CONFLICT OF INTEREST – LOAN FROM CONTRACTOR

Case No. 02-4

Facts:
Engineer A is a consulting engineer that performs both design and installation observation services. Following client review and approval of Engineer A's designs, Engineer A is generally requested to recommend a contractor to perform installation services and Engineer A frequently recommends that his clients hire Contractor B to perform the installation services because Contractor B performs quality construction. Recently, Engineer A mentions to Contractor B that Engineer A plans to expand his consulting engineering practice and, thereafter, Contractor B offers to lend Engineer A $20,000 at an interest rate significantly below market rate.

Question:
Would it be ethical for Engineer A to accept Contractor B's offer to lend Engineer A $20,000 at an interest rate significantly below market rate?

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.c.	-	*Code of Ethics:*	*Engineers shall not solicit or accept financial or other valuable consideration, directly or indirectly, from outside agents in connection with the work for which they are responsible.*
Section III.5.b.	-	*Code of Ethics:*	*Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the Engineer in connection with work for which the Engineer is responsible.*

Discussion:
The question of what constitutes an improper inducement that might influence or appear to influence an engineer in making a decision is often not an easy question to answer. The answer will be based upon a variety of factors—some objective with others being more subjective. It is often very difficult to get into the mind of an individual to determine what motivates the individual to make or not make certain decisions in connection with their engineering practice.

It is essential that an engineer maintain an "arms length" relationship with contractors, vendors, etc. having, or potentially having, contractual arrangements with the engineer's employer or client. It is often difficult to discern whether a gift is an expression of gratitude or an attempt to buy a favor, and it is just as difficult to ascertain the influence a particular gift may have on the recipient's disposition to return and/or perpetuate the favor by compromising standards or rendering preferential treatment to the giver. The engineer though must be mindful of how others may construe the effect a gift would have on the firmness of an "arms length" relationship.

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The NSPE Board of Ethical Review (Board) has had occasion to consider the issue of gifts or inducements that might influence or appear to influence an engineer in making a decision on several occasions. The closest in similarity of circumstances is BER Case 81-4. In this situation, three principals or employees of a consulting firm provided a list of recommended contractors to their developer clients. From time-to-time, at holidays or on birthdays, these contractors and vendors with whom the engineers dealt would give the engineers personal gifts of substantial value. Citing previous cases and language of the NSPE Code (Sections II.4.c., II.5.b., and III.5.b.), the Board concluded there was a reasonable suspicion to others, and particularly to other contractors and suppliers, that acceptance of gifts by the engineers would imply favoritism. The Board determined that acceptances of gifts under the circumstances were unethical. The discussion in BER Case 81-4 refers the reader to the discussion of BER Case 60-9 for guidance on the nature of generally acceptable gifts. BER Case 60-9 noted that the "question of when a gift is intended to or becomes an inducement to influence one's impartial decision, as distinguished from an expression of friendship or a social custom, has remained a perplexing one over the years. No blanket rule covering all situations has been discovered." It was also noted by the Board that the size of the gift is usually a material factor, but must be related to the circumstances of the gift. It would hardly be felt a token gift, such as a desk calendar, etc., would be prohibited. It has been customary in the business world for friends and business associates to tender such tokens of recognition or appreciation, and "picking up the tab" at a business luncheon or dinner is commonplace and well accepted in the mores of our society. The Board also acknowledged that while engineers may neither offer nor receive a gift which is intended to or will influence his independent professional judgment, the full application of this principle requires the impossible—that we read the state of mind of the donor or donee.

More recently, in BER Case 95-3, a contractor offered the following incentive in exchange for referrals by a professional engineer: "As an incentive to include my company on such list or as a referral to your clients, I am prepared to offer you a flat $500 plus 3% of the total contract price, as a finders fee/commission for every contract I sign as a result of your referral." In finding that it would not be ethical for the engineer to associate with the contractor under the circumstances being proposed, the Board noted that it is essential that an engineer maintain an "arms length" relationship with contractors, vendors, etc. having, or potentially having, contractual arrangements with the engineer's employer or client.

Turning to the present case, there is close similarity to BER Case 81-4, as the Board considers the below market interest loan to be a gift of substantial value. It would seem disclosure would be awkward and confusing for clients. In addition, neither NSPE Code Sections II.4.c. nor III.5.b. provide for disclosure as a remedy.

While the facts are somewhat different than those cited in the earlier Board opinions, there are similarities that are important to consider in the context of this case. As the facts indicate, Engineer A is in a position to influence the award of a contract to a contractor by virtue of Engineer A's opinion of the quality of Contractor B's services. This is a sound and reasonable

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basis upon which to make a such a recommendation to a client. At the same time, the facts indicate an additional factor that might influence or appear to influence Engineer A's judgment—the offering of a significant loan to Engineer A at a rate significantly below what is available in the marketplace. In this connection, the Board is concerned that the injection of the loan offer could influence, or at the very least appear to influence, Engineer A's judgment regarding Contractor B. The facts indicate that Engineer A had a high opinion of the quality of Contractor B's services prior to the offer of the loan and, therefore, one may conclude that Engineer A could not be more positively influenced than Engineer A already is. However, the Board can foresee potential situations where Engineer A's judgment could be compromised by his financial relationship with Contractor B. For example, should the quality of Contractor B's services decline or should Engineer A's financial situation change (e.g., requiring the negotiation of additional loans from Contractor B or being unable to meet existing obligations, etc.), the Board can foresee circumstances where Engineer A could be severely conflicted and compromised in seeking to serve the interests of Engineer A's clients. In addition, since Engineer A also performs construction inspection services for clients, there is also the possibility that Engineer A's judgment in evaluating Contractor B's construction work will be compromised as well.

Conclusion: It would not be ethical for Engineer A to accept Contractor B's offer to lend Engineer A $20,000 at an interest rate significantly below market rate. Further, the Board questions the propriety of engineer-contractor relations of this nature.

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