Report on a Case by the Board of Ethical Review

Case No. 72-7

Competitive Bidding Study Contracts

Facts:
Example 1-A public agency invites a number of consulting firms to submit proposals, including fee, for a feasibility study of the economic, physical, and ecological development of marine terminal facilities. The announcement states that the study is to include an evaluation of present facilities, potential expansion of such facilities for more extensive use by existing and new industries, the economic aspects of possible expansion, the cost of installing automated handling equipment, present and potential labor supply and the impact on local employment conditions, and alternative methods of possible financing arrangements. The announcement makes it clear that the study does not necessarily mean that an expansion program will be undertaken, or that if such a project does result that the firm making the study will be given preference for the design aspects of the project.

Example 2-A local airport authority requests priced proposals from several firms for a study of alternative methods of removing snow and ice from the runways. The scope of the study is to include a review of existing removal methods, proposed new methods, analysis of special type of equipment which may be needed for the various suggested methods, the relative cost of each method which is analyzed, and the time factors involved for various conditions of the several methods. The firms invited to submit proposals include consulting engineering firms, research and development firms, and some companies involved in the manufacture of various kinds of snow removal equipment.

Question:
May engineering firms ethically present priced proposals for the work described in either or both of the examples?

Reference:
Code of Ethics Section 11(c)-"He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man-days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but

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if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professionals."

Discussion:
The question raised herein is symptomatic of a growing area of practice of engineering firms. Both public agencies and private companies, although generally adhering to the established practice of not seeking bids or price proposals for professional engineering services, construe that procedure not to apply to contracts of the type indicated in the examples. They often reason, rightly or wrongly, that services for various types of studies, not involving design, are not of a nature contemplated in the strictures against bidding for "engineering services." Engineering firms may and often are invited to submit proposals, along with other types of firms such as management consulting firms or companies which engage in research and development.

Some years ago we considered a related situation in which we noted that professional engineers often own, manage, or work in organizations which engage primarily in research and development, in which the normal practice is to require priced proposals prior to selection of a firm for the work (Case 62-6). After stating in some detail the definition of research and development, we turned to the ultimate question of whether such activity constitutes "engineering services" contemplated in the then-existing Rules of Professional Conduct which forbade competitive bidding much as Section 11(c) now prohibits it (but which did not include the definition of competitive bidding now found in Section 11(c)). The Board of Ethical Review then found, "The R&D function, which ordinarily requires a team effort of many disciplines, must be regarded as a whole. It would be difficult, if at all possible, to itemize and separate those functions which are engineering and those which are other disciplines." The board then analyzed that the wording of the then-existing Canons of Ethics and Rules of Professional Conduct applied "to services which are directly related to an engineering function; i.e., the design of structures, machines, or processes." (Emphasis added.) Finally, the board concluded that "R&D projects are more in the nature of contracts to produce an end item or prototype rather than of the traditional service concept found in engineering."

We have set forth the reasoning and findings of the older case in more than usual detail not only because of the importance of the question before us, but also because the logic or wisdom of that decision should now be reviewed in light of changed circumstances in engineering practice and the adoption of the NSPE Code of Ethics in lieu of the previous Canons of Ethics and Rules of Professional Conduct.

The code defines "competitive bidding" in fairly precise and complete terms and if the services described are within the meaning of "engineering services" in Section 11(c) of the code there is no doubt that engineering firms may not ethically submit the priced proposals for the described work. The question, therefore, is whether the services in question are within the contemplation of "engineering services" as used in Section 11(c).

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In July, 1972, the NSPE Board of Directors substantially modified NSPE Policy 10-F, dealing with competitive bidding, which had heretofore tracked Section 11(c) of the code in almost identical terms. A major difference was that the previous language of Policy 10-F had included the sentence, "This policy applies to all services provided by a professional engineering firm." Under that concept, an engineering firm could not ethically submit a price proposal for any service or activity-even the selling of blueprinting services or the lease of spare computer time.

However, the July revision of the policy eliminated the sentence quoted above, and, more significantly, added for the first time a definition of "engineering services" in the context of a policy dealing with selection procedures for professional engineering services. The new policy now states:

"For the purpose of this policy, 'Engineering Services' includes professional services associated with the study, design, and construction of real property improvements (public and private) including pre-feasibility and feasibility studies, comprehensive and general planning, preliminary studies, preparation of drawings, plans, designs, specifications, cost estimates, other studies and preparation of manuals and reports, consultations, performance of surveys, inspection and development related to the preceding categories."

While NSPE policies are not binding upon us in construing the Code of Ethics, we have in previous cases referred to pertinent NSPE policies as a guide to discern the intent of wording in the code on a particular point. (Case 70-4) In the absence of any definition of "engineering services" in the code itself, we turn to the expression of the Board of Directors to reach an appropriate reading of the undefined words of the code.

The new definition, when applied to the facts in the two examples, indicates that "engineering services" are meant to refer to and include those services which are within the contemplation of physical improvements to real property. The language employed further applies the definition to services "associated" with the improvement of real property, including "related" studies of various types. On the basis of the guidance furnished in the revised NSPE Policy 10-G we can distinguish between the two examples in this case.

In Example 1, the scope of work is geared to and "related" to prospective improvement of physical plant facilities. While there is no assurance that the design of new or improved facilities will result, the study is primarily, though not exclusively, tied in with possible future design. Hence, the evil of competitive bidding for engineering services-the possible sacrifice of quality in design to meet low cost competition-could be a real factor when and if physical plant designs are required. The study, if done on a low cost-low quality basis resulting from competitive bidding could have a detrimental effect on later design and construction of required physical facilities because the low-cost study approach might form the basis for later design decisions on the basis of incomplete or hurried findings to meet the low-cost requirements of the study.

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In Example 2, by contrast, there is little if any emphasis on the potential future design of physical facilities, although the study might project the need for consideration of new equipment. The emphasis in this study is on snow removal methods rather than improvement to real property of the type contemplated in the new definition of "engineering services." We recognize that there is still an element of danger to the client in seeking a low-cost study approach through competitive bidding, but there is not the same degree of exposure of possible dangers to the interests of the client found in Example 1.

In Example 2, the client is essentially buying a "best effort" study. It is more readily related to an R&D-type approach under which the consultant agrees for a price to do the study as outlined in his proposal. If the study falls short of developing all the information or advice needed it can be supplemented with further "best effort" studies and no discernible harm accrues to the client or the public, except that the client may find that he could have saved money in the long run by engaging a firm on the basis of a more complete initial study than by a piecemeal approach. That concern, however, is not the basis for the opposition to competitive bidding found in Section 11(c).

Conclusion*:
Example 1-An engineering firm may not ethically present a priced proposal prior to selection for negotiation for the work described.

Example 2-An engineering firm may ethically present a priced proposal prior to selection for negotiation for the work described.

***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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