NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

BOARD of ETHICAL REVIEW

CASE REVIEW

Public Contracting Practices

Case No. 24-3

NSPE.ORG

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Facts

Engineer A, a licensed professional engineer, joins City D's engineering department as the Assistant City Engineer, responsible for overseeing department staff, managing capital improvement programs, and supervising private development projects. Shortly after starting, Engineer A is approached by Engineer B, also a licensed professional engineer, the owner of a local civil engineering firm, who raises concerns about City D's contracting practices. Engineers A and B have no historical relationship. Engineer B alleges that City D is exclusively awarding traffic engineering contracts to Firm X and civil engineering contracts to Firm Z without utilizing the request for qualifications (RFQ) process. Engineer B expresses frustration that this practice excludes other qualified firms from competing for City D contracts. City D is in a jurisdiction with strong qualification-based selection (QBS) procurement laws at the state and local levels codified within the state's professional engineering licensure laws.

Engineer A acknowledges the value of the RFQ and QBS processes in securing engineering services for public entities and commits to investigating Engineer B's concerns. Through the investigation, Engineer A discovers that over the past seven years, City D has awarded consultant contracts exclusively to two firms: Firm X and Firm Z.

City D hired Firm X seven years ago through an RFQ process to maintain the citywide traffic model and review traffic studies submitted by private developers. The contract includes an option for annual extensions for up to 10 years. The work provided by Firm X aligns with the original scope of the RFQ and the resulting contract, with four optional extensions remaining.

City D has entered into five separate contracts with Firm Z over the past six years, with no recorded issues. Records show the first three contracts were awarded through a competitive RFQ process that attracted, on average, four submissions per advertisement. However, the two most recent contracts were awarded solely on the approval of the City Engineer without an RFQ process, even though their dollar amounts exceeded the threshold requiring City D's Council authorization and an RFQ process.

Engineer A brings these findings to City D's Engineer, a licensed professional engineer, recommending improvements to address compliance concerns with the contracting process. City D's Engineer acknowledges that the two most recent contracts with Firm Z did not comply with contracting requirements but dismisses the need for corrective action, citing the convenience and longstanding relationship with Firm Z as justification.

Questions

1. Was it ethical for Engineer B to complain to Engineer A?
2. Were Engineer A's actions in investigating City D's contracting practices ethical?
3. Because City D's Engineer refuses to change the contract arrangement with Firm Z, what steps must Engineer A take?

Code of Ethics References:

I.4 Act for each employer or client as faithful agents or trustees.

I.6 Conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.

II.1.e Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.

II.1.f Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.

III.6 Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.

III.7 Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.

III.8.a Engineers shall conform with state registration laws in the practice of engineering.

BER CASE REFERENCES:

BER Case 58-1; BER Case 80-1; BER Case 08-8; BER Case 21-9; BER Case 22-1; BER Case 23-3

Discussion

This case focuses on the engineer's ethical obligation to comply with local and state procurement laws, including state registration board rules of professional conduct, that require consultant selection through a competitive QBS process. This case also discusses how engineers must conduct themselves honorably, responsibly, and fairly so as to maintain the public's trust in professional procurement matters.

The Board of Ethical Review (BER) Case 08-8 provides helpful precedent. This case discussed actions by the US Justice Department, in 1977, that required NSPE and other engineering and professional organizations to remove NSPE Code of Ethics (Code) provisions related to professional selection, compensation, restrictions on competitive bidding, free engineering, supplanting, advertising, and other practices, and the U.S. Supreme Court's ruling in National Soc'y of Prof. Engineers v. United States, 435 U.S. 679 (1978). BER Case 08-8 concluded that one of the most fundamental outcomes of these antitrust actions and rules was the basic principle that federal, state, and local laws governing procedures to procure engineering services are not affected and remain in full force and effect.

Earlier BER opinions confirm that engineers may, and sometimes must, challenge procurement practices that could compromise the public interest. For example, BER Case 80-1 examined a state agency's selection method that mixed qualifications screening with a post-scoping meeting price proposal. Firms B and C publicly protested the award to Firm A because they believed a low-cost bid ($70,000-$80,000 less than Firm B and C) was unsafe and could lead to an inadequate design. The BER held that lodging such a protest was not an unfair competitive act under the Code. BER Case 80-1 includes an "Additional Views" section that provides that while those authors agree with the BER conclusions, "we feel that Firms B and C are walking a very thin line of ethical practices when they make a public statement" regarding Firm A's fees and likelihood of project success.

Recent BER cases demonstrate that an engineer's careful compliance with licensure law is expected. For example, BER Case 22-1 introduced Engineer A, a consulting engineer, who presented signed and sealed design contract documents to the State Agency manager, "Transportation Engineer" B, who personally reviewed those documents for final approval, made comments, and directed changes – all of which under the laws of the state constituted the practice of engineering. Engineer A learned that "Transportation Engineer" B was neither a licensed engineer nor even a degreed engineer. Engineer A in BER Case 22-1 was concerned that the State Agency had given staff in management positions the title of "Engineer" when they were not qualified to review and

approve consulting engineers' design documents. In BER Case 22-1, the BER found it was unlawful and therefore not ethical for "Transportation Engineer" B to engage in the practice of engineering without having fulfilled the requirements for licensure: adequate education, rigorous examination, and substantial experience. Moreover, because "Transportation Engineer" B was practicing engineering (as defined by the state in question), Engineer A had an obligation to report "Transportation Engineer" B for unlicensed practice.

BER Case 23-3 discussed Engineer D, a licensed professional engineer, who worked as the City Engineer in a mid-sized municipality that had been experiencing rapid population and infrastructure growth. Engineer D had been one of the City's main points of contact for AE firms and contractors in the area, both with respect to contract negotiation and award (consultant and construction) and senior-level review of major project issues that arose from time to time. Engineer D announced plans to step down as the City Engineer and indicated that they accepted a position at an unnamed engineering firm in the City. Of significance was that the City did not include "revolving door" provisions in employment contracts for its senior-level employees. Shortly after Engineer D's announcement, Firm AE&R announced Engineer D as a newly hired associate. AE&R completed many projects for the City during Engineer D's tenure as City Engineer, and the firm planned to continue submitting proposals and performing consulting work for the City. In their analysis of BER Case 23-3, the BER acknowledged:

Some might assert that because Engineer A's employment contract with the City did not include a revolving door prohibition, nothing more needs to be said. But the BER does not hold this perspective. BER Case 58-1 speaks of the 'purity of the enterprise, of avoiding 'dishonor to the profession, and how engineers must consider not only the letter but the spirit of the ethics code. Consistent with Fundamental Canon 1.6, such values form the context of an engineer's professional relationships and apply in this case.

A third example is BER Case 21-9, where Engineer A was a licensed professional engineer in three states (C, D, and E) and was a Board Certified Diplomate in Forensic Engineering. Attorney X contacted Engineer A, seeking the services of a non-engineering expert to provide testimony in State M. Engineer A agreed to evaluate the case, prepare an expert opinion, and provide testimony. The licensing statute in State M specified that any engineer providing expert testimony in a State M court must be licensed in State M. Engineer A signed the report as "Consultant A, Board-certified Diplomate in Forensic Engineering," and made no reference whatsoever to licensure status. There the BER concluded that if Engineer A qualified as an expert without relying on engineering qualifications, Engineer A's self-presentation as a consultant-expert without identifying status as a licensed professional engineer was not unethical. However, when Engineer A claimed status as a Board Certified Diplomate in Forensic Engineering, Engineer A's self-presentation became unethical.

The point is, per Code section III.8.a, engineers are ethically obligated to "conform with state registration laws in the practice of engineering" and they must do so in an honorable, responsible, and ethical manner.

Turning to the first question for consideration, the facts establish that whereas City D's hiring of Firm X complied with procurement law, City D's two recent contract awards to Firm Z appear to

have violated the procurement law. For this reason, the City D Engineer and those engineers employed by Firm Z are in violation of the procurement law, and also Code section III.8.a. Accordingly, Engineer B has an obligation, per Code section II.1.f, to report "any alleged violation of this Code," and B has done so. Engineer B's actions are consistent with the BER's analysis of past cases.

It is reasonable to question whether Engineer A is "the proper authority" – e.g., is there another more appropriate group or individual B should have contacted? Resolving issues at the lowest possible level is often an effective way to solve problems. In this case, Engineer A was able to establish there were no issues with Firm X or with three of the five contracts Firm Z had with the City. Engineer A can in good faith report to Engineer B that there are no issues with Firm X and can also point out other avenues for Engineer B to raise concerns, for example, the state licensing agency or the City Attorney.

The second question asks about Engineer A's investigation. Engineer A was made aware of potential unlawful practices, so A has an obligation to not aid or abet the unlawful practice of engineering. Engineer A also has an obligation to the City to act as a faithful agent or trustee. Reviewing contracting procedures and notifying relevant parties about potential violations of established procedures is consistent with these Code of Ethics requirements.

The third question asks what steps must Engineer A take given the City D Engineer's refusal to address the contract arrangement with Firm Z. The BER holds that per Code sections II.1.e, II.1.f, and III.8.a, appropriate action must be taken. Such action should proceed advisedly, carefully, and sensitively, with a view to complying with the law and Code sections I.4, I.6, III.6, III.7, while simultaneously promoting the interests of all stakeholders to the extent possible.

Ideally, Engineer A should proceed within the City's approved channels of communication. Engineer D's authority should be respected, and all facts must be carefully checked and verified. It may be prudent to solicit input from other stakeholders such as the City Manager, the City Attorney, and other engineers who are knowledgeable of the situation. It is in City D's interest – legally, ethically, and politically – to procure its consultant services in accordance with the laws of the state where its engineers are licensed. Within this context, Engineer A will hopefully be able to influence responsible parties to follow a legal, ethical, and mutually acceptable solution. Engineer A, Engineer B, and City D's Engineer must also consider any obligations they may have to report to the state licensure board.

Conclusions:

1. It was not only ethical for Engineer B to complain to Engineer A, it was ethically required that Engineer B report his belief that statutory obligations were not being followed.
2. It was ethical for Engineer A to investigate City D's contracting practices, both as a part of A's own familiarization process and to follow up on Engineer B's complaints.
3. Since the City D Engineer indicated they have no plans to change the contract arrangement with Firm Z, Engineer A is obligated to take appropriate action.

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