Use of Existing Work for Another Client

Case No. 05-11

Facts:
Engineer A prepares drawings, plans, and specifications for Client A in connection with a 7-lot subdivision. After the work is nearly complete and ready to be submitted for permitting, Client A decides for several reasons (lack of sufficient economic return, other priorities) not to proceed any further with the project and pays Engineer A for his services. At the time, Client A did not own the property, but did have a purchase and sale agreement for it. Client A was able to back out of the land purchase agreement with a contingency for lack of economic viability. Thereafter, Client B expresses interest in picking up the project and has expressed interest in retaining Engineer A to perform the engineering work.

Questions:
1. Does Engineer A have an ethical obligation to disclose to Client B the fact that Engineer A prepared a portion of the existing work requested by Client B earlier under contract with Client A?

2. Does Engineer A have an obligation to inform Client A that Client B expressed an interest in the project?

Reference:

Section II.1.c.	-	*NSPE Code of Ethics:*	*Engineers shall not reveal facts, data, nor information without the prior consent of the client or employer except as authorized or required by law or this Code.*
Section II.4.b.	-	*NSPE Code of Ethics:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
Section III.4.	-	*NSPE Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
Section III.4.a.	-	*NSPE Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, promote nor arrange for new employment or practice in connection with a specific project for which the engineer has gained particular and specialized knowledge.*

Discussion:
The facts in the present case relate to the question of an engineer accepting compensation from more than one party for services on what is essentially the same project. This issue is addressed by NSPE Code of Ethics Section II.4.b., which has been examined by the NSPE Board of Ethical Review on several occasions.

Among one of the early examinations of Section II.4.b. is found in BER Case No. 62-5. In that case, Engineer A was retained by a government agency to make a study of computer programming methods and techniques as related to the economical extraction of certain metals from ore. He undertook extensive investigation, conducted experiments, and submitted a comprehensive report containing detailed recommendations to solve the problem posed in his assignment. Engineer A was paid an appropriate fee for his services and the project was terminated. The government then published the report and made it available to the public. Subsequently, Engineer A was contacted by a commercial mining company, which had a problem similar in scope and content. Engineer A was requested by the mining company to act as its consultant and recommend methods to improve its operations in this area.

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In ruling that Engineer A was ethically required to advise the mining company of the existence and availability of the report he prepared for the government, the Board noted that in the situation described, the engineer was applying knowledge gained from previous work that was performed for the government and the results of which were now in the public domain. The Board also noted that in this situation the mining company, together with all other citizens, was a joint owner of the report that was prepared at public expense. Assuming that the mining company officials did not know of the existence of the report, they were, nevertheless, entitled to share in its benefits. Therefore, the engineer was ethically obligated to inform the mining company of the report and its availability during the negotiations as a failure to do so would be in conflict with the principle of NSPE Code Section II.4.b. that the engineer will not accept compensation for services pertaining to the same work unless there is a full disclosure of the facts. Whether the report furnished the mining company a complete solution of its problem, said the Board, is for its sole determination. The engineer would be justified in charging a fee for an analysis of the report as related to the problem of the mining company or for its application to the requirements of the client. The Board noted that this case should be distinguished from the performance of a service for a private client in the first instance because in such case the current client would not have any right or ownership in the original work. In the opinion of the Board, this last point is important to its examination of the present case. Unlike the circumstances in BER Case No. 65-2, the present case involves two private clients requesting proprietary material that is not within the public domain.

In this connection, the Board is of the view that under the circumstances, Engineer A has an obligation to disclose to Client B that Engineer A had earlier prepared the drawings, plans, and specifications in connection with the 7-lot subdivision. Having said that, Engineer A is clearly within his rights to negotiate for fair and reasonable compensation for professional services provided to Client B in connection with the work in question. That is clearly a matter between Engineer A and Client B based upon a variety of factors, including the value of the original work performed by Engineer A, the amount of rework necessary for the benefit of Client B, and other factors and considerations negotiated between the parties.

Finally, the Board's conclusions assume that the engineer has ownership over the design drawings, plans, and specifications, and, therefore, Engineer A's only obligation is to inform the client of subsequent use of the design drawings, plans, and specifications.

Conclusions:

1. Engineer A has an ethical obligation to disclose to Client B the fact that Engineer A prepared a portion of the existing work requested by Client B earlier under contract with Client A.

2. Engineer A has an ethical obligation to inform Client A that Client B has expressed an interest in the project.

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