CONFLICT OF INTEREST – CONSULTANT SERVING AS CITY ENGINEER

Case No. 01-11

Facts:
Engineer A is the president of WXY Engineers, an engineering firm. For many years, WXY has provided services directly to City H (a small city), and WXY currently has three contracts directly with the city for separate projects with City H. Engineer B, the full-time city engineer, has resigned from his position with City H. City H officials are currently considering whether to replace Engineer B with another full-time city engineer or, as a cost cutting and efficiency measure, to hire a consultant (such as WXY Engineers) as the city engineer to perform general consulting services and be under contract to provide specific design services on individual city projects. One city official has raised a concern that because WXY is under contract with City H, having WXY serve as city engineer would constitute a conflict of interest. WXY does not perform any private work for developers or other private parties within City H and, therefore, if it were designated city engineer for City H, WXY would not be reviewing the work it performed for private clients.

Question:
Would it be ethical for Engineer A's firm, WXY Engineers, to serve as city engineer for City H, perform general consulting services, and be under contract to provide specific design services on individual city projects?

References:

Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*
Section II.4.d.	-	*Code of Ethics:*	*Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.*

Discussion:
Over the years, conflicts of interest issues have been regularly considered by the NSPE Board of Ethical Review. Since its inception in the late 1950s, the Board has considered many cases involving conflicts of interest in the public and private sector, as well as conflicts involving employment, litigation, government officials, construction, and other issues. Conflicts of interest are clearly among the most prevalent ethical issues that engineers face in their professional lives.

In an early case, BER Case No. 63-5, a small community retained a professional engineer, Engineer B, on a part-time basis to serve as city engineer. Engineer B was engaged in full-time private practice and treated his part-time service to the community as service to a client. The duties for the city usually included advising the city council on engineering problems, offering recommendations on engineering project considerations, and approving plans for engineering

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processes and works. In addition to general advisory services to the city, Engineer B was retained by the city council for the preparation of plans and specifications for a city project. In such cases, Engineer B was compensated on a normal professional fee basis over and above his monthly retainer. The Board ruled that it is ethical for a professional engineer retained by a community on a part-time basis as a city engineer to prepare plans and specifications for a project for the same community, but in so acting the engineer must be scrupulously careful that his advice is not influenced by his secondary interest as the engineer likely to be retained for the design of the project. The Board noted that "it is axiomatic that a professional person may not take action or make decisions which would divide his loyalties or interests from those of his employer or client." Among the issues the Board considered in BER Case No. 63-5 was the practical question of the engineer passing on the adequacy of his own plans in his capacity as city engineer. The Board noted that there is no requirement in the NSPE Code that an engineer's plans for a client must be reviewed by an engineer employed or retained by the client. The Board noted that the client has the right of review by its own engineer, but it may waive its right, as it did in BER Case No. 63-5. Under those circumstances, the engineer was acting in a dual capacity, but not a divided one.

Later, in BER Case No. 74-2, the Board considered a case involving a state law that required that every municipality have a municipal engineer whose duties and compensation are to be fixed by a municipal ordinance. The duties of the municipal engineer varied by size and nature of the municipalities, but generally consisted of attending meetings of public bodies of the municipality, providing general advice on engineering matters, maintaining tax maps, reviewing site plans and subdivision maps, preparing cost estimates for proposed facilities, handling complaints from citizens on engineering-related problems (drainage, roads, and the like), and advising on the retention of consultants for project requirements. Many of the smaller communities in the state did not have and could not afford full-time municipal engineers or supporting staff personnel for a full-time office. In such instances the smaller communities retained the services of a consulting firm in private practice and appointed a principal of the firm as the municipal engineer. Such a municipal engineer was paid either on a cost-plus basis or a flat monthly retainer—usually a relatively low amount. The municipal engineer's firm was thereafter usually retained for engineering services for capital improvement projects needed by the municipality. In deciding that it is ethical for the engineer to serve as a municipal engineer and participate in a consulting firm providing engineering services to the same municipality under the stated conditions, the Board determined that the public interest is best served by providing to the small municipalities the most competent engineering services which they can acquire. It is assumed that the state law was intended to achieve this end.

Turning to the facts, the Board believes many of the same considerations present in BER Case Nos. 63-5 and 74-2 are applicable to the present case. The facts indicate that Engineer A and his firm, WXY Engineering, have provided services to City H for many years and it appears that City H will gain the benefit of that experience and expertise. Moreover, the Board does not concur with City H official's concern that because WXY is under contract with City H, having WXY serve as city engineer would constitute a conflict of interests. Both the previously cited

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BER cases, as well as subsequent BER decisions, do not agree with the city official's conclusion. This view is reinforced by the fact that WXY does not perform any private work within City H and would not be reviewing the work it performed for private clients.

The Board is of the view that it would be ethical for Engineer A and his firm WXY to serve as city engineer for City H, perform general consulting services where these services do not include reviewing the work of Engineer A's firm and be under contract to provide specific design services on individual city projects. However, the Board would caution that WXY will need to disclose further circumstances (e.g., private work in city, reviewing its own work, etc.) that might create a potential for a conflict of interest. Under different factual circumstances, the city may have to revisit the ethical considerations raised.

Conclusion:
It would be ethical for Engineer A's firm, WXY Engineers, to serve as city engineer for City H, perform general consulting services, and be under contract to provide specific design services.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services—which must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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