Conflict of Interest—Design Build

Case No. 05-10

Facts:
Engineer A performs design services on a design-build/joint venture project with Contractor M for Private Client X. Later, Private Client X retains Engineer A on another unrelated design-bid-build project to review the submissions and construction work performed by Contractor M.

Question:
Would it be ethical for Engineer A to review the submissions and construction work performed by Contractor M after having participated in a joint venture with Contractor M for the same client?

References:

Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section II.4.a.	-	*NSPE 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.*

Discussion:
At the outset, it would appear that the facts presented in this matter suggest the possibility of a conflict of interest. Engineers are frequently faced with situations that could raise a conflict of interest or, at least, the appearance of a conflict of interest. Two critical issues that are implicit in a conflict of interest situation are the effect that the conflict has or could have on (1) the engineer's professional or business judgment and (2) an employer's client's interests.

The issue of conflict of interest is among the most widely examined topics addressed by the NSPE Board of Ethical Review. For example in BER Case No. 02-6, Engineer A's engineering firm ABC&D entered into a joint venture with Engineer W's engineering firm WXY&Z to perform certain private design and inspection work in State S on an ongoing and active basis. Later, Engineer A's firm established a proposed joint venture with Contractor R on a proposed design-build project for a utility district in State Y and submitted a proposal to the H utility district. By coincidence, Engineer W's firm also established a proposed joint venture with Contractor R on a proposed design-build project for a utility district in State Y and submitted a proposal to the J utility district. The Engineer W/Contractor R joint venture was 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. In deciding that 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, the Board noted that the objective on design-build projects is single point responsibility and close coordination of design and construction services for the benefit of the client. The Board went on to note that it is important that in order for an engineer to meet the obligation of "faithful agent and trustee," the client must 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. Under the facts, the Board noted that 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 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, the Board noted that 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, 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.

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The Board is of the view that the facts and discussion in BER Case No. 02-6 provide an important framework for the Board to evaluate and contrast the circumstances and the ethical issues in the present case. While there are certainly similarities between BER Case No. 02-6 and the present case, there are distinct differences as well. In the Board's view, among the key differences include the fact that in the present case, the circumstances involve the same parties. In contrast, BER Case No. 02-6 involved a number of different service providers in varying types of relationships, a variety of clients with presumably varying interests, an apparent lack of full disclosure to affected clients, and that much of the work involved public or publicly regulated entities (e.g., utilities). Assuming there is full disclosure by Engineer A (which is a reasonable assumption under the facts), there is no current or planned relationship with Contractor M. The Board cannot see why it would be unethical for Engineer A to review the submissions and construction work performed by Contractor M after having participated in a joint venture with Contractor M for the same client. While it may not necessarily be the preferred manner for Client X to proceed, as the client and the recipient of engineering and construction services, that is a decision for the client to make. While Engineer A may wish to advise Client X that there may be a better procedure to follow in order to ensure proper "checks and balances," the Board can not say that as a matter of ethics that the facts present an unacceptable situation.

Conclusion:
It would be ethical for Engineer A to review the submissions and construction work performed by Contractor M after having participated in a joint venture with Contractor M for the same client.

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