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Conflict of Interest – Mining Engineer's Review of Claims for Federal Government

Case No. 14-2

Facts:

Engineer A is a mining engineer in private practice. Client B approaches Engineer A and asks Engineer A to examine the feasibility of a mining claim that Client B is currently considering. Engineer A reviews the claim and provides a report detailing his examination of the claim. Client B accepts the report but Client B has insufficient funds to pay Engineer A's fee. Engineer A enters into an agreement with Client B whereby, in the event that Client B's mining claim is ultimately validated, Client B will provide a percentage of the revenue generated to Engineer A. Several years later, Engineer A enters into a government contract with a federal agency to review mining claims on behalf of the government. After Engineer A enters into the agreement with the agency, Engineer A discovers that one of the claims he is being asked to review is the claim by Client B.

Question:

What are Engineer A's ethical obligations 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.b. *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. *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.5 *Engineers shall avoid deceptive acts.*

Section III.6.a. *Engineers shall not request, propose, or accept a commission on a contingent basis under circumstances in which their judgment may be compromised.*

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Discussion:
Conflicts of interest often raise complex issues for professional engineers and are at the same time one of the most common ethical issues examined over the years by the NSPE Board of Ethical Review. Conflict-of-interest cases that have been decided by the Board have taken on many forms and have arisen in a variety of circumstances.

One of the earliest cases in which this issue was examined was BER Case 62-7, where 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.

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 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 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 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.

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BER Case 75-7 addressed the question of whether an engineer who serves as a member of local boards or commissions that consider engineering issues may provide engineering services through his private firm to the boards and commissions. In this case, the Board concluded that an engineer serving on a commission could ethically provide services to the private owners because the engineer had abstained from the discussion and vote on permit applications. The Board cautioned, however, that the engineer in such a situation must be careful to not take any action to influence the favorable decision on the permit. In BER Case 82-4, there was nothing to suggest Engineer A had taken any action to influence decisions as administrator of the city block grant program or project administrator of the county airport authority.

Turning to the facts in the present case, based on the earlier cited decisions, the Board believes that Engineer A had a real and genuine conflict of interest that would need to be resolved by Engineer A by disclosing the nature of the conflict to all parties. This case clearly illustrates the difficulty of considerations of self-interest and divided loyalties that arise in many conflict-of-interest cases, including those cited earlier in this opinion. Since mere disclosure probably would not be able to resolve this conflict, it would appear that Engineer A would also have an obligation to recuse himself from his review and consideration of Client B's mining claim on behalf of the government because Engineer A had a material and tangible interest in that claim that could influence his judgment or the quality of his services. In addition, because Engineer A has contracted to perform services for a federal agency, Engineer A must act in accordance with applicable federal procurement laws and regulations that may apply to his engineering services.

Conclusion:

Engineer A had a real and genuine conflict of interest. Since this conflict probably would not be able to be resolved merely by disclosure, it would appear that Engineer A would also have an obligation to recuse himself from his review and consideration of Client B's mining claim on behalf of the government because Engineer A had a material and tangible interest in that claim that could influence his judgment or the quality of his services. This case also illustrates the potential difficulties that arise in connection with nontraditional compensation methods, such as contingency fees, that extend over a lengthy period of time and can easily raise ethical concerns.

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