Report on a Case by the Board of Ethical Review

Case No. 69-11

Negotiation Of Per Diem Fee

Facts:
Corporation A is under contract to the Federal government to provide engineering services for national defense plants, involving analysis and design of nuclear weapons systems. Because the engineering work is highly specialized and requires doctorate level expertise, Corporation A often retains engineering consultants. Often these consultants are obtained from the faculty of a nearby state university. Contact is made with faculty members in specialized engineering areas, as needed, to ascertain their interest in providing consulting services on a per diem basis.

Engineer B is chief engineer of Corporation A and handles the interviews and negotiations with the interested faculty members. Engineer B advises the faculty members selected for the consulting services that Corporation A negotiates the fee on a per diem basis by taking the faculty member's academic salary, which is public information, and adding a small percentage to that figure, thereby establishing the per diem fee. The faculty member can accept or reject the offer, but Corporation A will not negotiate on any other basis.

Questions:
Q.1. Is Engineer B acting ethically in presenting the fee proposal to the faculty member on the basis indicated?

Q. 2. Is an engineering faculty member acting ethically in accepting the proposed fee on the basis indicated?

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(b): "He will not undertake work at a fee or salary below the accepted standards of the profession in the area."

Section 9(d): "When hiring other engineers, he shall offer a salary according to the engineer's qualifications and the recognized standards in the particular geographical area."

Section 11 (e): "While in a salaried position, he will accept part-time engineering work only at a salary or fee not less than that recognized as standard in the area."

Discussion:

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We are here confronted with the difficult task of deciding what is "appropriate and adequate" compensation and the fee which would be the accepted standard of the profession in the area. Even should actual figures on the salary of the faculty member and the amount of the additional "small" percentage be available to us, the problem would remain in reaching a definitive conclusion in the absence of more precise knowledge of the type and scope of work and the local area practice.

Rather than attempt to deal with the questions in a vacuum, we approach the problem by considering the intent of the quoted sections of the code. The customary and recommended procedure for retaining a consultant is to "negotiate" a proper fee for the services involved. NSPE Policy No. 10-F "recommends the practice of negotiating contracts and outlines a recommended procedure for negotiations." The NSPE policy on suggested procedures for negotiations with Federal agencies refers to the negotiated fee reflecting ". . . the varying degrees of complexity of the work involved. . . ."

Webster defines "negotiate" as: "To hold intercourse with a view to coming to terms, to confer regarding a basis of agreement. . . ."

Put another way, "negotiate" means a give-and-take procedure wherein each party makes proposals and counter-proposals until a meeting of the minds occurs or it is concluded that agreement cannot be reached.

In this context, Engineer B did not provide an opportunity for the faculty member to "negotiate." The only recourse of the faculty member would be to reject out of hand the proposal made to him.

The salary paid to a faculty member is not necessarily a valid measuring stick when the faculty member serves as a consultant. The measuring stick under the code is "appropriate and adequate" compensation as related to the accepted standards in the area and the type of specialized knowledge which is required. Unlike faculty salary, fees paid for consulting services do not relate to continuity of employment, tenure, fringe benefits, expenses which may be involved for research and assistance, and the "overtime" aspect if the faculty member is to render his services in addition to his regular duties for the university.

For these reasons we believe that the approach taken by Engineer B is inconsistent with the principle of "negotiation" as contemplated in the code. We apply the principle that "the laborer is worthy of his hire," and that determination of the proper fee in this light is best arrived at by a mutual exchange of ail the facts and circumstances whereby reasonable men may hopefully arrive at a fee which is fair to both parties.

We assume for purposes of this discussion that the fee formula offered could produce a "fee less than that recognized as standard in the area" for similar services.

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The faculty member who accepts the fee on the basis offered would be taking advantage of his salaried position to create unfair competition with the full-time consultants that might be available to offer such service.

Conclusion*:

Q.1. Engineer B was not acting ethically in presenting the fee proposal to the faculty member on the basis indicated.

Q.2. The engineering faculty member would not be acting ethically in accepting the proposed fee on the basis indicated.

***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.

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