CONFLICT-OF-INTEREST: THIRD PARTY DEVELOPER

Case No. 01-2

Facts:

A developer, Mall Dev, has approached a town requesting approval to construct a development on a vacant site in Niceville. Based on the size of the development, Niceville is requesting that an environmental impact statement be prepared that will address traffic operations, as well as other issues.

Niceville requests an outside consultant, Engineer A, to assist the town in scoping out the necessary traffic analyses and to review and advise Niceville on possible traffic impacts of the proposed development. The development will be both retail and offices and will contain a supermarket.

The consultant, Engineer A, is also assisting other jurisdictions in review of proposals by Mall Dev. Engineer A has disclosed to the town all relationships, if any, with the proposed developer, Mall Dev with announced tenants, and with other customers that develop sites for retail development. Niceville is satisfied that there is no conflict of interest.

More specifically, Engineer A is not currently representing any other developers in the town, but in the past has prepared traffic impact studies for other developers on projects concerning other developments constructed in Niceville. Engineer A is currently providing traffic impact studies to other developers in other jurisdictions, as well as services to Mall Dev. These have all been disclosed to Niceville.

Mall Dev, however, has informed Niceville that it believes the use of the consultant Engineer A is a conflict of interest and breaches the code of professional ethics. Mall Dev bases its belief on the fact that Engineer A has worked in the past, and is currently working for, other developers who compete for the same tenants Mall Dev tries to attract to its developments.

Questions:

1. Would Engineer A's work for the Niceville constitute a conflict of interest?

2. Was it appropriate for Mall Dev to raise an ethical issue relating to Engineer A's actions?

References:

Section I.4. - Code of Ethics: Act for each employer or client as faithful agents or trustees.

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Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section II.4.b.	-	*Code of Ethics:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*

Discussion:

Fundamental to the practice of engineering is the duty of loyalty of the engineer to the client. This is an individual and personal obligation that all engineers owe uniquely to their clients. It includes the basic responsibility to perform professional services in a competent manner, considering a client's overall project requirements and needs. In performing their work, all engineers must seek to avoid situations or circumstances that call into question this basic duty. One of the most common examples in which an engineer's duty to the client is called into question is the area of conflict of interests.

A classic illustration of this was BER Case No. 88-1. In that case, Engineer A was retained by the county to perform a feasibility study and make recommendations concerning the location of a new power facility in the county. Two parcels of land located on a river had been identified by the county as the "candidates" for facility sites. The first parcel was undeveloped and owned by an individual who planned to build a recreational home for his family. The second parcel, owned by Engineer A, was a developed parcel of land. Engineer A disclosed that he was the owner of the second parcel of land and recommended that the county build the facility on the undeveloped parcel of land because (1) it was a better location for the power facility from an engineering standpoint, and (2) it would be less costly for the county to acquire. The county did not object to having Engineer A perform the feasibility study.

In determining that it was not ethical for Engineer A to perform a feasibility study and make recommendations concerning the location of a new power facility in the county, the Board noted that although Engineer A's professional opinion was supported by two important public policy considerations (e.g., that the undeveloped parcel was a better location for a power facility and that the county's cost of acquiring the developed property would be higher than the cost of acquiring the undeveloped tract of land), these reasons were not sufficient to justify Engineer A's decision to perform the feasibility study for the county. The Board noted that public perceptions play an important role in engineering ethics. The facts and circumstances of Engineer A's study may have appeared to suggest a benefit to the "common good" if his recommended course of action was followed but these same facts and circumstances allow for the appearance of impropriety, and this can easily damage public confidence in the engineering profession. Clearly there could have been public perception under the facts that Engineer A did not want to risk personal disruption of his developed property or possibly anticipated future appreciation of the value of the property. Engineer A should have followed the far simpler and more ethical approach recommended in the earlier BER Case No. 69-13 which stated, "(The Engineer) can avoid such a conflict under these facts either by disposing of his land holdings

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prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time."

In the earlier cited BER Case No. 69-13, the Board reviewed a situation in which an engineer was an officer in an incorporated consulting engineering firm that was primarily engaged in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the Board under those facts was "May the engineer ethically design a water and sewer system in the general area of his land interest?"

The Board ruled that the engineer could not ethically design the system under those circumstances. The Board recognized that the issue was a difficult one to resolve, pointing to the fact that there was no conflict of interest when the engineer entered his practice. The conflict developed in the normal course of his practice, when it became apparent that his study and recommendation could lead to the location of a water and sewer system near his land. This could bring a considerable appreciation in the value of his land, depending upon the exact location of certain system elements in proximity to his land. The BER stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the NSPE Code of Ethics. The Board concluded by saying, "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels,' it is a necessary conclusion to achieve compliance with both the letter and the spirit of the NSPE Code. The real test of ethical conduct is not when compliance with the NSPE Code comports with the interest of those it is intended to govern, but when compliance is adverse to personal interest."

In the more recent BER Case No. 85-6, the Board reviewed similar facts and circumstances and came to a different result. There, an engineer was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area adjacent to a residential community in which the engineer's residence was located. After learning of the proposed location of the spur, the engineer disclosed to the state the fact that his residential property might be affected and fully disclosed the potential conflict with the state. The state did not object to the engineer performing the work.

Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed. In ruling that it was not unethical for the engineer to perform the feasibility study, despite the fact that his land might be affected thereby, the Board noted that the ethical obligations contained in NSPE Code Section II.4.a. do not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. Such an interpretation of the NSPE Code, The Board said, would leave engineers without any real understanding of the ethical issues nor any guidance as to how to deal with the problem. The BER noted that the basic purpose of a code of ethics is to provide the engineering profession

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with a better awareness and understanding of the ethical issues that impact the public. The Board concluded that only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

Turning to the facts in this case, while the circumstances described are somewhat different than the earlier cases considered, the Board believes some of the basic principles and issues considered are useful in understanding the present case. First, it is clear from the language in the NSPE Code and its application in the earlier cases that the obligation concerning conflicts of interest is owed to an "employer" or a "client." Therefore, under the facts presented, it appears that the duty would be owed solely to the "client," (e.g., the town Niceville) and would not extend to any third party (e.g., the developer Mall Dev). In other words, a conflict of interest cannot be asserted as a matter of ethical practice by a third party against an engineer. While Engineer A is performing work for Mall Dev in other jurisdictions and has obligations to Mall Dev, there is no factual assertion of a conflict of interest by Mall Dev other than a general, non-specific assertion of possible prejudice and bias. This, without more, is insufficient to raise a conflict. To conclude otherwise would result in subjecting an engineer's practice activities to a "veto" by any third party that might decide to allege some particular interest on a project.

The Board can easily imagine an endless list of speculative and baseless conflicts of interest alleged by third parties against engineers performing services for public agencies in order to improve the third party's business opportunities. We can also speculate that an ill-motivated client could assert in bad faith a conflict against an engineer for purely self-serving, and even malicious, motives. Under the NSPE Code, a third party, such as a developer, does not have a legitimate basis upon which to complain of an alleged conflict of interest, and once an "employer" or "client" is satisfied that no conflict of interest exists, the question of whether a conflict of interest exists should be resolved. Under the facts, it is clear that with full disclosure to all parties, Engineer A can pursue work with Niceville. As in all such cases, it is important that such situations be viewed in light of the total situation being contemplated.

Second, the NSPE Code language clearly recognizes that engineers frequently face conflicts of interest in their practice and are obligated to address them by disclosing all known or potential conflicts that could influence or appear to influence their judgment or the quality of their services. By doing so, the engineer fulfills his/her ethical obligation under the NSPE Code. Under the facts, this obligation appears to have been completely fulfilled with by Engineer A.

Conclusions:

1. Engineer A's work for the town would not constitute a conflict of interest since there was full disclosure. Based upon the language in the NSPE Code, it is clear that no conflict of interest exists and the engineer has fulfilled his ethical obligation under the NSPE Code.

2. It was not appropriate for Mall Dev to raise an ethical issue relating to Engineer A's actions.

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