students to address the scenario from different angles, representing different parties, will enrich the discussion as it allows for alternative scenarios and opinions to be contemplated and discussed. The scenarios provide open ended questions that may not have one definitive answer.

The questions are extracted from the case study, and appropriate analysis is provided for each. The instructor can start the discussion by asking the students to extract unethical situations from the narrative of the case study, and then guide them through the analysis.

The instructor can make changes to the initial setting of the case study making variations on the nature of the project (public versus private), the project delivery system (GMP versus lump sum or negotiated contracts), the CM self-performing part of the job versus coordinating among different subcontractors, and similar variations resulting in different scenarios and leading to a deeper discussion.

The case study could be addressed in multiple class sessions to support discussion of the various phases in the execution of a construction project. Section 1 could be discussed during the class coverage of preconstruction activities, section 2 could be discussed during class coverage of subcontract solicitation and award, section 3 could be addressed during coverage of management of construction activities, and section 4 could be discussed during coverage of project close-out.

If desired by the instructor, the case study could be discussed in a single session. Recommended times and coverage for two types of single sessions are shown below:

**Suggested teaching plan for the complete case study in one session (2.5 hours)**

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Questions and Answers

Part 1: Preconstruction Phase

a. Background

The market has been extremely volatile in the last several months, and the market pricing for various trades has produced a wide range of bid results, including bids from some subcontractors with less than excellent reputations, yet providing very competitive pricing. Southeast State University, under pressure to complete the project on time and within budget, wants to complete the project with minimum cost growth.

b. Site Characterization

The existing site for the project had been used for the past 45 years as a metal foundry and had been recently acquired by the University. The University elected to develop this site since it was near the main campus and would encourage additional investment in the reuse of this former industrial area. The demolition of the existing buildings and site clearing from obstacles were done under a separate contract. The University hired a consultant to perform the initial surveying and geotechnical evaluation of the property, including exploratory soil borings,
showing different layers of predominantly clayey soil. The geotechnical evaluation was performed by a registered geotechnical engineer and the report was included in the project bid documents. The bid documents emphasized that the geotechnical report was “to the best of our knowledge”, and that the potential subcontractors were responsible for underground conditions. It was further pointed out that there would be no extras for unforeseen underground conditions.

1. Is it ethical for an owner to hold the contractor responsible for underground conditions? Is this exacerbated by the fact that the owner has provided a complete geotechnical investigation?

It is the Owner’s responsibility and ethical obligation to be as transparent as possible about conveying all available and pertinent information of the site to potential bidders. The contract should provide equitable risk allocation allowing for each party to provide their best effort and assume risk according to their abilities and control. Shifting too much risk to the contractor will result in one of three less than optimum situations: 1) The contractor will provide for excessive risk in their estimate, thereby increasing the cost to the Owner, 2) the contractor will lose money if they run into unforeseen conditions, or 3) the contractor does lose significant dollars and it creates a claim situation. Owners will try to pass this risk on the contractor about 40% of the time.

2. What is the contractor’s defense if he runs into material unforeseen underground conditions? For example, what if the water table is at 5 feet when the geo-tech report shows 15 feet?

Although it is part of the contractor’s and subcontractors’ responsibility to visit the construction site prior to submitting a bid and to satisfy themselves to its existing conditions, a contractor with severe losses may find grounds to file a claim against the Owner. Many Owners will indicate, as a disclaimer, in the invitation to bid that it is the bidder’s responsibility to check the actual site conditions and that the information provided by the owner are to their (the owner’s) best knowledge, and that conditions may vary.

There is the Spearin Doctrine which states that a contractor has the right to rely on the bid documents provided by the Owner. This generally applies to plans and specs, but it can be argued that it also applies to other documents such as the geotechnical report.

Instructor: During class discussion, examine the situation where the existing water table is 5 feet below grade when the geotechnical report shows the general water table at 15 feet. This creates a serious dewatering problem for the contractor who then files a claim with the Owner. Prepare a fact comparison chart on the blackboard.

Under the facts for the Owner you can show:

- The specifications clearly hold the Contractor responsible for unforeseen conditions.
- The specifications clearly advise the Contractor that there will be no extras for unforeseen conditions.
- Conditions may vary.
- The site was an old metal foundry.

Under the facts for the Contractor you can show:

- A complete geotechnical report was included in bidding documents showing the water table at 15 feet.
Who stands to gain from dodging responsibility? Take a class vote. Then bring up the Spearin Doctrine. When the Owner takes responsibility for unforeseen conditions, he bears the cost and receives the gain in improvements to his building. When the owner passes the responsibility to the Contractor, without proper compensation, he still receives the benefit to his building. Is this a realistic problem? What is ethical? What is fair? What will the judge say?

c. Project Cost Estimate

Prior to finalizing the project GMP, Allied Constructors requested estimating assistance from one of their regular, and reliable, subcontractors for the specialized work of laboratories and clean rooms. Allied subsequently took bids on the work and determined that the preferred subcontractor’s price was $841,000. The low price, from a less than reputable contractor, was $801,000, a difference of $40,000. Allied has two options. They can go with the subcontractor with whom they are more familiar, who had proven their competence and quality on previous projects, and had helped Allied develop pricing for the project, or they can go with the low bidder.

3. Are there variables, other than price, that should be considered in making the final selection? Is it ethical to award to the second bidder?

The best practice is that the bid award should be based on the lowest responsible responsive bid, and not just the lowest price. Issues that should be on the table are 1) time of completion, 2) quality of work, and 3) claims history on the part of each subcontractor. The good working relationship among project participants is of great importance. The subcontractor voluntarily opted to assist Allied with the pricing policy for the project due to the long standing relationship and past experience of working together. Nevertheless, this should not be construed as a quid-pro-quo that the subcontractor will receive any special treatment from the Contractor. Bidding rules and procurement laws, especially for public projects governed by state and federal statutes would prevent any special treatment.

Another consideration is that Allied could have provided a stipend for helping on the development of the project or simply hired a disinterested subcontractor who will not bid on the project. If the low subcontractor fails on time, quality and/or files a claim, Allied will be held accountable. If however, Allied recommends using the higher subcontractor, the Owner could simply adjust the budget, and the GMP. The contractor has the right, ethically, to select the best subcontractor. Allied may be bound in this project by statute in the selection of the subcontractors due to the public nature of the project. Every project goes through this dilemma to one degree or another. Some contractors refuse to hire the lowest price subcontractors.

4. Can Allied renegotiate with the preferred subcontractor? Is this ethical?

It happens every day. You can make the argument that subcontractors are responsible for their reputations. All contracts are negotiated before final acceptance. Is this any different? It is in everyone’s best interest to arrive at an equitable price. This includes the Owner, Allied and the preferred subcontractor. On private projects, the situation may be slightly different, as the Owner may be consulted and may give the consent of such special treatment provided that it will not affect the project bidding competitiveness and fairness, and will yield better pricing for the Owner while maintaining the project quality.

Instructor: Lead a class discussion by identifying what options Allied has in selecting the Clean Room Subcontractor. List on the blackboard:
• Contract with the preferred subcontractor.
• Contract with the low subcontractor.
• Renegotiate with the preferred subcontractor.
• Require the low sub subcontractor to provide a performance bond.

List on the board beside the original list, the benefits and risks associated with each decision. Draw a line from each option to the subsequent list. Ask the class if there are performance issues in the equation. It being a CM job, who pays the $40,000? Does this bear on the decision? Is that an ethical consideration?

Take a class vote. What is ethical? What is prudent? Is that a word that should be in our vocabulary?

Part 2: Subcontract Solicitation and Award Phase

a. Underground Site Conditions

During the bidding on the bid packages, a very competitive price was submitted by an earthwork and foundations subcontractor, based on their familiarity with the area where the project will be built due to having been involved with a project in very close vicinity to the current project. Largon, the earthwork subcontractor, knew about pockets of expansive collapsible soil that do not show on the geotechnical reports. Largon used this prior knowledge to submit lower unit prices for excavation, knowing that they will be able to recoup the difference through change orders based on the existing type of soil, and the possibility for soil replacement, and/or change in the foundation design. Largon did not share this information with Allied Constructors and thought that the initial, and artificial, price reduction resulting from this relative unbalancing of their bid will result in a lower bid price, thus increasing their chances of winning the bid.

5. Should Largon share this information with Allied? Why or why not?

Experienced professional contractors often know of project or site conditions that will give them an advantage over the competition. This is atypical example of just such a situation. Largon is not contractually obligated to provide information about potential site conditions to Allied. However, Largon assumes the risk by submitting a low bid if differing site conditions are encountered. If differing site conditions are “Not” encountered Largon may be too cheap and will lose money.

6. Who bears the financial risk for the cost of handling potential differing site conditions?

The Owner has advised all contractors that they are responsible for underground site conditions. However, in this case, the expansive collapsible material may require a change in scope including replacement of the unacceptable material and a redesign of the foundation. The Owner should have to pay for changes in scope and redesign.

Instructor: Lead the discussion that every contractor wants to have information that will give him an advantage over the competition. That’s construction. However, the contractor must be prudent. He doesn’t want to bank on a change order that doesn’t materialize. There is that word again. Learn it!
b. Subcontract Clauses

G & S Mechanical, the mechanical subcontractor, received several bids from second tier subcontractors and suppliers on the project. It being a tough economic time and knowing that the supply of such services exceeds demand, G & S required all awarded subcontractors and suppliers to agree to no-damage-for-delay, pay-when-paid, and waiving of their lien rights.

No Damage for Delay Clause
The Contractor agrees to make no monetary claim for delays, interferences or hindrances of any kind in the performance of this Contract, occasioned by any act or omission to act of the authority of any of its Representatives and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work.

In general contracting, if the subcontractor delays the project, they are liable to the Owner and the general contractor for the associated delay damages. Conversely, if the Owner and/or general contractor delay the subcontractor, they should also be liable to the subcontractor for the associated delay damages. The subcontractor waives this right if they agree to the clause.

Pay if Paid Clause
The Contractor’s obligation to make a payment to its subcontractors and suppliers is subject to the express condition precedent of payment therefore by the Owner.

If the Owner goes broke, or simply has a dispute with the general contractor and does not make payment for the project, then under this clause, the general contractor is under no obligation to make corresponding payments to the subcontractor. The subcontractor is at risk of not getting paid for causes beyond their control, if they agree to this clause.

Waiving of Lien Rights
To the fullest extent permitted by law, the Subcontractor agrees that no mechanics liens will be filed against the project or project premises or any improvements thereon or against any monies due from the Owner to the General Contractor or from the General Contractor to the Subcontractor for any work performed in connection with the Work.

A mechanics lien is a security interest in the title to property for the benefit of those who have supplied labor or material that improve the property. They were put in place to secure payment for labor and materials used to improve the value of property. Subcontractor’s lien rights protect them from general contractor default. If the general contractor defaults, the subcontractor can file a mechanics lien against the Owner of the project for payment for work completed. It must be filed in 60 or 90 days depending on the state. If the Owner fails to make payment, the mechanic’s lien can be enforced by judicial foreclosure sale of the property. The exact procedures for processing liens vary according to state statute. If the subcontractor waives the right to file a mechanic’s lien, they waive their protection under the law.

G & S Mechanical knew that their contract with Allied Constructors did not have such clauses. To the contrary, it included clear time limits about payments to subcontractors and suppliers within 28 days of receiving payment from the Owner, and compensation for delays caused by the actions of the Owner. The contract between Allied and G & S Mechanical also included a clause reflecting the right of the subcontractor to file a mechanic’s lien in case of not receiving their final payment upon project completion. One of the subcontractors to G & S
mechanical had just recovered from a lawsuit related to similar exculpatory clauses, which are primarily disclaimers protecting one party against another by removing the blame from the first party that may have caused the damage. Knowing that courts do not look favorably at such restrictions, especially in cases of ambiguity in the contract language or conflicts among its clauses, the subcontractor signed the contract knowing that they can claim later for delay damages.

7. **Is it ethical for G & S to insist on exculpatory clauses? Is this impacted by the fact that G & S doesn’t have those same clauses in its contract with Allied?**

Fairness and ethical behavior dictate using flow-down language, which means that the conditions of contract from a higher contract (G & S/Allied) would be used in lower contracts (G & S/subcontractors). Some modification may be made from time to time to affect the review period of interim payments (e.g. 15 days in a higher contract and 30 days in a lower one resulting in partial project financing by the second and third tier contractors, and sometimes simply stated without time limits as no-pay-until-paid). An exculpatory clause is a disclaimer removing the blame and responsibility from one party and placing it on another. Examples include broad indemnification, no-damage-for-delay, and pay-if-paid. The enforcement of such exculpatory clauses has had mixed results in courts, where some courts totally reject such practices, some others have allowed it within certain limits. While G & S was not ethically justified in imposing an additional burden on her sub-subcontractors and suppliers, it was a gamble from the sub-subcontractor’s side to sign the contract while disagreeing with its clauses, thinking that he can recover any additional costs through claims, whether justified or not.

Ethical or not, we see this activity throughout the construction industry. The subcontractor should be aware of the danger and risks involved. These kinds of clauses can put the subcontractor out of business.

8. **What are a subcontractor’s options in dealing with a contract that includes exculpatory clauses?**

It would be better to negotiate the contract clauses prior to signing the contract with G & S, highlighting the negative results of improper risk sharing. The subcontractor can always elect to walk away from the job by not signing the contract, and that depends to some degree on their need for work.

**Instructor:** – Conduct a “Role Play” between the subcontractor and the general contractor (GC). The situation is that the GC has presented the subcontractor with a subcontract agreement which includes the exculpatory clauses. The subcontractor must go first and explain why the clauses are unfair and should not be included in the agreement. The GC must then respond on why they are to be included. The two role players are required to negotiate the agreement to conclusion, short of walking away from the negotiations.

The class must then discuss the merits of each presentation and the ethics of each perspective. It appears on face value that including these clauses in agreements is unethical, however, there are many Owners and GCs that feel well within their rights to include them. The nuggets in the case are:

- It is important that subcontractors recognize these clauses when they are included in their agreements.
- It is more important that the sub do everything possible to eliminate or mitigate the damage.
- The subcontractor, must at the very least, red line the agreement before returning it to the GC.
- It is often overlooked that the subcontractor’s business skills are being tested. Their reputation as a businessman will be impacted by how he manages his subcontracts.
If a subcontractor agrees to no damage for delay, are they safe in assuming that the court will not hold them to their agreement? Is this prudent?

“Pay if Paid” is not to be confused with “Paid when Paid.” “Pay when Paid” is standard language in most subcontracts used within the construction industry. If the general contractor pays the subcontractors before being paid by the project owner, he becomes the financial backer for the project. This is not fiscally prudent, nor is it ethically fair.

c. Material Pricing

Upon receiving notification that its bid was the lowest responsible responsive bid, Rafferty and Co., one of the interior finishes subcontractors, contacted the acoustic ceiling supplier to confirm an orally communicated price that was received in the last moment before submitting its quote to Allied Constructors. The suspended ceiling supplier kept its price to the last minute for fear that it would be underbid. When Rafferty called after submitting the bid to confirm the material pricing, the supplier reneged on the offer, claiming that they would be tied up in other projects and would not have the required manpower for the job. Rafferty had relied in good faith on the supplier’s offer, but lacked a written formal quote, which would have resulted in selecting the second material price quote, resulting in a $35,000 price difference that Rafferty would have to absorb.

Prior to contacting the second lowest bidder, Rafferty received a call from a supplier that had not originally submitted a quote to Rafferty, but was now offering a very competitive price that would enable Rafferty to avoid most of the losses. Rafferty accepted the new low price while being assured that the quality of materials will be acceptable. The second lowest bidder for the acoustic ceiling package contacted Rafferty explaining that the selected supplier had had financial problems in the past and may not be able to provide the desired quantity of material. Upon contacting the supplier, Rafferty confirmed the information.

9. Does Rafferty have recourse against the subcontractor who gave the oral quote?

Several states allow the contractor to recover any lost profits or bidding advantages through the concept of promissory estoppel. This legal principle holds a subcontractor responsible for an oral quote, upon which the contractor relied in good faith, and lead to the establishment of the bid price. Courts in the states that uphold promissory estoppel have granted the damaged contractor the right to recover damages from the reneging subcontractor in the amount of the difference between that subcontractor’s promised bid pricing and the second lowest bid.

10. As the supplier analyses whether they will honor their verbal quote, are there other issues that they should consider besides price?

A contractor’s reputation and integrity are their strongest assets and best marketing tools. Reneging on a promise, even if it was a verbal promise, tarnishes a contractor’s reputation, and the word of mouth can travel long distances. Being known in the construction market as an unreliable contractor or subcontractor will make other project owners hesitant about hiring such a firm. If a mistake in pricing were discovered, the options for the subcontractor would include discussing the issue with Allied Constructors, and trying to withdraw the bid if the mistake was in good faith and not the result of ignorance or lack of experience, and as long as it does not create a procurement issue for the project necessitating a restart of the bidding process. Realistically, don’t expect Allied to be too cooperative. Allied promised a GMP to the Owner, which will be impacted by Rafferty.
11. From whom should Rafferty purchase the material? Should the second lowest bidder on the acoustic ceiling package voluntarily notify Rafferty of their competitor’s financial situation? What is ethical practice in this case?

Rafferty has a $35,000 problem. They must do everything possible to avoid the loss. They need to do some investigation on the details of the financial problems. Can the problem be solved by joint checks? Where does the manufacturer fit in to the situation? Meet with the supplier to work out a solution. Suppliers and subcontractors are in a fight for their financial lives. If a supplier has financial difficulty, their competition will use that against them as they should.

One of the imbalances in contracting is that it holds a subcontractor responsible for their quoted price, even if it is a last minute verbal quote, while it allows the contractor to perform post-bid bid-shopping. This latter practice, albeit legally tolerated, is highly unethical, as it gives a first tier subcontractor an advantage that is not given to a second or third tier subcontractor or supplier. Therefore, contractors should abstain from post-bid bid-shopping, and should be held to the same ethical standards as those expected by their subcontractors and suppliers.

Instructor: Lead a discussion in class by listing Rafferty’s options. They would be:

- Sue the supplier that withdrew his bid.
- Purchase the material from the second low bidder and take a $35,000 loss.
- Renegotiate with the second low bidder.
- He can purchase the material from the late bidder and take a chance.
- Negotiate with the late bidder’s manufacturers and strike a deal to supply the material.
- Negotiate with the late bidder and write joint checks to the manufacturer and the supplier.
- Ask Allied to raise the budget by $35,000 due to the withdrawn bid.

Ask the class to vote on the decision.

Are we going to sue the supplier? How much would that cost? Did the supplier make a good decision? What are the long term damages?

On one large project, the low concrete sub bid $44 million and the second low bidder was at $60 million, for a $16 million difference. The CM told the low bidder that if he withdrew his bid, he would never bid another project for that CM. The sub honored his price and lost over $10 million. What was the right call? What is prudent?

Part 3: Project Execution (Construction) Phase

a. Differing Site Conditions (DSC)

While performing the mass excavation for the project foundations, an old water line covered with asbestos for insulation was unearthed. The asbestos-covered water line did not appear on any of the drawings, but the University could argue that something of that sort could have been expected knowing that the site used to be used as an old metal foundry. Largon, the earthwork subcontractor, not wanting to risk any further delay, and not sure whether they can claim this as a differing site condition, informed their excavation team to wrap the line in plastic
and remove it without notifying Allied Constructors. The line was removed by plainclothes workers after wrapping it in plastic, and was disposed-of without notifying Allied.

Allied discovered after the fact that Largon did not require their workers to wear hazmat suits while disposing of the asbestos-insulated pipe, and that they had failed to notify Allied of the event.

**Claims for Concealed or Unknown Conditions Clause**

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions.

A Type I DSC claim involves situations in which the site surface or subsurface conditions deviate substantially from those represented in the bid package. A Type II DSC claim refers to situations in which the site surface or subsurface conditions are substantially different from those that might be reasonably expected.

12. **Does Largon assume some risk by not advising Allied of the differing site conditions? Should they have filed a claim with the Owner?**

Largon should keep open and transparent communication with Allied. The only correct response to this unexpected condition is to notify Allied Constructors of the asbestos water pipe. They should certainly have filed a claim with Allied. Since this may qualify under DSC type II, the Designer and Allied should have granted Largon an extension of time if this activity is on the critical path of the project’s schedule had he applied for such extension, and compensate him for any extra costs associated with mitigating the hazards related to removing and disposing of the asbestos-coated pipe. Delays should not be used as an excuse to cut corners or adopt or tolerate unsafe practices.

13. **If Largon files a claim after the fact, for the water pipe removal, how will the Owner respond? What are the Owner's ethical responsibilities?**

This behavior should not be condoned by Allied, even if it is going to result in delays and liquidated damages. Care for human life and health overrides any such considerations. Compliance with the safety rules and codes enforced by OSHA is a legal responsibility. If Allied were to compromise on this issue, they also can be held liable. The Owner should recognize this fact, and since it was not in Largon’s capacity to predict the existence of this hazard, this can be considered an excusable delay, and Largon can be granted a time extension to deal with the removal of the hazard. It is the Owner’s responsibility to uphold the safety rules and code and to enforce its application on their project.

The Owner would be well within his rights to reject the late claim.

14. **Does Largon assume some legal exposure for not taking proper action for the asbestos water pipe removal? What should have been their plan to remove the pipe?**

What Largon did was not only unethical, but illegal as well. They can be fined under OSHA regulations as the Controlling, the Exposing, and the Causing contractor. Largon should stop the work until a properly trained and
dressed team remedies the situation following the proper safety procedures. The employees should have refused to follow the Largon’s orders as it exposes them to unnecessary hazards.

Instructor: Lead the discussion. Are there time limits on when a claim must be filed? It is generally 10 days to 2 weeks. This gives the Owner some time to hopefully mitigate the damage of the claim. He didn’t even own the schedule.

Should the Owner have to pay if he was not notified in proper fashion? If he had been notified, he would clearly have had to pay. Contractors are notorious for not filing claims in timely fashion.

b. Schedule Management

Following a new change order approved by the designer related to the design of the bathrooms, G & S Mechanical discovered an unconventional method to complete the change order that should produce an extremely efficient production rate compared to the more conventional method. The new method will allow for the pre-assembly of the bathrooms in the form of pre-manufactured pods to be assembled off-site in a controlled facility, and then installed on-site, saving time and resulting in better coordination and cost savings. G & S can work with the pre-agreed price with the Allied Constructors, as the new method can yield some time and cost savings. The final deliverable will meet the same design criteria for quality and reliability. G & S selected to keep the time and cost savings for themselves, as this will create a safety buffer against future unexpected delays or cost overruns. G & S decided also to allocate the resulting total float on the schedule at their own discretion, while holding different subcontractors and suppliers responsible for meeting other deadlines according to the original schedule instead of notifying them and allocating the float in an equitable fashion.

15. How should G & S Mechanical deal with the available extra project float? Explain your answer.

It is within the right of G & S to use any innovative methods to deliver the specified product/system, as long as it complies with the technical standards illustrated in the project drawings and specifications. In some cases a subcontractor might use a proprietary system that they have developed. One of the criteria for the success of such proprietary methods is general compliance with the project objectives, and passing any type of specified tests or inspection upon completion. G & S is responsible for the warranty of their work for the specified duration under the contract. If the innovative system implementation during construction results in time and/or cost savings, it is their right of the subcontractor to keep them for his/her own use.

The project total float that appears on the schedule belongs to the project, and is a shared property among the project participants. It is usually distributed on a first-come-first-served basis. It is a common practice among some subcontractors and Construction Managers to create several versions of the schedule reflecting different amounts of project float, depending on whom the schedule is to be presented to. A subcontractor may “pad” the schedule with a few extra days of total float on some activities on the schedule presented to the CM if the subcontractor might think they may run late as a buffer, and as a way of protecting themselves from potential delays and liquidated damages. On the other hand, they may show another schedule, with no such buffers, to their sub-subcontractors and suppliers in order to urge them to finish their activities in the shortest possible time. A more appropriate practice is gaining ground in the form of cooperative schedules, sometimes called “reverse phase schedules” or “lean schedules” or “pull driven schedules”, where the schedule is developed as a joint effort among the project participants, including in many cases the Owner and the CM@R contractor, in order to reach an equitable risk allocation, and help each participant determine a reasonable duration for their activities. In such
cases, risk is allocated to the party best equipped to deal with it, and the project starts with a milestone schedule approved at contract signing, with the phase schedules, or fillers, coming at a later stage.

Rolling wave schedules, showing the details only for a rolling window in time (usually six to nine weeks) allows for better forecast resulting in more realistic schedules. A related topic that might create some conflict among project parties, and leads to hiding float from other project participants, is the issue of determining the value and amounts of liquidated damages. While not a penalty in themselves, these liquidated damages should reflect the actual damages a party (usually the Owner) may suffer from the delay of project completion beyond the contractual date (usually substantial completion). Most projects do not include a bonus for early completion, therefore driving the Contractors to the aforementioned practices.

c. Prevailing Wage Requirements

While Allied’s project manager was evaluating Lafayette Landscaping’s pay application for a monthly submission to the University, the project manager noticed that the Lafayette was paying their employees less than the minimum pay tables established by the U.S. Department of Labor as required by the Davis-Bacon Act, which is summarized below:

The Davis-Bacon Act
The Davis-Bacon and Related Acts, apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of $2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon Act and Related Act contractors and subcontractors must pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area. The Davis-Bacon Act directs the Department of Labor to determine such locally prevailing wage rates. The Davis-Bacon Act prevailing wage provisions apply to the “Related Acts,” under which federal agencies assist construction projects through grants, loans, loan guarantees, and insurance. For prime contracts in excess of $100,000, contractors and subcontractors must also, under the provisions of the Contract Work Hours and Safety Standards Act, as amended, pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. The overtime provisions of the Fair Labor Standards Act may also apply to DBA-covered contracts.

Under Section 3143 of the Act, the Project Owner has the authority to terminate the contractor’s right to proceed with the work or part thereof. Parts of the landscaping work are on the critical path, and any resulting delay will delay the overall schedule, thereby jeopardizing the project timely completion and result in liquidated damages. Allied’s project manager notified Lafayette of the discovery, and requested adjustments to the pay rates to comply with the act, and threatened to notify the University of any future violations.

16. How should Allied Constructors respond to Lafayette’s pay rate? Explain your answer.

Allied should notify the Owner of Lafayette’s violation, and reach a decision jointly. On a public project, enforcing the statutes is critical. In most cases, in order to maintain the project schedule and achieve a greater good by finishing the project on-time, the Owner may elect to penalize the violating subcontractor, since contract termination and seeking a replacement, especially on a critical activity at a later stage of the project execution, will most likely result in delays and cost overruns, which are not in the public good.
d. MBE Utilization

Allied’s project engineer was reviewing the shop drawings submitted by Geiger & Peters (the structural steel subcontractor) for one of his suppliers, the project engineer called to clarify some information about one of the details on the submittal. During the conversation, the project engineer discovered that this supplier, which was portrayed to be a minority business enterprise (MBE), had a core business that was not primarily related to the contracted work, and in essence the Geiger & Peters materials were “passing through” the MBE company to get credit for the MBE percentage dictated in the contract. Replacing the supplier at this point in time would cause some disruption to the project, and would result in additional cost over-runs in addition to the delays. The project engineer notified the project manager, who decided to deduct five percent from the value of the work done through that supplier as a penalty for Geiger & Peters’ disregard for the contract requirements. The contract MBE requirements are shown below:

**MBE Obligation of Bidder Clause**

The bidder shall make a Good Faith Effort to achieve the Participation Goal for MBE/WBE subcontractors/suppliers. The failure to meet the goal shall not necessarily be cause for disqualification of the bidder; however, bidders not meeting the goal are required to furnish with their bids written documentation of their Good Faith Efforts to do so. Award of Contract shall be conditioned upon satisfaction of the requirements set forth herein.

**Definition:**

A Minority-Owned Business Enterprise (MBE) is defined as a business which is certified as being at least 51 per cent owned and operated by persons of Hispanic or Latino ethnicity (Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin), or Black or African American, American Indian or Alaska Native, Asian, or Native Hawaiian or Other Pacific Islander race. A Woman-Owned Business Enterprise (WBE) is defined as a business which is certified as being at least 51 per cent owned and operated by one or more Non-Minority Females.

17. Was Geiger & Peters justified in claiming the MBE status for a supplier whose main line of business did not pertain to a scope of work related to the construction of the project?

While complying with the letter of the clause by including an MBE supplier, the spirit of the law was violated. Geiger & Peters could have asked for an exception if no MBE supplier were qualified to deliver the required quality, and public Owners may make these exceptions provided that the proof is presented. In this case G & P chose to use a pass through MBE. It is common in the industry. Many times there simply are not enough MBEs who are qualified and available for the project.

The main purpose of including a “set aside” clause, specifying a certain amount of the contract to be executed by historically under-represented groups (minority owned, women owned, and small business owned enterprises) is to encourage these groups to have a share of the construction market. Setting “façade” companies and other “pass through” entities defeats the purpose for which this clause is added to the contract. While some Owners, including public ones, may be lax in enforcing this clause, it should be strictly enforced to encourage the under-represented entities to compete in a market dominated by larger entities. Allied should indicate to Geiger & Peters the intent of the clause and its purpose, and negotiate with them if there is a difficulty meeting its requirements.
18. **How will Geiger & Peters respond to the Allied project manager deducting 5% from their contract for this activity?**

The Allied project manager has no legal authority to assess a 5% penalty for MBE participation. This would have to be handled by negotiation and change order. Especially in light of the fact that G & P met the MBE goals.

### Part 4: Close-Out and Hand-Over Phase

During the final project inspections and the preparations for project hand-over, Allied Constructors’ project discovered that Kildaire, the subcontractor responsible for the supply and installation of fume hoods in the labs, had provided blower fans that were not the ones specified in the contract documents and included in the submittals approved by the design engineer. Testing on the exhaust system and the blowers of these fume hoods had been previously conducted, and the results were satisfactory. He also determined that the blower fans were not “Underwriter Laboratory” certified and the installed equipment could create a hazard in the long term.

Kildaire did not deny the fact that the blower fans were not the ones specified and included in the submittals, but in fact exceeded the required specifications and were more readily available at the time of installation, which helped Kildaire stay on schedule. Kildaire showed the project manager documentation proving that there was no price difference, and that the substitution did not result in any financial advantage for the subcontractor.

19. **What is the extent of Kildaire’s legal and ethical exposure in the situation?**

Kildaire did not provide specified equipment. They did not provide the submitted equipment. They lied. They also didn’t provide Underwriter Laboratory certification, and there are concerns about the long term viability of the blower fans.

20. **What should be Allied’s response?**

The original issue with Kildaire is that despite the fact that the fume hood fans passed the inspection and performed tests, any substitution to a specified material/equipment should have received the review and approval of the Designer and Allied prior to its use. The subcontractor did not follow the ethical or legal route. Passing the tests and inspection by itself does not guarantee the long term performance or safety of the product, and the subcontractor may be called later to replace the non-specified material/equipment at their own cost, in addition to the negative effect on the subcontractor’s trustworthiness and integrity. Kildaire may also be asked to provide a bond or financial penalty to protect the Owner from future problems.
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An AGC Education and Research Foundation Task Force worked closely with the case study development team. Task Force members include:

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