Failure to Respond to Client

Case No. 05-3

Facts:
Engineer A, an engineer in private practice was hired by Client X for the design of certain structural members in connection with a warehouse. Following an initial meeting, Client X contacts Engineer A once by e-mail and three times by phone to determine the time frame for completion of the structural design work so that Client X can obtain financing for the project. Engineer A failed to respond to Client X on each occasion for a three-week period due to other business. After three weeks, Engineer A contacts Client X to respond to Client X's question. Client X is inconvenienced by the delay and is unable to obtain the favorable financing for the project, but the delay does not result in any other damage to Client X.

Question:
Was it unethical for Engineer A to fail to respond to Client X for a three-week period?

References:

Section I.6.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.*
Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section III.1.e.	-	*NSPE Code of Ethics:*	*Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.*
Section III.8.	-	*NSPE Code of Ethics:*	*Engineers shall accept personal responsibility for their professional activities, provided, however, that engineers may seek indemnification for services arising out of their practice for other than gross negligence, where the engineer's interests cannot otherwise be protected.*

Discussion:
Engineers have a fundamental obligation and responsibility to provide competent and timely services for the benefit of their employers or clients. This obligation and responsibility is the essence of what an employer or client expects when hiring or retaining an engineer to perform engineering services. How those obligations and responsibilities are pursued and accomplished by the engineer are critical to a fuller understanding of engineering professional practice.

While the NSPE Board of Ethical Review has not had an occasion to examine a case involving the specific facts as described in this case, there have been BER opinions that have explored some of the ethical principles involved in this case. One specific example is BER Case No. 78-6, where the Board examined a case in which Engineers A and B on behalf of their respective firms, both of which were engaged in a specialized field of engineering, were contenders for a contract with an out-of-state client. Following submission of their respective statements of qualification, the client selected Engineer B's firm for negotiations and subsequently executed a contract. Engineer A alleged in a complaint to the state society ethics committee that Engineer B had obtained the contract through improper means, charging that Engineer B's submission to the client stated that the firm had on its staff Engineer X who had outstanding technical qualifications for an important aspect of the work, and that Engineer X would be assigned the major responsibility to carry out that part of the assignment. Engineer A alleged that, in fact, Engineer X was not on the staff of Engineer B's firm, and that the false claim in that regard was a material or controlling factor in the client's selection of Engineer B's firm. The state society ethics committee conducted a preliminary inquiry and determined that at the time Engineer B submitted his statement of

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qualifications he had made an offer of employment to Engineer X, who had orally accepted it. Prior to the award and signing of the contract, however, Engineer X changed his mind and declined B's offer, but Engineer B did not communicate this information to the client at the time or at any time prior to signing the agreement. In determining that it was unethical for Engineer B to fail to promptly advise the client of the change in staffing set forth in his proposal to the client, the Board noted that, while it was not privileged to know under the submitted facts whether prompt advice to the client would have resulted in the award being made to Engineer A's firm or whether the client would have been content to allow Engineer B's firm to retain the contract with the assignment of other presently qualified staff personnel for the specialized work Engineer X would have performed, it is entirely possible that if Engineer B had disclosed the change in circumstances, the client would have been willing to allow Engineer B to search out and employ another engineer with comparable specialized expertise as required. Said the Board, "(W)hatever these speculative possibilities may be, it was the right of the client to be advised of the material change of qualifications prior to execution of the agreement, and to be allowed to make an informed judgment on whether the client wished to proceed with Engineer B's firm under a different staffing arrangement or exercise his right to terminate the selection under changed conditions and select another firm."

The Board of Ethical Review believes the Board's discussion in BER Case No. 78-6 is significant in its analysis of the facts in the present case. The Board's discussion in BER Case No. 78-6 recognizes the importance of the engineer's obligation to promptly advise a client regarding the right of a client to be advised of the material change of qualifications prior to execution of the agreement, and to be allowed to make an informed judgment on whether the client wished to proceed with an engagement with a particular engineer or engineering firm or to exercise the right to terminate the selection under changed conditions and select another firm. Although the facts in BER Case No. 78-6 involved a controversy between two competing engineers, the Board believes the same basic principles regarding the engineer's obligations to the client would apply to the present case.

The question for the Board to consider is whether in the present case the failure of Engineer A to respond to Client X on each occasion for a three-week period due to other business is of a similar nature to the failure of Engineer B to promptly advise the client of the change in staffing set forth in his proposal to the client. However, it is the Board's view that the circumstances involved in BER Case No. 78-6 related more to an apparent effort on the part of Engineer B to either mislead his client or at least neglect to correct a misunderstanding about a staffing change, while the present case appears to involve more of a failure on the part of Engineer A to respond to a client due to pending business commitments and does not indicate any intent apparent to mislead a client or failure to correct a misunderstanding by the client. Having said that, the Board still believes Engineer A's failure to act, which resulted in Client X missing a more favorable financing opportunity, rose to the level of an ethical lapse. Instead, all engineers have to balance a variety of professional and business priorities. Client X had no way to know of Engineer A's failure to respond would last three weeks and, therefore, forcing him to miss the chance to seek the services of other structural engineers to perform the required services. The Board cannot condone Engineer A's failure to be more responsive, and concludes that Engineer A's actions were a violation of the NSPE Code of Ethics.

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Conclusion:
It was unethical for Engineer A to fail to respond to Client X for a three-week period causing the client material damage.

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