Conflict of Interest—Consultant to Redevelopment Authority

Case No. 12-5

Facts:

Engineer A is a principal in the LMN Engineering firm. The firm is currently being retained by the County Redevelopment Authority to provide surveying services for a redevelopment area. Develco, a local developer, now wishes to hire LMN Engineering to prepare a site plan for a proposed redevelopment project within the redevelopment area. As part of the proposal process, Develco will have to appear before the Redevelopment Authority to present the site plan prepared by LMN Engineering. Under the proposed scenario, Engineer A and LMN Engineering would concurrently serve as Develco's engineer and also the County Redevelopment Authority's surveyor.

Question:

Can Engineer A and LMN Engineering concurrently serve as Develco's engineer and also the County Redevelopment Authority's surveyor?

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.*
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 II.4.d.	-	*NSPE Code of Ethics:*	*Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.*

Discussion:

The subject of conflicts of interest in connection with the practice of professional engineering is among the most commonly examined issues by the NSPE Board of Ethical Review. By the very nature of their professional practice—simultaneously or proximately providing services to various levels of government, developers, contractors, corporate clients, other consultants, etc.—it is rare that an engineering firm does not at one time or another find itself in a situation that has the potential to raise conflict of interest issues.

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A classic illustration of this was BER Case No. 88-1. In that case, Engineer A was retained by the county to perform a feasibility study and make recommendations concerning the location of a new power facility in the county. Two parcels of land located on a river had been identified by the county as the "candidates" for facility sites. The first parcel was undeveloped and owned by an individual who planned to build a recreational home for his family. The second parcel, owned by Engineer A, was a developed parcel of land. Engineer A disclosed that he was the owner of the second parcel of land and recommended that the county build the facility on the undeveloped parcel of land because (1) it was a better location for the power facility from an engineering standpoint and (2) it would be less costly for the county to acquire. The county did not object to having Engineer A perform the feasibility study.

In determining that it was not ethical for Engineer A to perform a feasibility study and make recommendations concerning the location of a new power facility in the county, the Board noted that although Engineer A's professional opinion was supported by two important public policy considerations (e.g., that the undeveloped parcel was a better location for a power facility and that the county's cost of acquiring the developed property would be higher than the cost of acquiring the undeveloped tract of land), these reasons were not sufficient to justify Engineer A's decision to perform the feasibility study for the county. The Board noted that public perceptions play an important role in engineering ethics. The facts and circumstances of Engineer A's study may have appeared to suggest a benefit to the "common good" if his recommended course of action was followed but these same facts and circumstances allow for the appearance of impropriety, and this can easily damage public confidence in the engineering profession. Clearly there could have been public perception under the facts that Engineer A did not want to risk personal disruption of his developed property or possibly anticipated future appreciation of the value of the property. Engineer A should have followed the far simpler and more ethical approach recommended in the earlier BER Case No. 69-13 which stated, "[The Engineer] can avoid such a conflict under these facts either by disposing of his land holdings prior to undertaking the commission or by declining to perform the services if it is not feasible or desirable for him to dispose of his land at the particular time."

In the earlier cited Case 69-13, the Board reviewed a situation in which an engineer was an officer in an incorporated consulting engineering firm that was primarily engaged in civil engineering projects for clients. Early in the engineer's life, he had acquired a tract of land by inheritance, which was in an area being developed for residential and industrial use. The engineer's firm had been retained to study and recommend a water and sewer system in the general area of his land interest. The question faced by the Board under those facts was "May the engineer ethically design a water and sewer system in the general area of his land interest?" The Board ruled that, ethically, the engineer could not design the system under those circumstances. The Board recognized that the issue was a difficult one to resolve, pointing to the fact that there

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was no conflict of interest when the engineer entered his practice. The conflict developed in the normal course of his practice, when it became apparent that his study and recommendation could lead to the location of a water and sewer system near his land. This could bring a considerable appreciation in the value of his land, depending upon the exact location of certain system elements in proximity to his land. The BER stated that while the engineer must make full disclosure of his personal interest to his client before proceeding with the project, such disclosure was not enough under the NSPE Code of Ethics. The Board concluded by saying, "This is a harsh result, but so long as men are in their motivations somewhat 'lower than angels,' it is a necessary conclusion to achieve compliance with both the letter and the spirit of the NSPE Code. The real test of ethical conduct is not when compliance with the NSPE Code comports with the interest of those it is intended to govern, but when compliance is adverse to personal interest."

In BER Case No. 85-6, the Board reviewed similar facts and circumstances and came to a different result. There, an engineer was retained by the state to perform certain feasibility studies relating to a possible highway spur. The state was considering the possibility of constructing the highway spur through an area adjacent to a residential community in which the engineer's residence was located. After learning of the proposed location of the spur, the engineer disclosed to the state the fact that his residential property might be affected and fully disclosed the potential conflict with the state. The state did not object to the engineer performing the work. Engineer A proceeded with his feasibility study and ultimately recommended that the spur be constructed. In ruling that it was not unethical for the engineer to perform the feasibility study, despite the fact that his land might be affected thereby, the Board noted that the ethical obligations contained in NSPE Code Section II.4.a. do not require the engineer to "avoid" any and all situations that may or may not raise the specter of a conflict of interest. Such an interpretation of the NSPE Code, the Board said, "would leave engineers without any real understanding of the ethical issues nor any guidance as to how to deal with the problem." The Board noted that the basic purpose of a code of ethics is to provide the engineering profession with a better awareness and understanding of the ethical issues that impact the public. The Board concluded that only through interacting with the public and clients will engineers be able to comprehend the true dimensions of ethical issues.

Turning to the facts in this case, the Board must first acknowledge that at the very least there is clearly the potential for the appearance of a conflict of interest under the circumstances—factors that could influence or appear to influence Engineer A's judgment or the quality of Engineer A's services. At the same time that Engineer A and LMN Engineering are being retained by the County Redevelopment Authority for surveying services for a redevelopment site, Engineer A and LMN Engineering are considering representing Develco to provide engineering services in connection with the same site. It would seem that under the express language of the NSPE Code of Ethics,

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Engineer A would have an obligation to fully disclose the proposed relationship between LMN Engineering and Develco to the County Redevelopment Authority for the Authority to determine whether Engineer A could proceed with the project. Among the potential options under the facts could be that Engineer A and LMN Engineering recuse itself or resign from its work with the Authority or decline performing the work for Develco. The nature of the services in question (professional surveying for the County Redevelopment Authority; professional engineer for Develco) are of a related nature and involve business and financial considerations that create the clear potential for a conflict of interest. Moreover, there may be state and local conflict of interest laws and regulations that Engineer A and LMN Engineering will need to be mindful of before agreeing to perform services for Develco. Finally, it is unclear whether and to what extent Engineer A and LMN Engineering may be participating in the County Redevelopment Authority decision-making process. A clearer situation occurs if the decision is made to proceed with Develco, and to continue in LMN Engineering's ongoing role as surveyor to the County Redevelopment Authority. In that situation, if Engineer A and LMN Engineering are involved in Redevelopment Authority determinations that could have some bearing on the relationship with Develco and the engineering services provided by Engineer A and LMN Engineering, a clear conflict of interest would arise.

Conclusion:

It would be ethical for Engineer A and LMN Engineering to concurrently serve as Develco's engineer and also the County Redevelopment Authority's surveyor. However, it would be necessary, under the express language of the NSPE Code of Ethics, for Engineer A to fully disclose the proposed relationship between LMN Engineering and Develco to the County Redevelopment Authority. It is up to the Authority to determine whether or not Engineer A could proceed with Develco's project.

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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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