Report on a Case by the Board of Ethical Review

Case No. 66-12

Subject: Contingent Contract on Public Work Designing to a Fixed Budget Posting of Performance Bond by Engineer

Facts:
An engineer contracted with a public agency to perform engineering services for a public project on the following conditions:

1. The engineer will not be paid any fee except from grants which have been allocated by state and Federal agencies, which funds will not be avail able until a construction con tract is let.

2. The engineer guarantees that if the lowest responsible construction bid exceeds the project budget he will redesign at no extra cost to bring the project within the budget limit.

3. The engineer will post a performance bond guaranteeing successful completion of his engineering contract.

Question:
Is it ethical for an engineer to contract for engineering services for a public work under these conditions?

References:
Code of Ethics-Section 1-"The Engineer will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee."

> "a. He will be realistic and honest in all estimates, reports, statements, and testimony."
>
> "b. He will admit and accept his own errors when proven obviously wrong and refrain from distorting or altering the facts in an attempt to justify his decision."
>
> "c. He will advise his client or employer when he believes a project will not be successful."

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."

Copyright © 1966 National Society of Professional Engineer (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).

Discussion:
For the purpose of this case, we assume that the engineer was selected under proper and ethical procedures and that economic feasibility had been determined. Conditions 1 and 2 of the engineer's contract are related and we treat them separately from Condition 3, which raises substantially different considerations.

The thrust of conditions 1 and 2 is that the engineer is willing to risk the loss of his fee for his design effort if the grant monies are not forthcoming, for any reason including the event that he cannot design the project within the budget limit.

As to condition 1, payment to the engineer does not depend upon a finding of economic feasibility or other conclusions but is dependent upon the funds which have been allocated being made available to the client. The condition of availability of funds is not prohibited by Section 11 (d).

As to condition 2, it is not unusual for an engineer to agree that he will redesign to the extent necessary to bring the construction cost within the budget limit set by the client and which is known to the engineer when he commences his design operation. It is axiomatic that an engineer should not agree to such a condition unless he has confidence that the budget limit is sufficient to construct the project on a safe and adequate basis consistent with the scope of the work agreed upon between the client and the engineer during the initial negotiations. Because construction costs may vary between the time the engineer contracts and the plans are completed and let for bid and for other reasons, it is possible that the project cost will exceed the budget. At any point when it appears to the engineer that the project cost may exceed the budget it is of the essence that the engineer and the client reach a full understanding on reduction of the scope of the work to bring it within the budget. If such reduction in scope will result in a facility which will not be adequate for the client's needs, the project must, of course, terminate or the budget must be revised. Only upon the event of termination can the engineer be said to have a contingent contract in a meaningful sense. We do not see that this contingency is prohibited by Section 11 (d) of the Code.

We are troubled by the agreement of the engineer to post a performance bond, but this condition is not specifically covered by the Code. It is not the practice for engineers or other professionals to post performance bonds to guarantee their professional services. The philosophical reason for this is found in Section 1 of the Code that the engineer will act for his client as a faithful agent or trustee and will perform in accordance with the highest standards of integrity. This fundamental requirement should be sufficient to protect the client's interests. The introduction of a performance bond is in conflict with professional principles by interposing a third party between the professional and his client. Although we cannot say that the posting of a performance bond by an engineer is a direct violation of the Code, we conclude that such a practice is unprofessional.

Copyright © 1966 National Society of Professional Engineer (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).

Conclusion:
It is ethical for an engineer to contract for engineering services for a public work under the conditions stated; the posting of a performance bond by an engineer is considered objectionable professional practice.

BOARD OF ETHICAL REVIEW FOR THESE CASES: T. C. Cooke, P.E., C. C. Hallvik, P.E., James Hallett, P.E., N. 0. Saulter, P.E., Sherman Smith, P.E., Kurt F. Wendt, P.E., Waldemar S. Nelson, P.E., Chairman.

Copyright © 1966 National Society of Professional Engineer (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).