Report on a Case by the Board of Ethical Review

Case No. 64-9

Subject: Supplanting Another Engineer
Section 11(a)-Code of Ethics.

Facts:
Engineering firm "A" entered into a contract with a state highway department in 1957 for a feasibility study and report for a bridge over a navigable river as part of the interstate highway system. The contract was for a feasibility study and to take appropriate steps to secure a permit to build the bridge, as required by Federal law. Discussion with the Federal agency during the course of the feasibility study revealed that it would not be possible to obtain a permit because of conflicting work then being performed. Consequently, the feasibility study was not completed at the time and the project became inactive until early 1963. At that time the impediment to the permit had been eliminated and firm "A" renewed its efforts, completed the feasibility study, participated in a hearing, and was successful in having the permit issued in 1964. The 1957 contract contained the following provision:

> "The above-mentioned fee is agreed upon with the understanding that, if the construction of this project ever proceeds beyond the making and publishing of the above-mentioned report, the Engineers will be given an opportunity to submit to said Department (of highways) and the other agencies involved in a mutually satisfactory agreement for the use and services of the Engineers in connection with such additional work."

Engineering firm "A" was not given an opportunity to negotiate the design contract and was advised after the permit had been issued that the state highway department was considering retaining engineering firm "B" for the design of the bridge. Firm "A" contacted firm "B" and advised it of the 1957 contract and quoted the above-cited contract language, suggesting that firm "B" no doubt had been unaware of the previous contract and that upon being advised of this fact should withdraw from consideration for the design contract. Firm "B" replied that it had contacted the state highway department early in 1964 upon learning of the pending project and at that time was assured that no commitments had been made for the engineering work and that firm "B" would be given consideration along with several other firms. Firm "B" also denied having had any knowledge of the 1957 contract at the time it contacted the state highway department. Subsequently a contract for design of the bridge was awarded to firm "B".

Question:
Was firm "B" ethically obligated to withdraw its offer to perform the engineering services upon being advised of the 1957 contract with firm "A"?

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Reference:
Code of Ethics-Section 11(a)- "The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment."

Discussion:
We have previously discussed at some length the application of the language of Section 11 (a), particularly with regard to the meaning of "definite steps," holding that this language "means that the engineer has been informed by the client that he has been selected to negotiate an agreement for a specific project." (See BER Cases 62-10 and 62-18). In Case 62-18 we concluded that "definite steps" had not been taken in the absence of any showing that the client specifically intended to retain the engineer for the later work. Also, in that case the facts stated that there was no evidence or indication that the engineer could expect the municipality to necessarily retain him for further work on the same project if it was later determined to proceed. It is also of some materiality that the competing engineer in that case had been "called in" by the city council.

In the case before us the facts are essentially different. The language of the 1957 agreement with firm "A" can only be read as a specific intention that the firm would be retained for the design when and if the project proceeded, subject to the negotiation of "a mutually satisfactory agreement."

Firm "B" acted properly in contacting the state agency to request consideration of its qualifications for the work prior to becoming aware of the 1957 contract and the apparent intent that the state would employ firm "A". However, upon being advised of the facts prior to the selection of a firm, we must conclude that firm "B" had an obligation under Section 11 (a) to specifically withdraw its request for consideration pending a decision by the state agency on the retention of firm "A". The proper course of action of firm "B" would have been to advise the state agency that it had learned of the prior agreement, and particularly the quoted contract language, and that under the Code of Ethics it was not in a position to maintain its offer of services unless the state agency made an official decision that it had determined not to negotiate with firm "A", or that the negotiations with firm "A" had been unsuccessful and that firm "A" had been dismissed from further consideration.

Reverting to our discussion in Case 62-18, we said the engineer could not be considered as displaced on the project under these circumstances "because he neither held a contract for the project, nor could he reasonably assume that he would be retained by the city council because he had performed the earlier study several years previously." (emphasis added) . In the present case, the opposite is true. Firm "A" could reasonably assume that it would be retained and it did have a contract containing this intent.

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It is not our function to evaluate the legal rights of firm "A" under the contract language, but it may be noted that part of the consideration for the preliminary phases may have been the "understanding" that the firm would be given an opportunity to negotiate an agreement for the additional work.

Conclusion:
Firm "B" was ethically obligated to withdraw its offer to perform engineering services for the project upon learning of a prior agreement indicating that firm "A" was to be retained for the same services, subject to the negotiation of a mutually satisfactory agreement, unless officially advised by the state agency that firm "A" would not be considered, or that an agreement had not been reached and that firm "A" had been dismissed from further consideration.

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