Report on a Case by the Board of Ethical Review

Case No. 65-14

Subject: Assistance in Preparation of Applications Under Advance Planning Act
Section 9-Code of Ethics; Section 9 (a)-Code of Ethics; Section 11 (d)-Code of Ethics.

Facts:
Under the Federal Advance Planning Law local communities may apply for the advance of funds necessary to design various types of public works. The application must be in sufficient detail to indicate the nature and scope of the project, its economic and technical feasibility, the procedure under which the project will be designed and constructed and other administrative details.

It is frequently the practice for communities considering a project under the Federal program to discuss it in general terms with one or more consulting engineers and after a determination that an application should be made for advance planning funds to request the selected consulting engineer to assist in the preparation of the application on a contingent fee basis.

The application does not include detailed engineering evaluations. It is necessary only that it include a nominal amount of engineering data which, together with finance legal data and statistical information will be sufficient for the Community Facilities Administration, which administers the Advance Planning Program, to evaluate the economic feasibility of the proposal. In larger projects the extent of. engineering data to accompany the application may involve as much as $1000 of direct costs to the engineer. (If the application is approved the engineer will be reimbursed for his expenditures as part of the fee he is paid for the actual plans and specifications for the project.) If the application is not approved and the project is not undertaken the engineer will not be reimbursed from Federal funds for his expenditures. A condition of the engineer preparing the necessary data for the application by the municipality is that he will be retained as the engineer for the project if the application is approved and the project proceeds.

Question:
Is it ethical for a consulting engineer to prepare engineering data for an application by a municipality under the Federal Advance Planning Program under the conditions stated?

References:
Code of Ethics-Section 9-"The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work."

Section 9(a)-"He will not undertake or agree to perform any engineering service on a free basis, except for civic, charitable, religious, or eleemosynary nonprofit organizations when the professional services are advisory in nature."

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Section 11(d)-"He shall not solicit or accept an engineering engagement on a contingent fee basis if payment depends on a finding of economic feasibility, or other conclusions by the engineer."

Discussion:
The mandate of Section 9 and particularly Section 9(a) is that the engineer will not perform professional engineering services without expectation of compensation except in the limited number of areas specified in Section 9 (a). It may be construed that engineering services for a municipality are "civic" in nature and therefore within the exceptions, and that the engineering to accompany an application for an Advance Planning loan "are advisory in nature," in that they are not complete working plans and specifications. It is our impression, however, that the restrictions on free engineering do not contemplate or permit this broad an application of the Code in the case of engineering for a municipality. Even though all municipalities are "nonprofit" and have a "civic" purpose, we believe that the true meaning of those references pertains to private organizations which have a civic purpose and are nonprofit organizations. Had Section 9(a) been intended to permit free engineering for municipalities we believe the reference would not be limited to "organizations," as that is not the normal nomenclature for public bodies.

The question under Section 11(d) is more complex and requires an evaluation of whether the described arrangement amounts to a contingent fee contract. We believe that it does in that the engineer's retention for the full project depends on approval of the application and the furnishing of the funds for the design of the project. Webster states that "contingent" means, "liable, but not certain to occur; possible," and "dependent on something that may or may not occur." Those definitions cover the situation under discussion-the engineer may or may not be retained for the full engineering services for the project, dependent upon approval of the application for funds.

This conclusion does not dispose of the question, however, because Section 11 (d) bars contingent contracts only "if payment depends on a finding of economic feasibility, or other conclusions, by the engineer." (emphasis added) The purpose of Section 11 (d) is to prevent situations in which the engineer's judgment may be influenced during the course of his preliminary studies to produce a favorable finding that will result in his being retained for the full project. As stated in Case No. 65-4, involving a contingent contract under which the engineer was to conduct field investigations and studies as required for the issuance of bonds to finance the project:

> ". . . in determining the most economical and proper method for the design and construction of the project, the engineer must be influenced by this knowledge and by the knowledge that the estimated cost of the project and bond issue will be a material factor in determining whether he receives any compensation for his work."

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That reasoning is not applicable to this case, however, because the finding of economic feasibility or other conclusions on the project are not to be made by the engineer. Those determinations are to be made solely by the governmental agency. The engineering and other data is only to provide the factual information regarding the project which the agency requires to evaluate the economic feasibility of the project.

Under these circumstances, and considering that the engineering data to accompany the application is minimal and even short of the usual type of preliminary engineering study and does not contain either his conclusions or opinions as to economic or technical feasibility of the project, we do not believe that such activity is contrary to the full purpose and meaning of Section 11(d). We are constrained to note, however, that in related cases of this general type, the engineer must be careful not to include such degree of engineering service or opinions or conclusions on the economic and technical feasibility of the project that he would run afoul of the restrictions imposed by Section 11(d).

Conclusion:
It is ethical for a consulting engineer to prepare engineering data for an application by a municipality under the Federal Advance Planning Program, on the condition that he will be retained for the complete engineering service for the project if the application is approved and the project proceeds, provided that the engineering data is limited to pre-preliminary studies and does not contain an opinion or conclusion of the engineer as to the economic and technical feasibility of the project.

Board of Ethical Review: T. C. COOKE, P.E. JAMES HALLETT, P.E. W. S. NELSON, P.E. N. O. SAULTER, P.E. KURT F. WENDT, P.E. A. C. KIRKWOOD, P. E., Chairman

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