Selection of Firm—FOIA Request

Case No. 10-8

Facts:

In response to a public request for qualifications (RFQ), Engineer A submits his firm's engineering qualifications to a state agency for a public project using the state's public procurement procedures. Prior to the interview process, Engineer B, a competitor of Engineer A, whose firm also intends to respond to the same RFQ, submits a state Freedom of Information Act (FOIA) request in order to obtain a copy of the qualifications information Engineer A submitted to the state. The state provides the information to Engineer B. Thereafter, Engineer B submits his firm's engineering qualifications to the state agency for the same public project.

Question:

Was it ethical for Engineer B to make the FOIA request in connection with the state's procurement of engineering services?

References:

Section II.2.a.	-	*NSPE Code of Ethics:*	*Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.*
Section II.4.	-	*NSPE Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section II.5.	-	*NSPE Code of Ethics:*	*Engineers shall avoid deceptive acts.*

Discussion:

The practice of engineering is a business as well as a profession. Engineers and engineering companies compete within the legal framework that exists at the local, state, and federal levels. While certain practices and activities are clearly beyond what is legally and ethically acceptable, it is also clear that free and open competition is a basic rule that generally exists under local, state, and federal laws and regulations.

At one time, the NSPE Code of Ethics contained provisions (e.g., prohibiting advertising, prohibiting competitive bidding) that were deemed to conflict with the notion of free and open competition by government regulators and those provisions were eventually removed by NSPE. The NSPE Board of Ethical Review's purpose here is not to reevaluate any of those issues, but instead to place the important and serious issue of free and open competition in the context of engineering practice.

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Conflicts between engineering firms are not new, and over the years the Board has examined these issues. One example is BER Case No. 93-3. In that case, Engineer A was retained by a major franchiser to provide engineering design services for a chain of stores throughout the United States. After several years, the franchiser decided to terminate its relationship with Engineer A and provided a notice of its intent not to renew its contract with Engineer A's firm. In order to maintain continuity and before the contract expired, the franchiser began discussions with Engineer B and retained Engineer B to provide immediate review of design concerns that were pending in connection with the design of several franchise facilities throughout the U.S.

Prior to the review, franchiser specifically told Engineer B not to disclose to their relationship to Engineer A. Nevertheless, Engineer B reviewed the design information the following week and following his review, notified Engineer A of his relationship with franchiser and the preliminary results of his review. Several weeks later, Engineer A's agreement with the franchiser expired and the franchiser retained Engineer B as its design engineer.

In deciding that Engineer B's actions were not consistent with the NSPE Code of Ethics, the Board determined that Engineer B had an obligation as "faithful agent and trustee" to not to tell Engineer A of his relationship with the client. Said the Board, "the general duty of loyalty and fair dealing denotes that a person has the duty of carrying out a transaction, in which he and another person are interested, in such manner as will be most for the benefit of the latter, and not in such a way that he himself might be tempted, for the sake of his personal advantage, to neglect the interests of the other." Here, Engineer B did not appear to be motivated by personal advantage in informing Engineer A of his relationship with client. The Board determined that Engineer B's disclosure of his relationship with client constituted a neglect of the interests of his client and that on balance the benefits to be derived by Engineer B's disclosure, for all parties involved, did not outweigh detriments that may be suffered by the client.

While the facts in BER Case No. 93-3 are somewhat different than the facts in the present case, Case No. 93-3 makes an important point which is relevant to the case at hand—the role of the engineer in serving the legitimate needs of the client and the role of the engineer as the employer or client's "faithful agent and trustee."

In the context of the present case, the Board must assume that the referenced public procurement system was designed to advance the public interest in obtaining the most qualified engineering services and that the laws and regulations pertaining to that system were put into place to achieve that result. In this situation, overlooking the timing of Engineer B's request, which is of concern to the Board, Engineer B appears to have been acting in a manner consistent with those laws and regulations, and the Board is not in a position to second guess or otherwise determine the appropriateness of those rules and regulations. Moreover, in view of the fact that the public procurement process is intended to

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be free and open in order to, among other considerations, avoid misrepresentations by parties including consultants, a review of a party's representations provides the public with some degree of protection that misleading or deceptive representations are not made that could undermine the public interest.

In passing, the Board would caution engineers that in situations such as the one represented by the facts of this case, an engineer may wish to avoid including any confidential or proprietary information in this type of submission to a public agency since such information could be subject to public disclosure under applicable laws and regulations.

Conclusion:

It was ethical for Engineer B to make the FOIA request in connection with the state's procurement of engineering services, pursuant to the State's RFQ procedures. However, in order to avoid any appearance of impropriety, Engineer B should have made the FOIA request subsequent to Engineer B's firm's submitting its RFQ.

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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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