SELECTION OF FIRM—GRANT MONEY

Case No. 03-4

Facts:

Engineering Company X submits its qualifications in connection with a Brownfields project in a medium-size city (Brownfield refers to real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant). At the outset of the interview, the first question Engineer C, the City Engineer, asks Engineer Company X's principal Engineer B, is "How can you help us find grant money and other money to help the City fund this project if we award you the contract?" Prior to Engineer C raising this issue, there had been no prior discussion of grant funding.

Question:

Was it ethical for City Engineer C to ask Engineer B during an interview the following question: "How can you help us find grant money and other money to help the City fund this project if we award you the contract?"

References:

Section II.2. - *NSPE Code of Ethics:* *Engineers shall perform services only in the areas of their competence.*

Section II.5.b. - *NSPE Code of Ethics:* *Engineers shall not offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect of intent to influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*

Discussion:

The circumstances under which engineers and engineering firms are retained by private and public clients vary widely and often raise difficult professional issues and questions. In past years, the Board of Ethical Review has considered the issue of the method under which engineers and engineering firms are retained.

For example, in BER Case 73-4, the Board reviewed a situation involving Engineer A, a specialist in utility systems, who offered to industrial clients a service consisting of a technical evaluation of the client's use of utility services (electric power, gas, telephone, and the like) including, where appropriate, recommendations for changes in the utility facilities and systems, methods of payment for such utilities, study of pertinent rating schedules, discussions with utility suppliers on rate charges, and renegotiation (where found applicable) of rate schedules forming the basis of charges to the client. Engineer A was compensated by his clients for these

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services solely on the basis of a percentage of money saved by the client for utility costs. In deciding that Engineer A's actions were ethical, the Board noted that while it is conceivable that Engineer A could compromise his professional judgment under these facts by over-zealousness in seeking means of savings to his clients, this kind of motivation can hardly produce a compromise of professional judgment, providing all other interests of the client, such as safety and reliability, are protected. Said the Board, "Whether this type of compensation arrangement is the most productive or wisest for Engineer A or his clients is not for us to say; it is enough to say that it is an arrangement not prohibited by the NSPE Code."

In BER Case 81-2, the Board considered a case involving a village board that made known its interest in receiving what it called "proposals" in connection with a contemplated water project, with an estimated construction cost of $500,000, to be financed in part with funds under a federal-aid program. Three engineering firms submitted so-called proposals, one of which (from Firm A) included a pre-application study for submission to the federal agency, including a feasibility study, a general system layout, and a cost estimate. The other firms submitted less detailed proposals primarily in the nature of information of the background, experience, and qualification of their firms for the project. The proposal from Firm A was accepted by the village board on the basis of Firm A's condition that it would be given a letter of intent for the work, stating that if the village secures the financing and proceeds with the project a contract will be negotiated with Firm A, but otherwise Firm A would not be entitled to any fee or other payment. The other two firms have protested that the proposal by Firm A was unethical as constituting free engineering, or a contingency contract. In determining that it was not ethical for Firm A to submit a contingent contract proposal including the type of technical data stated in the facts, the Board noted that under the facts, the engineering data provided by Firm A were of such detail that Firm A necessarily had reached engineering conclusions as to the feasibility of the project. It follows that Firm A had placed itself in a position of commitment and could not any longer be impartial with regard to the future analysis of the client's interest in proceeding or not proceeding with the project.

Although these two cases raise somewhat different issues than the present case, both cases relate to unorthodox financial arrangements negotiated between the engineer and the client. As noted in BER Case 73-4, whether a particular type of compensation arrangement is the most productive or wisest for an engineer or for the engineer's client may be subject to some question or dispute, but unless there is something about the arrangement that is in conflict with the NSPE Code, this Board will not conclude that it is improper.

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The issue for the Board is, therefore, to determine whether under the facts and circumstances outlined, Engineer C's actions would interfere with the ability of Engineer Company X's ability to properly perform its work. The Board believes that a discussion of the issue raised by Engineer C—funding of the project—is an appropriate subject for discussion as Engineering Company X may have particular expertise in this area. The Board does not have concerns that the issue is being raised in the context of the selection of Engineering Company X to provide engineering services. It would appear that Engineering Company X should have reasonably assumed that funding for this particular project may not have been in place and that the company was being interviewed to provide engineering services based upon the company's experience, competence, quality, and other factors as an engineering firm. Clearly, it appears Engineering Company X possessed the necessary expertise. To be asked to assist in the location of grant money to fund the project does not appear to be an inappropriate topic of discussion in the context of a qualifications-based selection procedure and does not raise the potential of a conflict of interest, particularly where Engineering Company X becomes involved in the budgeting and financing of this project prior or during the negotiations for the development of the scope of services to be provided.

The Board recognizes that sometimes local governmental agencies do not have the necessary in-house expertise to address engineering-related issues and rely upon the private sector to perform many of these functions. The Board is of the view that in the case of basic financing for a project, there should be some up-front understanding between the parties that financing is a part of the services to be identified. This is a topic that can be addressed by the local governmental agency or through some other governmental mechanism. Unlike BER Case No. 81-2, under the present case, funding is not a contingent issue and, therefore, it was appropriate for City Engineer C to raise the issue in the discussions.

Conclusion:
It was ethical for City Engineer C to ask Engineer B during an interview, "How can you help us find grant money and other money to help the City fund this project if we award you the contract?"

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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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