Conflict of Interest—
Engineer's Out-of-State Office Providing Review of Steel Fabricator's Work

Case No. 10-10

Facts:

Engineer A's firm was hired by Client to provide engineering design services in connection with the design and construction of Client's building. Part of the services Engineer A's firm performs includes providing assistance to Client in seeking construction bids from contractors. One of the steel fabrication contractors, an out-of-state company proposing to submit a construction bid, contacted one of Engineer A's firm's local engineering offices in his part of the country to determine whether the office would be interested in submitting a proposal to provide engineering review services in connection with the steel fabrication process.

Question:

Would it be ethical for the local engineering office to submit a proposal to provide engineering review services in connection with the steel fabrication process for the steel fabrication contractor?

References:

Section I.5.	-	*NSPE Code of Ethics:*	*Engineers, in the fulfillment of their professional duties, shall avoid deceptive acts.*
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.*
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.5.	-	*NSPE Code of Ethics:*	*Engineers shall not be influenced in their professional duties by conflicting interests.*

Discussion:

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Engineers are often called upon by various parties involved in the design and construction process to provide engineering services in a variety of capacities. These parties may include the project owner, other design professionals, contractors, subcontractors and suppliers, vendors, public agencies, and other parties. When called upon to provide these engineering services, engineers need to be mindful of a potential conflict of interest that could arise when attempting to serve more than one party on the project.

A recent example of the conflict of interest issue can be found in BER Case No. 04-9. In that case, Engineer A was a professional engineer in private practice. Development Contractor X (Contractor), for whom Engineer A worked from time to time as a consultant, was asked by a local building inspector to have a foundation the Contractor built inspected by a professional engineer since the foundation had cracks that were visible to the inspector.

Since Engineer A's firm designed the house foundation for the Contractor, Engineer A performed the inspection for the Contractor. Engineer A determined the foundation had some minor surface cracks but nothing that Engineer A considered unsafe. In Engineer A's estimation, the cracks were not unusual for the type of foundation involved. Engineer A sent the building inspector a letter (which Engineer A also sealed), stating that Engineer A had inspected the foundation and in Engineer A's professional opinion, the foundation was structurally safe. The building inspector responded with a letter to the contractor stating he was not accepting Engineer A's letter and told the contractor to hire another engineer to inspect the foundation.

The NSPE Board of Ethical Review decided that it was not ethical for Engineer A to inspect his own work and that in view of the fact that a question has been raised by the building inspector concerning the sufficiency of the foundation, it would be appropriate for there to be an independent third-party review of the foundation. The Board first noted that the issues did not appear to turn upon lack of disclosure in connection with any interest that Engineer A might have had in connection with the project. The Board stated that there was nothing to suggest under the facts that Engineer A was attempting to limit disclosure or conceal any information from any interested party or governmental agency.

In addition, there did not appear to be any evidence that Engineer A was performing any service other than that which is customary when a consultant is called upon by a private client to perform design and other possible services. The Board noted that in most cases, it is not uncommon for the design engineer to also perform construction inspection services within the scope of customary services for the benefit of the client. Those services are entirely consistent with the role of the design engineer in providing professional services to the client.

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However, in Case No. 04-9, the Board also noted that there are situations where an independent review may be necessary to resolve issues raised by public officials charged with approving the work on the site, particularly where the engineer was involved in the actual design of the house foundation about which specific questions were raised by a government inspector with enforcement authority. On that basis, the Board determined that it was inappropriate for Engineer A to perform an inspection of foundation for the benefit of the party that retained Engineer A.

As demonstrated by the previous discussion, one of the most fundamental principles in the NSPE Code of Ethics is the concept that an individual engineer should not be in a position to perform a review of his/her own work for a client unless the circumstances are fully disclosed and agreed to by the client and/or other parties as appropriate. By serving as an owner's representative, in most circumstances an engineer may be required to check a contractor or subcontractor's work, including, possibly the work of an engineer retained by the contractor or subcontractor. As the facts in the present case suggest, this could require an engineer to review the work of another engineer. If the reviewed engineer is an employee within the reviewing engineer's own firm, albeit in another out-of-state office, this type or review could easily constitute an actual conflict of interest.

At a minimum, an engineer would have an obligation to bring this issue to the attention of all interested parties. However, even if all of the parties consent to the proposed review, the circumstance of an engineer reviewing the work of individuals within the engineer's own firm, at a minimum, raises the appearance of a conflict of interest and also places the engineer in a potentially untenable situation, should some issue or disagreement arise between the client and the subcontractor.

As the expression goes, a party cannot serve two masters, and an engineer should not place himself in a situation where the engineer's judgment will be called into question and could be compromised.

Conclusion:
Under the circumstances, it would be unethical for the local engineering office to submit a proposal to provide engineering review services in connection with the steel fabrication process for the steel fabrication contractor.

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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, and university engineering departments), 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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