Confidentiality – Discussion with Potential Bidding Contractor

Case No. 15-7

Facts:
Engineer A works for Engineering Firm X. Firm X is retained by a municipality to design a water treatment facility. Engineer A is assigned work on the design of the water treatment facility. Engineer A would like to also discuss constructability issues with a local contractor, Contractor B, with whom Engineer A has worked and who may potentially also bid on the water treatment facility construction contract following the design phase. While Engineer A believes that the design documents and the overall project would benefit from discussions with Contractor B, Engineer A is concerned that by discussing technical and other aspects of the project with the contractor, Engineer A may be providing the contractor with an unfair advantage during the public bidding process.

Question:
Would it be ethical for Engineer A to also discuss constructability issues with a local contractor, Contractor B, with whom Engineer A has worked and who may potentially also bid on the water treatment facility construction contract following the design phase?

NSPE Code of Ethics References:

Section II.1.c. - *Engineers shall not reveal facts, data, or information without the prior consent of the client or employer except as authorized or required by law or this Code.*

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

Section II.5.b. - *Engineers shall not offer, give, solicit, or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift or other valuable consideration in order to secure work. They shall not pay a commission, percentage, or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*

Section III.4. - *Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

BER Case Reference: 93-4

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Discussion:
Engineers have an ethical obligation to act as faithful agents or trustees for the benefit of their employers or clients. This obligation is rooted in the notion that the engineer's actions must be aligned with the goals of the employer or client.

The NSPE Board of Ethical Review has reviewed this obligation on several occasions. For example, in BER Case 93-4, Engineer A was retained by an Owner to provide both design and construction-phase services. Following the commencement of construction, a dispute arose between the Owner and the General Contractor concerning the acceptability of a concrete pour by the Contractor. Engineer A, sought to remain impartial in the dispute, citing a provision in his contract with the Owner stating that the engineer is the initial interpreter of the requirements of the contract documents and judge of the acceptability of the work. The Owner and the Contractor asked Engineer A to review the dispute. Following his review, Engineer A agreed with the Contractor's position, noting that the Owner had approved certain changes in the work and that the Contractor complied with those changes. The Owner accepted Engineer A's interpretation, but also criticized Engineer A, claiming that because of Engineer A's ethical duty of loyalty to the Owner, Engineer A should have found in Owner's favor. In deciding that case, the NSPE Board of Ethical Review concluded that it would have been unethical for Engineer A to have found in the Owner's favor and Engineer A owed a general duty of loyalty to the Owner. However, in acting impartially under the terms of the contract, the Board of Ethical Review determined that Engineer A fulfilled that ethical obligation to the Owner. By acting in an impartial, neutral, and objective manner as the initial interpreter of the contract documents' requirements and judge of the acceptability of the work, Engineer A fulfilled his legal and ethical responsibility under the terms of the agreement. Engineer A's action provided the Owner with a candid and straightforward interpretation of the issues involved in the claim, expedited the claim, and avoided further delays and a potential for further misunderstandings between the parties. Engineer A's action also complied with the terms of the agreement and avoided a charge that the Owner and Engineer A may have "colluded" against the Contractor.

While the facts in the present case are somewhat different, it is this Board's view that the basic principles in BER Case 93-4 are the same: the need to serve the client's interest consistent with the engineer's obligation to act as a faithful agent and trustee. In the Board's view, this objective could be achieved in a manner that not only permits Engineer A to gain the necessary contractor input, but also honors the client's interest in maintaining the integrity of the public bidding process. Rather than consulting solely with Contractor B, Engineer A could have conducted a publically advertised constructability meeting, inviting all interested contractors to provide Engineer A with the input necessary to achieve a better design and construction outcome. Such a process would avoid any appearance of favoritism toward one particular contractor, serve the client's interests, and gain the benefit of broader input to improve the design and construction process.

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Conclusion:

It is unethical (and perhaps illegal) for Engineer A to privately discuss constructability issues with Contractor B or any contractor who may bid on the water treatment facility construction contract following the design phase. Instead, Engineer A could conduct a publically advertised constructability meeting, inviting all interested contractors to provide Engineer A with the input necessary to achieve a better design and construction outcome. Engineer A may also want to consider hiring a consultant to advise on constructability issues.

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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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