CONFLICT OF INTEREST -- UTILITY AUDITS FOR CITY

Case No. 01-5

Facts:
Engineer A receives a "Request for Qualifications (RFQ)" from City X for the review of unbilled and mis-billed water and wastewater service records. One paragraph of the RFQ reads as follows: "The consultant shall be entitled to receive X% of increased revenues generated. If the consultant fails to identify and document unbilled or mis-billed water and wastewater sewer service records, the City shall be under no obligation to compensate the consultant."

Question:
Would it be ethical for Engineer A to enter into a contract under the circumstances described?

Reference:

Section III.6.	-	*Code of Ethics:*	*Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.*
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 manner in which engineers are compensated has long been a subject of the NSPE Code of Ethics. Over the years, the specific language contained in the NSPE Code, as well as the NSPE Board of Ethical Review Opinions, has significantly evolved. Many methods of compensation that have at one point in time been considered not ethical or improper are today deemed acceptable. This factor is a reflection of a variety of considerations, including changing ethical attitudes, competitive pressures, and legal requirements.

Over the years, the Board has considered ethical issues relating to contingent contracts based upon a variety of factors including speculative arrangements, savings to clients, identification of errors/omissions, lower construction costs, as well as other considerations. In each of these cases, among the key issues for the Board's review has been the question of whether the circumstances under which compensation was determined would have the effect of compromising the engineer's professional judgment.

Over the many years in which the Board has functioned, it has had several opportunities to review circumstances involving compensation arrangements with clients and others that could potentially call into question the independent judgment of the engineer. Such was the case in BER Case No. 73-4. There, an engineer, a specialist in utility systems, offered to industrial clients a service consisting of a technical evaluation of the client's use of utility services, including where appropriate, recommendations for changes in utility facilities and systems,

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methods of payment for such utilities, study of pertinent rating schedules, discussions with utility suppliers on rate charges, and renegotiation of rate schedules forming the basis of the charges to the client. The engineer was compensated by his client for these services solely on the basis of a percentage of money saved for utility costs. In finding that it was ethical for the engineer to be compensated solely on the basis of a percentage of savings to his client, the Board first noted that the NSPE Code does not rule out contingent contracts, pointing out that contingent contracts are improper only under circumstances in which the arrangement may compromise the professional judgment of an engineer. One example then cited by the Board as this type of restriction was found in BER Case No. 65-4, in which it was determined that it would not be ethical for an engineer to enter into a contingent contract under which his payment depends upon a favorable feasibility study for a public works project. The Board commented in BER Case No. 65-4 that "the import of the restriction . . . is that the engineer must render completely impartial and independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project."

In another case, BER Case No. 66-11, an engineer expert was retained by an attorney to provide expert analysis and advice on the technical reasons for a failure which led to certain damage. Although the engineer had provided these services on a per diem basis in the past, it was proposed by the attorney that the engineer be compensated on the basis of being paid a percentage of the amount recovered by his client. If the judgment was in favor of the defendant, neither the engineer nor the attorney would be paid for their services. In concluding that it was not ethical for the engineer to provide technical advisory services or serve as an expert witness in a lawsuit on a contingent basis, the Board, agreeing with BER Case No. 65-4, noted that the "duty of the engineer as a technical advisor is to provide his client with all of the pertinent technical facts related to the case, favorable and unfavorable alike." The Board also stated that under the facts, the engineer "could not ethically serve on a contingent fee basis because his conclusions might be influenced by the fact that he stood to gain financially by having his conclusions coincide with his personal interest in his remuneration, which is dependent upon his client being successful in the litigation." Comparing the facts to those in BER Case No. 65-4, the Board noted that the engineer must not be in a position whereby his form of compensation might tend to prevent him from being completely impartial, or from rendering a full and complete report containing both favorable and unfavorable facts or conclusions.

More recently in BER Case No. 91-2, Client, a non-engineer, retained Engineer A, a consulting engineer, to perform certain design services in connection with a waste-water treatment facility. Engineer A performed the design services and Client reviewed the documents prepared by Engineer A. Following the review, Client made the judgment that the documents prepared by Engineer A contained errors and omissions. Client terminated his relationship with Engineer A. Client then contacted Engineer B and proposed an arrangement whereby Engineer B would review the work prepared by Engineer A and identify errors/omissions contained in the documents in contemplation of a suit for breach of contract. Client proposed that Engineer B's fee would be dependent upon the ultimate court judgment or settlement made with Engineer A. Engineer B accepted the assignment under the terms proposed by Client. The Board concluded

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that it was apparent that Engineer B was being placed in a position of identifying errors/omissions in Engineer A's work in order to pressure Engineer A into a settlement which would result in a fee for Engineer B. By finding no errors/omissions in Engineer A's work there would be no fee.

The Board noted that "these circumstances appear to be just the very factors for which NSPE Code Section III.7.a. was intended to guard against." The Board determined that the circumstances in BER Case No. 91-2 were similar to those in BER Case No. 65-4 where the Board determined that a contingent arrangement based upon the results of a feasibility study was improper. Said the BER, "it would be difficult to imagine a clearer set of circumstances involving a contingent fee arrangement in which an engineer's professional judgment could risk becoming compromised." Importantly, the Board also noted that the circumstances in BER Case No. 73-4 involved the engineer's compensation being based on the money saved by clients for utility costs under circumstances which do not appear to involve a significant possibility of a compromise in judgment. However, in BER Case No. 91-2, the nature of the services and the related contingency arrangement suggested a strong possibility that the engineer's judgment could be compromised, or at the very least, create the appearance of being compromised.

Turning the facts in the present case, the Board believes that this case raises issues more analogous to BER Case No. 73-4. Under the facts, Engineer A would only be compensated if Engineer A satisfies her professional obligation to serve the client consistent with the public interest in making sure that utility fees are properly accounted for. It must be assumed that informed consent on the part of the public is appropriately obtained and this consent implies the existence of a public appeal process for an adverse decision made against a consumer. Within this context, the service is not subject to vague interpretation; it will in essence consist of properly documenting cases where the meter or measuring process is not functioning properly. The only apparent situation that could arise that might arguably compromise Engineer A's judgment could be circumstances where Engineer A might focus only on certain types of invoices (e.g., commercial vs. residential) that might yield the highest return, etc., as opposed to reviewing all bills equally. However, even in this situation, it would appear that such an approach would not adversely affect the client or the public, which would presumably support an approach that would obtain a higher revenue return. In the absence of some public policy concern that might impact on this issue differently, it is the Board's conclusion that no ethical concern exists. In view of the significant benefit to the client in this form of compensation, the Board can see the desirability of this approach.

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Conclusion:
It would be ethical for Engineer A to enter into a contract under the circumstances described.

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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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