Report on a Case by the Board of Ethical Review

Case No. 71-2

Brokerage of Engineering Services

Facts:
A government agency contacts 15 engineering firms to solicit their interest in, and a statement of expertise and capability to provide services in a highly specialized area of technical knowledge. Eight firms responded affirmatively. Two of the eight firms, A and B, stated that they had each made arrangements with Engineer X, a recognized expert in the technical subject matter and a principal in his own firm, to provide the highly specialized expertise and that they would themselves furnish all other services involved. In actuality, these other services would be nominal in nature. The firm of Engineer X was not on the original list of those contacted.

The government agency, concluding that Firms A and B would not make a substantial contribution to the work, then contacted Engineer X, advising him that two firms had indicated their intention to use him as a special technical consultant if awarded the contract and asked him if he would be interested in taking the contract on his own firm's account. Engineer X responded by submitting his qualifications but not stating definitely if he would be willing to undertake the work as the prime professional. The work to be performed is entirely within Engineer X's field of expertise and does not require services from firms other than those of Engineer X.

Questions:
Q1. Was it ethical for Firm A or B to offer its services as the prime professional under the stated circumstances?

Q2. Was it consistent with the Code of Ethics for the agency to contact Engineer X directly rather than through Firms A or B as the prime professional?

Q3. Would it be ethical for Engineer X or his firm to accept the contract under the stated circumstances?

References:
Code of Ethics-Section 6- "The Engineer will under take engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service."

Section 11(a)-"The Engineer will not attempt to supplant another engineer in a particular employment after be coming aware that definite steps have been taken toward the other's employment."

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Discussion:

We must first dispose of a technicality which often arises in ethics cases. The Code of Ethics applies only too individual engineers and not to organizations as such. This point has now been noted by action of the NSPE Board of Directors in its directive adopted in January 1971 to include the following note on each printing of the Code of Ethics:

> "Note: In regard to the question of application of the code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the code. The code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The code is clearly written to apply to the engineer, and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the code."

Although this note refers to corporations rather than government agencies or firms, its premise applies to all forms of organizations, including governmental agencies and consulting firms. We therefore treat the case before us as involving actions of engineers in the governmental agency and consulting firms in situations in which the engineer(s) had the power of decision or effective recommendation as to the procedure followed.

The first part of Section 6 of the code precludes an engineer from accepting an engineering engagement unless qualified to perform the services involved. On the basis of the stated facts, it appears that Firm A and Firm B were primarily offering to serve in the capacity of a "broker" and would furnish only the services involved in the negotiations and administration of the contract, looking to Engineer X as the sole technical contributor to the project.

The second clause of Section 6 recognizes the propriety and value of the prime professional or client retaining the services of experts and specialists in the interest of the project. We read this procedure in the context of the full Section 6, however, and conclude that in totality Section 6 contemplates that a prime professional engineer will be expected to retain or recommend the retention of experts and specialists in situations in which the prime professional engineer is performing substantial services of a project. On that basis we believe that Firms A and B should not have offered to undertake the prime contract if their only substantive service would be to arrange for the services of Engineer X. Their ethical position in that event was to recommend to the agency that it directly contact Engineer X as the better qualified engineer for the services required.

If Firms A and B had proposed to provide a substantial portion of the work through their own capabilities, they acted quite appropriately in making arrangements with Engineer X to provide his expertise and proposing this mode of service to the client. In defining the word "substantial," consideration should be given to benefits to the client due to geographic locations, familiarity with local conditions, and other pertinent factors.

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Turning to the action of the agency itself, we perceive no reason why it should not make direct contact with Engineer X once having learned from two separate sources that he was a highly qualified specialist of the type required. The mere fact that some eight firms had responded to the invitation for an expression of interest and qualification did not bind the agency to select one of those firms for the contract. Nor did the fact that Firms A and B supplied the information as to the special qualifications of Engineer X impose any duty on the agency to award the contract to Firms A and B when it was apparent that neither would contribute very much, if anything, to the project.

We find no grounds in the code which would prevent Engineer X and his firm from accepting the contract on a direct basis if so desired by the client and the firm. Section 11 (a), which prohibits one engineer from supplanting another, is no bar unless it be shown that "definite steps" have been taken by the client to retain another engineer. As we have stated previously, the mandate of Section 11 (a) does not come into play unless ". . . the engineer has been informed by the client that he has been selected to negotiate an agreement for a specific project," (Case 62-10) or that it be shown that". . . the client specifically intended to retain the engineer for the . . . work" (Case 62-18). Under this reading we find that neither Firm A nor Firm B had any commitment or expectation of being awarded the contract at the time the agency contacted Engineer X.

We might note, however, that Engineer X should consider carefully whether his accepting the contract independently would violate any arrangement he might have had with Firms A or B.

Conclusions*:

Q1. It was not ethical for Firm A or Firm B to offer its services as the prime professional under the stated circumstances.

Q2. It was consistent with the Code of Ethics for the agency to contact Engineer X as the proposed prime professional directly rather than through Firms A or B.

Q3. It would be ethical for Engineer X or his firm to accept the contract under the stated circumstances.

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