Conflict–of–Interest
Recusal Relating to Jointly Funded Site Development Study

Case No. 14-11

Facts:
A county Industrial Development Agency (IDA) and the county plan to jointly fund a site-development study for a proposed business/commerce park on two parcels behind the Mid-County Plaza. The county will take the lead on the project and contract with an engineering firm to perform the site-development study. The land is currently owned by XYZ Properties Inc. The IDA-County agreement stipulates that IDA and the county will each contribute $50,000 for the project.

As project lead, the county is considering a proposal from ABC Engineering to perform services in connection with the project. Engineer A, an IDA board member and part owner of ABC Engineering, believes he has a conflict of interest due to IDA's involvement on the project and the fact that Engineer A's firm, ABC Engineering, has previously done development work on the property for XYZ Properties. Engineer A indicates that because the county is the lead agency, he plans to recuse himself from discussions and decisions relating to the study. Engineer A also indicates that if IDA had been the lead agency, he would have resigned from the IDA. The county attorney indicates that because this is a contract between the county and the engineering firm, there is no need for Engineer A to resign.

Question:
Was Engineer A's decision to recuse himself from discussions and decisions relating to the jointly funded site-development study ethically sufficient under the circumstances?

NSPE Code of Ethics References:

Section II.4. *Engineers shall act for each employer or client as faithful agents or trustees.*

Section II.4.a. *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.d. *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.*

Section II.4.e. *Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.*

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Discussion:
Ethical issues relating to conflicts of interest are among the most examined areas of ethics by the NSPE Board of Ethical Review. The Board has considered cases similar to this type on other occasions. In an early case, BER Case 62-7, an engineering consultant had been retained by a county commission to perform all necessary engineering and advisory services. The commission did not have an engineering staff, so the engineer acted as the staff for the commission in the preparation of sewage and water studies, the financing of sanitary districts, and the approval of plans submitted by others. The engineer was also retained by a private company to perform engineering design for a development of several thousand housing units, which involved extensive contract negotiations between the commission and the developer.

The Board found that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements that the engineer performed or in which he participated. This obviously involved the self-interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, he was put into the position of assessing his recommendations to two clients with possibly opposing interests. Given these realities, the Board concluded that a conflict of interest existed.

Later, the Board decided BER Case 74-2, a case in which a state law required every municipality to retain a municipal engineer with that engineer's firm usually retained for engineering services for capital improvements needed by the municipality. The Board found that the engineer was not a bona fide employee of the municipality but a consultant, thus it was not unethical for him to serve as municipal engineer and participate in a consulting firm providing engineering services to the municipality. The Board reasoned that the public interest was best served by providing to small municipalities the most competent engineering services that they could acquire. It was assumed that the state law was intended to achieve that end. In all honesty, it is difficult to reconcile these two cases (BER Case Nos. 62-7 and 74-2), as the two cases were based in pertinent part on identical language.

In BER Case 82-4, Engineer A, who was in full-time private practice, was retained by the county as county engineer for a stipulated monthly fee. His duties included reviewing plats and construction drawings to determine whether they met county requirements, and making recommendations to local developers, county commissions, and the planning and zoning board. In addition, Engineer A was retained by the city as city engineer for a stipulated annual fee. His duties included making recommendations to the city council concerning the approval of completed engineering work.

Engineer A also served as project administrator for the county airport authority and as such was responsible for formulating a plan for the continued development of an airport industrial park. Finally, Engineer A was administrator of the city block grant program, and as such oversaw engineering work on various projects. Engineer A had been retained as

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a consultant by several private firms to help develop city and county project proposals. The Board found that Engineer A did not actually participate in decisions with respect to services solicited or provided by him or his organization in private or public engineering practice but rather reviewed, recommended, formulated, and oversaw plans. Although it was arguable that under the older NSPE Code provisions, Engineer A's activities would have constituted a conflict as he may have in fact participated in consideration of actions, the Board found that his activities were within the meaning of the amended NSPE Code provisions and did not constitute "decisions" under Section II.4.d. Therefore, the Board concluded that one who serves as both city and county engineer for a retainer fee may provide private engineering consulting services to the city and county.

Later, in BER Case 94-5, City engaged the services of a private consulting engineering firm, Firm A, to provide design review and construction inspection. In accordance with local ordinance governing land development, private developers were required to submit plans to the city for review and approval. The developer was required to pay the city's expenses for having Firm A review the drawings. Additionally, during construction the developer was required to also pay for inspection services, to be provided by Firm A on the city's behalf. The ordinance stated specifically that these inspection services were solely for the purpose of ensuring that construction was in accordance with the city's design standards. The developer was also required to pay for separate inspection services in order to protect his interests. Firm A also provided design and inspection services for private developers within the city and, in fact, used its position as the city's engineer as a marketing tool, openly telling prospective clients that they could save 50% on inspection costs by using their firm.

In deciding that it was unethical for Engineer A to serve as city engineer and also provide review and inspection services for private developers within the city, the Board reaffirmed the view that the circumstances described were in violation of NSPE Code Section II.4.d. The Board could not see how an engineer could wear many hats and still represent his clients' best interests. As described by the facts, Firm A was a private consulting engineering firm that regularly prepared drawings for developers and at the same time reviewed those drawings at developer expense for the benefit of the city. Firm A also performed inspection services at developer expense for the benefit of the city. The Board could not see how Firm A could adequately represent the separate and sometimes differing interests of its clients under the facts presented. The Board was particularly troubled by the fact that Firm A was expected to perform review and inspection services for one client while being compensated for those services by another client. The Board was also uncomfortable with Firm A using its position as city engineer to openly market its services with prospective clients. Since the beneficiary of the services in question was the city, the marketing technique suggests that Firm A may be offering developers less than the full range of services required to adequately perform the work but sufficient enough to cause the work to be approved by the city.

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In the present case, Engineer A was a board member of the IDA and also a part owner of ABC Engineering, a firm that is contracting with a joint venture consisting of a county and the IDA. While Engineer A is not directly contracting with the IDA but instead with the county, the county is a partner with the IDA, on whose board Engineer A serves. In the Board of Ethical Review's opinion, a sufficiently close relationship exists and appears to make Engineer A's participation in the discussions and decisions relating to the study very problematic. While the county attorney has offered an opinion indicating that it would not be necessary for Engineer A to resign from his role as a member of the IDA, it is the Board's view that NSPE Code Section II.4.e would require Engineer A to resign because the IDA-County joint venture constitutes a "governmental body" under NSPE Code Section II.4.e. Under the circumstances, Engineer A's recusal from discussions and decisions would not be sufficient under the NSPE Code of Ethics.

Conclusion:

Consistent with NSPE Code of Ethics Section II.4.e., Engineer A's decision to recuse himself from discussions and decisions relating to the jointly funded site-development study was ethically insufficient under the circumstances because Engineer A had an option to resign from the IDA board or remain on the board but not accept the contract.

Board of Ethical Review:

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Dissent:

John C. Branch, P.E.
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NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.

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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Conflict-of-Interest

Recusal Relating to Jointly Funded Site Development Study

Case No. 14-11 - Minority Opinion

There are a number of Board of Ethical Review cases related to conflicts of interest faced by engineers who have private and public engineering roles within their community. BER Case 74-2 asks whether it is ethical for an engineer to serve as a municipal engineer and participate in a consulting firm providing engineering services to the same municipality. In its decision, the Board reasoned that the public interest is best served by providing small municipalities with the most competent engineering services they can acquire. The Board also recognized that the state law was intended to achieve that end.

From Case 74-2 "Many of the smaller communities in the state do not have and cannot afford full-time municipal engineers or supporting staff personnel for a full time office. In such instances the smaller communities retain the services of a consulting firm in private practice and appoint a principal of the firm as the municipal engineer. Such a municipal engineer is paid either on a cost-plus basis or a flat monthly retainer-usually a relatively low amount. The municipal engineer's firm is there after usually retained for engineering services for capital improvement projects needed by the municipality."

We believe there are hundreds of smaller communities in the US that face similar problems in attaining the best engineering advice for municipal agencies. Case 74-2 also notes in the discussion that:

"Continuity of municipal engineering services tends to insure the best services to the municipality, assuming that the best available are utilized. Therefore, it would seem that the engineer-consultant who is designated as the "municipal engineer" should not be barred from serving the municipality as the one to furnish complete engineering services through his own organization if he is qualified. However, it must be evident that the relationship between the engineer and the municipality must be one of engineer to client (municipality) and not engineer to employer (municipality) for this principle to be valid in accordance with the mandate of Section 8(b)."

Additionally, Case 74-2 cites NSPE Code Section 8(b): "When in public service as a member, advisor, or employee of a governmental body or department, an engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice."

In the present case, 14-11, the engineer serves in a part-time role as an IDA board member. While this service is not pro-bono, it obviously accounts for a small part of his income because he has volunteered and stated that he would have resigned from the IDA board position if IDA had been the lead agency in the proposed project. His open and full disclosure in the case certainly measures well against Section II 4.a. of the 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."

In the facts for Case No. 14-11, Engineer A's plan to recuse himself from discussions and decisions related to the study also demonstrates his determination to take the ethical high road.

NSPE Code Section II 4 d: 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.

Finally, we believe that because of Engineer A's full disclosure and because this arrangement was agreed to in a contract between the county and the engineering firm, we believe Engineer A was justified in accepting the county attorney's advice that there is no need to resign from the IDA board.

Engineer A also would have been subject to all state laws, but any state laws that deal with such potential conflicts in small communities are not disclosed.

We find nothing in the facts to indicate that Engineer A did not do everything in his power to fully disclose and to take the correct recusal actions. We believe that Engineer A did not violate the NSPE Code of Ethics.

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