Report on a Case by the Board of Ethical Review

Case No. 65-4

Subject: Contingent Fee Contracts
Section 11l(d)-Code of Ethics.

Facts:
An engineer enters into a contract with a public body whereby he agrees to conduct such field investigations and studies as may be necessary for a determination of the most economical and proper method for the design and construction of a water supply system, to prepare an engineering report, including the cost of the project, and to estimate the amount of bond issue required. The contract provides that if the bond issue passes the engineer will be paid to prepare plans and specifications and supervise the construction, and will be paid a fee for his preliminary services. If said bond issue should fail, the public body would not be obligated to pay for the preliminary work. The public body is prohibited by law from committing funds for the preliminary work until the bond issue is approved.

Question:
May an engineer ethically accept a contingent contract under these conditions?

References: Code of Ethics-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:
Section 11 (d) prohibits contingent fee contracts if the payment depends on findings of "economic feasibility or other conclusions" by the engineer. The question for determination, then, is whether the engineer can perform the services involved without running afoul of the two criteria in Section 11 (d) which make contingent contracts unethical. Payment to the engineer under the facts stated clearly is dependent upon approval of the bond issue, and the success of the bond issue, in turn, is dependent upon a showing that the project is technically and financially sound. Accordingly, 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 the bond issue will be a material factor in determining whether he receives any compensation for his work. The import of the restrictions in Section 11(d) is that the engineer must render completely impartial and independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project. We think that such independent judgment would be jeopardized in these circumstances. Therefore, the restrictions of Section 11 (d) would be violated because the engineer in performing the duties imposed upon him would be required to make feasibility determinations, economic analyses, and other engineering conclusions.

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Conclusion:
An engineer may not ethically accept a contingent contract under the circumstances described.

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