Report on a Case by the Board of Ethical Review

Case No. 68-5

Contingent Contract Repurchase of Report

Facts:
An engineering firm contracted with a municipality for engineering services for the purpose of studying the market potential for a particular type of energy source, including the following:

> The preparation of a preliminary engineering plan for a distribution system for the energy source; preparation of cost estimates for construction and operation of the distribution sys tem; an estimate of revenue from the indicated market potential; a comparison of anticipated annual costs and annual revenues to determine the profit or loss potential; and, if a profit able operation is indicated, a summary of requirements for the first three years of anticipated operations for use by the municipality in requesting an al location of the energy source from the appropriate govern mental agency.

The compensation to the engineering firm for its services was on a per capita basis according to the latest census and was to be paid upon completion of the work and its acceptance by the city council. The contract further provided that in the event the municipality should determine not to create a municipally owned energy system, the engineering firm would repurchase the report for the full and complete cost thereof, plus one thousand dollars ($1,000) on the condition that the municipality would assign to the engineering firm an exclusive franchise to distribute the energy source in the municipality upon terms to be negotiated.

Objection was filed to the engineering firm's approach by one or more private companies engaged in the business of supplying the same energy source involved in the study on the ground that the private companies had sought to obtain the franchise from the municipality and that the approach used by the engineering firm was "irregular and unethical." The objections of the private companies also centered on the issue of public v. private ownership of utility systems, and that the engineering firm's contract was a factor in bringing about public ownership.

Question:
Does the Code of Ethics prohibit an arrangement of the type described?

References:
Code of Ethics-Section 8(a)- "The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer."

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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:

At the start we can agree that the contract is "unusual" before deciding whether it was "irregular or unethical." Before passing upon the ethical aspects we dismiss from consideration the aspect of public v. private ownership and the fact that certain private companies were contenders for the franchise. It is not unusual for engineers in private practice to find themselves involved in public or political questions relating to a particular project, or to take sides in such questions. All that is required in such circumstances is that the engineer faithfully recommend that course of action which will in his opinion best serve the interests of his client. Although dedicated to the public interest, it is not the function of the engineer to undertake to decide in what direction the public interest lies when that decision is in the hands of the public through regularly designated public officials.

The prime issue in this case is the condition that the engineer would buy back his report if the municipality should decide not to create a municipally owned energy system. Put another way, the engineer agreed to perform his services on a contingent basis. Section 11(d) of the Code permits contingent contracts on the conditions set forth. In this situation payment depended, at least in part, upon a finding of economic feasibility by the client. At the same time, the client was not required to base the decision to proceed on the basis of economic feasibility alone. The client could decide not to proceed on other grounds as well, in which case the engineer would not be paid for his services.

As we stated in Case 65-4, "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." Under the instant facts, it is logical to assume that if the project proceeded, the same engineering firm would be retained for the final design, therefore the engineering firm had an interest in developing a favorable report and conclusion, both as to the prospects for additional work and to secure payment for the services rendered under the first contract. On this basis we conclude that the contract was for contingent services not within the permissible scope of Section 11(d).

The contract, however, did comport with the mandate of Section 8(a) in that the client obviously did know of the business connections and interest of the firm in the project should the municipality decide not to proceed. In that event the firm would have the option (upon the payment of $1,000) to go into the utility business by virtue of obtaining a franchise from the municipality. While this may be unusual, we do not perceive that an engineer may not go into business apart from engineering services insofar as the Code of Ethics is concerned. We are constrained to observe, however, that it is poor practice for an engineering firm to operate a commercial business under the name and title of an engineering firm. If this is to be done it should be through a separate identity to avoid

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confusion as to the nature of the firm's operations and area of professional practice. Even should the firm acquire the franchise for the purpose of selling it to a company in the utility business the acquisition should not be in the name of the engineering firm. It could as well be in the name of an individual in the firm. It is not unusual for partners or officers of engineering firms to hold commercial interests in nonengineering activities in their own names.

Conclusion:*
An arrangement of the type described is a violation of the Code of Ethics insofar as it is in conflict with the restrictions of the Code of Ethics on contingent contracts.

***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. Note: Member Kurt F. Wendt did not participate in the decision of this case.

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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.

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