Report on a Case by the Board of Ethical Review

Case No. 68-3

Services Pertaining To Same Work

Facts:
Engineer "A" was retained by an architect who was designing an office building to prepare the plans and specifications for the air conditioning system. The work was performed, the building constructed and all parties paid their fees.

Subsequently the Owner advised the architect that the air conditioning system was deficient in performance. After several unsuccessful attempts to correct the condition, the architect recommended to the Owner that Engineer "B" be retained to make a study of the problem and to submit recommendations for correction. The Owner agreed and Engineer "B" was retained by the architect, with the knowledge of Engineer "A". He completed his study and submitted his report to the architect. The report recommended that major changes should be made in the system, the estimated cost of which would be $82,000. The architect felt that the amount was excessive and refused to agree with the recommendation. Engineer "A" requested the opportunity to review the system and the architect asked the permission of the Owner to retain him, to which the Owner agreed. Engineer "A's" study recommended corrective work to cost approximately $20,000. Before accepting this proposal, the Owner asked that Engineer "B" be retained to review the proposal of Engineer "A". This review was agreed to by Engineer "A".

Engineer "B", after review of the study by Engineer "A", stated that the recommendations were satisfactory but did not go far enough to correct the problem. The Owner thereupon refused to accept the recommendations of Engineer "A", although the architect had recommended that the Owner accept them. The Owner proposed that Engineer "B's" recommendations be accepted, to which the architect objected. Arbitration proceedings were instituted, but not completed, with the Owner presenting a claim in the amount of $122,000.

Approximately a year later the Owner informed the architect that further delay could not be tolerated and that he proposed to retain Engineer "B" to develop the plans for a corrected system in accordance with the report and recommendations of Engineer "B". The architect stated that he still had a contract with the Owner, that he had the responsibility to correct the problem and that he objected to the Owner retaining Engineer "B" for this purpose. The architect further stated that Engineer "B" would be in violation of the Code of Ethics applicable to him if he accepted the commission from the Owner. Engineer "B" stated that he had not been paid for his report to the architect. This was denied by the architect. Engineer "B" further stated that a new study and subsequent preparation of plans and specifications would be necessary to perform the work for which the Owner desired to retain Engineer "B", therefore his previous relationship with the Owner and the architect had been terminated. However, Engineer

Copyright © 1968 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).

"B" further stated that he did not wish to perform the work for the Owner if such action would be unethical.

Question:
Would it be unethical for Engineer "B" to accept a contract with the Owner under circumstances stated?

References:
Code of Ethics-Section 10- "The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties."

Section 12(a)-"An Engineer in private practice will not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated."

Discussion:
We first dispose of the question of reviewing the work of another engineer under Section 12(a) by noting that throughout this proceeding the respective reviews by Engineers "A" and "B" were made with the consent and knowledge of all parties. To this extent all parties acted ethically.

The more complex and difficult question is the application of Section 10 to these facts. The intent and thrust of Section 10 is that an engineer will not be paid twice for the same service, or will not perform services involving the same work, without the consent of all interested parties.

The report of Engineer "B" to the architect would not be the "same" service as his service directly to the Owner in preparing plans and specifications for a revised system. The report was an analysis of the problem and its cause, together with recommendations for correcting the problem. The contract with the Owner for the preparation of plans and specifications would be an additional and separate service to implement the recommendations.

However, the services of Engineer "B" directly to the Owner would be for services pertaining to the same work. The architect is an "interested" party under Section 10. Having assumed the responsibility for the air conditioning system under his original contract with the Owner, the architect would be in jeopardy of being charged by the Owner for the cost of revising the system as proposed by Engineer "B". The Owner is likewise an "interested" party under Section 10 and is clearly entitled to have the system corrected if the architect does not provide such correction within a reasonable period of time.

Copyright © 1968 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).

The ultimate question, there fore, is whether by having pre pared a report on the system for the architect, Engineer "B" has foreclosed himself from contracting directly with the Owner for correction of the same system unless he obtains the consent of the architect? The jeopardy of the architect would be exactly the same if the Owner decided to retain Engineer "C" to perform the work, in which case there would not be any ethical question as to Engineer "C".

There remains the question of whether Engineer "B" would, in fact, be receiving compensation for services pertaining to the same work in view of his statement that he had not been paid for his report to the architect. It is not within our purview to determine whether Engineer "B" is correct that he had not been paid in accordance with his arrangement with the architect as that point is in dispute. On the basis, however, that Engineer "B" was or is entitled to his fee for the report to the architect, we read the reference to "compensation" in Section 10 to mean payment which has been paid to an engineer or which is legally due him. Under that reading we believe that Engineer "B" would be receiving compensation for "services pertaining to the same work," which would require the consent of the architect.

Conclusion:*
It would be unethical for Engineer "B" to accept a contract with the Owner under the circumstances stated.

BOARD OF ETHICAL REVIEW CASE REPORTS: The Board of Ethical Review was established to provide service to the membership of the NSPE by rendering impartial opinions pertaining to the interpretation of the NSPE code of ethics.

BOARD OF ETHICAL REVIEW: Frank H. Bridgers, P.E., T. C. Cooke P.E., James Hallett, P.E., C. C. Hallvik,' P-E/. Kurt F Wendt, P.E., Sherman Smith, P.E., N. 0. Saulter, P.E., Chairman.

Dissenting Opinion: In our opinion it would be ethical for Engineer "B" to accept the contract with the owner under the circumstances stated in the Facts. Section 10 of the Code of Ethics states: "pertaining to the same work." We maintain that these words refer to a specific phase of the project, rather than to the project as a whole. Furthermore, we believe that in view of the fact that Engineer "B's" report was rejected and not used by the architect it is indicated that the relation between them has changed, and that Engineer "B" had no further responsibility to the architect on the project, hence, could ethically undertake the work for the owner. N. O. Saulter, P.E., Chairman; T. C. Cooke, P.E.; Kurt F. Wendt, P.E.

*__Note__-This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

Copyright © 1968 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).