CONTINGENCY FEES – ENGINEER/ATTORNEY HIRING ENGINEERING EXPERT

Case No. 00-10

Facts:

Engineer A is both an attorney and an engineer. Engineer A is retained by Client X on a contingency basis to perform legal services in connection with an accident in which Client X alleges that a manufactured product caused the accident. Engineer A interviews a number of experts familiar with the product and the reasons for similar accidents and hires Engineer B, an expert in the product in question. No written agreement is executed between Engineer A and Engineer B for the services in question. Engineer B reviews the facts and circumstances surrounding the accident, conducts and completes study, and issues a report to Engineer A. Engineer A reviews Engineer B's report and informs Client X that it appears that no basis exists for a lawsuit. Engineer B bills Engineer A for his professional services. Engineer A refuses to pay, indicating that since Engineer A was not paid for his services, Engineer A has no obligation to pay Engineer B.

Question:

Was it ethical for Engineer A to refuse to pay Engineer B for Engineer B's services?

References:

Preamble	-	*Code of Ethics:*	*Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness and equity, and must be dedicated to the protection of the public health, safety and welfare. Engineers must perform under a standard of professional behavior which requires adherence to the highest principles of ethical conduct.*
Section I.5.	-	*Code of Ethics:*	*Avoid deceptive acts.*
Section I.6.	-	*Code of Ethics:*	*Conduct themselves honorably, responsibly, ethically and lawfully so as to enhance the honor, reputation and usefulness of the profession.*
Section III.6.a.	-	*Code of Ethics:*	*Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*

Discussion:

The facts in this case illustrate a frequently encountered situation often presented within the design and construction industry – payment disputes that occur between clients that ripple into disputes between design and construction industry parties.

The Board of Ethical Review has considered ethics cases in the past involving an engineer being retained on a speculative basis. In BER Case No. 77-4, a county agency published an open announcement to consulting engineering firms soliciting

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expressions of interest in providing services for a water system project. The announcement made it clear that the engagement would be for the purpose of preparing an engineering report to be submitted to a federal agency to seek financial assistance for the proposed project. It was also made clear that the agency did not have any present funds to pay the consultant, that the agency was not committed to carrying through the project to construction, that if the report shows that the project is not feasible either from an engineering or financial standpoint, "…or that there is discerned a majority sentiment against the project for whatever reason, prior to federal funding commitment, then the project preparation will be terminated." The announcement further stated, "The consulting engineer would be retained solely on the basis of speculation that the project may proceed through the construction phase. If the project is stopped at any time before federal funds are committed, then the [agency] would have no legal obligation to remunerate the consulting engineer for services performed." The announcement closed with the statement that all interested consultants were invited to attend a public hearing "…to observe personally the public sentiment about the project." Although deciding that it would not be ethical for an engineer to undertake to provide the services indicated under the stated conditions insofar as they include an engineering report to be used as a basis for determining the economic and technical feasibility of the project, the Board noted that "we do not find that the code by its specific language bars an engineer from entering into a purely speculative contract. If the engineer wishes to take chances on being compensated for the services because negative public comment causes cancellation of the proposed project or because the owner may not ultimately obtain the needed funds for any reason, he or she may do so."

BER Case No. 77-4 and the present case illustrate some of the difficulties involved in speculative-type contracts. In BER Case No. 77-4, the case appeared to hinge upon the age-old problem whereby an engineer performs services on a contingency fee basis with the contents of the report containing information that suggest a course of action that could have a significant influence upon the decision of the client to move forward on the project, and thereby retaining the engineer for the services in question. In such cases, one observer has noted, "how long would an engineering firm stay in business if it performed contingency contracts that recommended that the client not proceed with the project?" In the present case, the issue related more to the apparent lack of a written contract or formal understanding between Engineer A and Engineer B, as well as an apparent disagreement about the protocols of payment when one party has not been paid. Nevertheless, these cases illustrate some of the difficulties involved in employing contingent contracts in the professional engineering sphere and should cause engineers to carefully scrutinize and be mindful of the risks associated with such agreements, particularly as here, there appeared to be a "chain" of contingency contracts.

In this case, the fact that Engineer A is a lawyer is not relevant to his obligation as an engineer dealing with another engineer, although it could be in other cases. The Board

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believes that Engineer A's failure to have informed Engineer B in advance about the nature of Engineer A's arrangement with Client X was at best misleading. If Engineer A intended that compensation to Engineer B would be on a contingency fee basis, Engineer A should have negotiated this up front with Engineer B. Having not done so, Engineer A had a clear obligation to compensate Engineer B in full.

Conclusion:

It was not ethical for Engineer A to refuse to pay Engineer B for his services.

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