Duty to Provide Recommendation Based on Objective and Factual Information

Case No. 15-9

Facts:
Engineer A is retained by a state agency to design a facility for the state agency. Engineer A prepares the drawings, plans, and specifications and later the project is publicly announced for contractor bid by the state agency. Following receipt of contractor bids, the state agency requests Engineer A's review of a bid submitted by Contractor X as well as Engineer A's opinion of Contractor X, based on Engineer A's experience with Contractor X. Based upon the facts known to Engineer A, Engineer A's specifications, and Engineer A's previous experience with Contractor X, Engineer A indicates to state agency that Contractor X should not be selected for the construction of the facility. Contractor X believes Engineer A's actions are unethical.

Question:
Was it unethical for Engineer A to indicate to the state agency that Contractor X should not be selected for the construction of the facility?

NSPE Code of Ethics References:

Section - II.1. - *Engineers shall hold paramount the safety, health, and welfare of the public.*

Section - II.3. - *Engineers shall issue public statements only in an objective and truthful manner.*

Section - II.3.a. - *Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*

Section - II.3.b. - *Engineers may express publicly technical opinions that are founded upon knowledge of the facts and competence in the subject matter.*

Section - II.3.c. - *Engineers shall issue no statements, criticisms, or arguments on technical matters that are inspired or paid for by interested parties, unless they have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking, and by revealing the existence of any interest the engineers may have in the matters.*

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

Section - III.1. - *Engineers shall be guided in all their relations by the highest standards of honesty and integrity.*

Section - III.1.b. - *Engineers shall advise their clients or employers when they believe a project will not be successful.*

Section – III.2. - *Engineers shall at all times strive to serve the public interest.*

Copyright © 2015 National Society of Professional Engineers (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review case, please contact the NSPE Legal Department (legal@nspe.org).

BER Case References: 79-2; 63-6

Discussion:
The NSPE Code of Ethics makes it clear that professional engineers have an ethical obligation to warn project owners of potential threats or risks. In addition, the NSPE Code makes clear that the public has an interest in ensuring that only competent, reliable, and responsible contractors receive public work, particularly where the work affects the public health and safety. In this connection, professional engineers typically act as representatives or agents of the public entity and have a duty to protect the interests of the entity.

An example of the important role that professional engineers play in stating their views and opinions was discussed by the NSPE Board of Ethical Review in BER Case 79-2. In that case, Engineer A, the town engineer, and Engineer B, a consulting engineer retained by the town council, collaborated on an assignment to make studies and determine final contours for an existing sanitary landfill, taking into account final land use, environmental concerns, surrounding land use, and topography. Engineers A and B jointly determined that the existing landfill space would be exhausted at the present rate of use in three years, or soon thereafter. The town council had sought an alternate disposal location, but had not been able to locate one. It then requested Engineers A and B to submit new designs for the existing site at higher final contours, in accordance with state environmental laws. After several redesigns were not accepted, the town council requested Engineers A and B to prepare a new design, which resulted in an accepted solution, incorporating minimum setbacks and maximum allowable slopes. This design would provide for a hill more than 100 feet higher than originally proposed. Engineer C, a resident of the town, publicly contended that the higher level design concept would be environmentally unsound because methane gas from the landfill would move into adjacent private property and pollute the nearby ground water. The issue stirred up considerable local publicity and controversy. Engineer C had publicly questioned whether Engineers A and Engineer B should have agreed to the higher intensity use of the site. In deciding that Engineer C acted ethically in publicly challenging the design approach adopted by Engineers A and B, the Board of Ethical Review noted that Engineer C was acting within the intent of the code in raising his concern. Citing earlier BER Case 63-6, the Board also noted that “there may be honest differences of opinion among equally qualified engineers on the interpretation of the known physical facts.” The NSPE Code of Ethics does not prohibit public criticism—it only requires that the engineer apply due restraint. (See NSPE Code Section II.3).

While the specific facts in the present case are somewhat different than those in NSPE BER Case 79-2, this Board believes the general principles are similar. As noted earlier, as representatives or agents of the public entity, professional engineers have a duty to their clients to take all appropriate steps to ensure that only competent, reliable and responsible contractors receive public work, particularly where the work affects the public

Copyright © 2015 National Society of Professional Engineers (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review case, please contact the NSPE Legal Department (legal@nspe.org).

health and safety. As trusted advisors to public entities, professional engineers have an obligation to step forward and make their views known to the appropriate parties. This may include appropriate comments and advice regarding the ability of a contractor to perform services. Such comments by the professional engineer must in all cases and under all circumstances be completely factual, dispassionate, and objective and not contain any misrepresentations or bias.

Conclusion:
It was not unethical for Engineer A to indicate to the state agency that Contractor X should not be selected for the construction of the facility, provided Engineer A's comments are completely factual, dispassionate, and objective.

Board of Ethical Review:
Robert J. Andreoli, P.E.
John C. Branch, P.E.
Vincent P. Drnevich, Ph.D., P.E., F.NSPE
Neil A. Norman, P.E., D.E.E., F.NSPE
Luke Patterson, P.E.
Francis "Frank" J. Stanton, Jr., P.E.
Daniel K. O'Brien, P.E., F.NSPE ***(Chair)***

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.

This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

To obtain additional NSPE Board of Ethical Review opinions, visit www.nspe.org or call 800-417-0348.

Copyright © 2015 National Society of Professional Engineers (NSPE) www.nspe.org. All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review case, please contact the NSPE Legal Department (legal@nspe.org).