CONFLICT OF INTEREST – INSPECTION OF WORK IN JOINT VENTURE

Case No. 02-6

Facts:
Engineer A's engineering firm ABC&D (A) enters into a joint venture with Engineer W's engineering firm WXY&Z (W) to perform certain private design and inspection work in State S on an ongoing and active basis. Later, Engineer A's firm establishes a proposed joint venture with Contractor R on a proposed design/build project for a utility district in State Y and submits a proposal to the H utility district. By coincidence, Engineer W's firm also establishes a proposed joint venture with Contractor R on a proposed design/build project for a utility district in State Y and submits a proposal to the J utility district. The Engineer W/Contractor R joint venture is selected. Thereafter, Engineer A's firm is invited by the J utility district to serve as an independent inspector for the work of the Engineer W/Contractor R joint venture.

Question:
Would it be ethical for Engineer A to serve as an independent inspector for the work of the Engineer W/Contractor R joint venture?

References:

Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
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 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.*
Section III.7.a.	-	*Code of Ethics:*	*Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.*

Discussion:
The NSPE Board of Ethical Review (Board) has noted on numerous occasions that engineers consistently face conflicts of interest in their professional practice. The Board has considered conflicts of interest involving engineering practice on many occasions and these cases are generally determined by considering all of the facts and circumstances involved in the case.

In BER Case 87-3, Greenhill County employed individuals to perform building inspections in the county. Dissatisfied with the services provided by in-house inspectors and, as part of an effort to "contract out" certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. Greenhill County selected and retained Engineer A's firm. One of Engineer A's responsibilities was to inspect a building project developed by Enterprise, Inc., a company for which she has regularly performed services in the

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past. Although she did not provide any services in connection with the building project in question, Engineer A and Enterprise, Inc. anticipated that they would continue to work together in the future. In contract negotiations with the county, Engineer A disclosed this relationship with Enterprise, Inc. and it became a matter of public record. In finding that it would not be unethical for Engineer A to perform building inspection services for the county in connection with the project developed by Enterprise, Inc., the Board noted that this was not a situation where an engineer was being retained as a paid "advocate" for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor was the Board faced with a situation where the timing of the retainer raised a question of propriety. Rather, Engineer A was being asked to perform basic inspection services in connection with a building with which she never previously had been involved, but which was developed by a former and possibly future client. While the Board noted that Engineer A clearly had a professional obligation under NSPE Code Sections II.4. and II.4.a. to disclose her relationship with Enterprise, Inc. to the Greenhill County, the Board did not believe it would be necessary for Engineer A to decline to perform the inspection services. Said the Board, "to prohibit Engineer A from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety."

More recently in BER Case 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 subconsultants 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 finding that it was unethical for Engineer A to accept the contract with the state's department of transportation, the Board noted that a sufficient distance did not exist between Engineer A's relationship with the developer and Engineer A's relationship with the state department of transportation. The work being performed by Engineer A for the developer was very specific in nature and the work might have some impact on the services he performed for the state. While Engineer A fully complied with his obligations under the NSPE Code of Ethics 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 the engineer of ethical concerns that could arise. 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.

Turning to the facts in the present case, the Board is of the opinion that the facts are more similar to the factual circumstances involved in BER Case 94-1 than those in BER Case 87-3. As a

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preliminary matter, with the sizeable increase in the amount of design-build work being performed by engineers, engineers will need to maintain a high degree of flexibility and interchangeability in their relationships with other engineering firms, contractors, owners, etc. Increasingly, engineers may find themselves joint venturing with contractors on design-build projects and later on a different project representing owners in reviewing the work of design-builders, contractors and design professionals. It is the Board's view that full disclosure will not always be the method by which engineers facing conflicts of interest will be able to address this issue ethically. Since the objective on design-build projects is single point responsibility and close coordination of design and construction services for the benefit of the client, it is important that in order for an engineer to meet the obligation of "faithful agent and trustee," the client be fully aware of any prior or existing relationship(s) that may exist that could raise conflicts of interest, particularly where, as here, the engineer is being requested to perform inspection services for the benefit of the client.

In the present case, it is incumbent upon Engineer A to disclose to the utility district that Engineer A currently has an active joint venture with Engineer W's engineering firm WXY&Z (W) to perform certain private design and inspection work in State S and also that Engineer A's firm established a speculative joint venture with Contractor R on a proposed design/build project for a utility district in State Y. Although these projects may not directly affect the work being performed by Engineer A for utility district J, it is for utility district J to determine whether a conflict exists and what steps, if any, would be necessary to address the conflict. However, as here, where an engineer has an active and ongoing relationship, disclosure would not appear to be enough to meet the ethical obligation to act as a faithful agent and trustee to the client.

Conclusion:

It would not be ethical for Engineer A to serve as an independent inspector for the work of Engineer W/Contractor R joint venture since Engineer A would not be able to serve as a faithful agent and trustee.

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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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