CONFLICT OF INTEREST – PRIVATIZATION OF PLAN REVIEWS

Case No. 01-7

Facts:

A controversial new ordinance is developed by a local county Board of Supervisors to give property owners the option of hiring private engineers and architects to perform plan reviews and inspections normally performed by a building department. The ordinance has stirred debate about who in the design and construction process is responsible for the code compliance of buildings. According to county officials, the "affidavit ordinance" is intended to help the county encourage new development by streamlining the permitting process without compromising public safety. The ordinance states that the private plan reviewer or inspector must be a licensed engineer or architect other than the design professional of record, and is required to carry liability insurance, without a deductible, of at least $1 million for residential projects and $2 million for commercial projects. The ordinance also calls for an audit of 20% of all privately certified plans and 50% of all private inspections. Contractors have criticized the ordinance, claiming that it will encourage private plan reviewers to take less personal responsibility. Others have criticized the law because it will create a conflict of interest for the plan reviewers who are selected and paid by the property owners. It is recognized that most of the county plan reviews will still be performed by county plan reviewers and that the program is intended as an experiment.

Question:

Would it be ethical for engineers to participate in a private plan review under the circumstances described?

References:

Section I.1.	-	*Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall hold paramount the safety, health and welfare of the public.*
Section II.2.	-	*Code of Ethics:*	*Engineers shall perform services only in the areas of their competence.*
Section II.3.c.	-	*Code of Ethics:*	*Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*
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.*

Copyright © 2001 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Discussion:

The facts in the present case describe a growing trend in the public sector—the movement toward the privatization of services, including engineering and design services by governmental entities. In recent years, governmental agencies have sought to move various functions previously performed by in-house government employees into the private sector. These actions are driven by a variety of factors including expected cost savings, more timely action and anticipated improved services, innovation, and other considerations that are intended to benefit the public. This trend has not been without some controversy, and some of the issues discussed, some have related to the potential conflicts that could arise where a private engineering firm performs a public function.

The NSPE Board of Ethical Review has, on several occasions, reviewed ethical questions relating to situations in which engineers in private practice have been called upon to perform a public function. As the Board has noted in the past, at one time, the NSPE Code of Ethics specifically prohibited engineers from becoming involved in cases or situations where a conflict of interest was present. This was based upon the view that professional engineers must always be above reproach and avoid any situation that could be perceived as compromising their professional judgment and integrity as independent professionals. Classic examples of the Board's view can be found in BER Case Nos. 59-3, 60-5, 62-7, and 63-5, where the Board strictly viewed the obligation of engineers to avoid conflicts of interest.

Over time, the NSPE Code and the Board have moderated to the point of recognizing that certain types of conflicts of interest are difficult, if not impossible, to avoid and that while the NSPE Code holds paramount the public health and safety, the more realistic approach for individual engineers faced with this type of ethical conflict is to fully disclose the nature and extent of the conflict to the appropriate parties involved or impacted by the conflict. This is based upon the view that the parties that are most affected by the conflict and who have the most at stake (e.g., the public, clients, employers, other engineering firms, etc.) are in the best position to determine whether their interests will be compromised by the conflict. While perceived conflicts of interest are sometimes resolved by the parties as a result of full disclosure, in other instances, the conflicts are deeper and require the engineer to disassociate from a specific project.

Over the years, the Board has considered the issue of conflicts of interest in various contexts. In BER Case No. 76-3, an engineer principal under retainer for many years with a county for services on a water project, was then retained by a developer with the approval of county officials. The developer filed a petition with the county zoning board to rezone a substantial area of the county for commercial purposes. The county department of public works filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water/sewer facilities. The development company called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the rezoning petition. In concluding that the engineer was not ethical in appearing for the development company while serving as engineering consultant to the county, the Board noted that when the engineer was approached by the developer, while still on retainer to the

Copyright © 2001 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

county, it should have been quite clear to him that a conflict of interest was inevitable. "It would seem" The Board said, "that a little interrogation of the development company concerning its plans would have revealed the conflict of interest." The Board went further, stating that "it would be incorrect to accept the engineer's role as an expert witness in the ordinary sense of that kind of professional service arrangement." "The engineer," continued the Board, "was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the zoning board. He was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers."

In BER Case No. 82-6, an engineer was retained by the U.S. government to study the causes of a dam failure. The engineer was later retained by the project's contractor, who had filed a claim against the U.S. government for additional compensation. In concluding that it was not ethical for the engineer to be retained as an expert witness for the contractor under these circumstances, the Board noted that the facts were similar to those in BER Case No. 76-3 with one exception. In BER Case No. 82-6, the engineer was paid in full for his services to the government and was free to oppose its position on behalf of an adverse party, while in BER Case No. 76-3, the engineer had an ongoing contractual relationship with the county client. However, we noted that in recent years the language in the NSPE Code had become more restrictive and it therefore prohibited the engineer's actions in BER Case No. 82-6 because the engineer had failed to obtain the consent of his former client before serving as an expert on behalf of the contractor.

More recently in BER Case No. 94-1, Engineer A was retained by a developer in the early stages of a project to perform site and engineering studies in connection with a major development project. Later, Engineer A was selected by the state's department of transportation to oversee numerous sub-consultants in the preliminary design work for the proposed widening of eight miles of an interstate highway and proposed construction of a new interchange to serve the major development project. That work would be incorporated into the federal environmental impact statement analyzing the road project's effect on traffic and air quality. Engineer A officially informed the state department of transportation of his earlier work for the developer. In deciding it was not ethical for Engineer A to accept the contract with the state's department of transportation, the Board first noted that there was not sufficient distance between Engineer A's relationship with the developer and Engineer A's relationship with the state department of transportation. The Board found that the work being performed by Engineer A for the developer was very specific in nature, and that work might have a significant impact on the engineering services performed for the state. While Engineer A fully complied with his obligations under the NSPE Code by promptly informing the department of transportation of his prior business association, the Board did not believe that the disclosure of a conflict of interest to all interested parties absolved an engineer of the ethical concerns that could arise. The Board said, "there may be some circumstances where a conflict is so serious and the impact so great that disclosure alone would not be sufficient to address all ethical questions involved. Moreover, there may be situations where the conflict may not be viewed as serious to the affected public agency, but could raise questions of ethics in the mind of the public. Engineers need to be mindful of the impact that such situations may have upon the dignity and integrity of the profession."

Copyright © 2001 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Turning to the facts in the present case, the Board has generalized concerns about the ethical situation in which engineers will be placed, including those in which they are called upon to perform a public function (e.g., plan reviews) but are selected and compensated for such functions by private parties (e.g., developers, etc.) that stand to benefit by the engineer's actions. The obvious concern is that the engineer who functions as a plan reviewer is acting as a protector of the public interest. However, the question must be asked—how can an engineer act to serve the public interest, or even appear to serve the public interest, when the engineer is being retained and compensated by the private party seeking approval of the plans being reviewed? At the same time, the Board fully recognizes the important need for legislative and executive bodies to experiment with new and innovative public sector service delivery systems that better meet the needs of the public. One enhancement would be to let public agencies have a more direct role in retaining engineers to perform these services through the collection of fees from developers.

Balancing these considerations, the Board is not willing to say that it would be unethical for engineers to participate in a private plan review under the circumstances described. Unlike earlier BER cases, the development of this program was established as a public policy by county authority and has the clear sanction of law. Furthermore, the Board recognizes that some checks and balances exist within public plan review systems to eliminate, or at least limit, the possibility of abuse of the process through government audits of private reviews and inspections, as well as public monitoring of the system. Finally, because the reviews are being performed by licensed engineers, the state licensure board rules of professional conduct offer some deterrent against misconduct by individuals that will be performing the plan reviews. Moreover, to the point raised by contractor groups, it would appear that insurance carriers will also track claims in this area and penalize design professionals engaging in an inappropriate personal or professional manner through increased insurance premiums or the reduction or elimination of insurance coverage.

At the same time, the Board believes that these and other innovative public sector engineering service delivery systems need to be watched carefully in the years ahead to make certain that the public health, safety, and welfare is protected and uncompromised.

Conclusion:

It would be ethical for engineers to participate in a plan review with full disclosure under the circumstances described. However, the plan review process creates conflicts and questions that could be minimized if the local county, and not the developer, is responsible for retaining and paying the engineer for review and inspection.

BOARD OF ETHICAL REVIEW

E. Dave Dorchester, P.E., NSPE
John W. Gregorits, P.E., F.NSPE
Louis L. Guy, Jr., P.E., F.NSPE
William D. Lawson, P.E., NSPE
Roddy J. Rogers, P.E., F.NSPE

Copyright © 2001 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Harold E. Williamson, P.E., NSPE
William J. Lhota, P.E., NSPE, Chair

NOTE: The NSPE Board of Ethical Review (BER) considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and that appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

Visit www.nspe.org and learn how to obtain volumes that include NSPE Opinions (or call 800/417-0348).

Copyright © 2001 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).