Report on a Case by the Board of Ethical Review

Case No. 73-7

Supplanting Another Engineer - Indefinite Contract

Facts:
A firm in private practice handles many small projects for an industrial client, averaging 20 to 30 projects a year. The firm has a signed agreement with the industrial client which does not obligate the client to give the firm any work, but does establish the respective responsibilities, terms of payment and other contractual details when the client does use the firm's services. The actual assignments are made by means of purchase orders referring to the agreement. An engineer employee of the firm resigns his employment and establishes his own firm and then actively solicits the industrial client of his former employer without any prior indication of interest by the client.

Question:
Is the action of the former engineer employee of the firm ethical?

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

Discussion:
Our first decision on the issue of one engineer attempting to supplant another engineer was rendered in Case 62-10, in which we enunciated the principle that an engineer does not have an exclusive right to perform engineering services for a particular client. "There can be no question but that the client has a right to change from one consulting engineer to another." The test, we then suggested, is whether another consulting engineer may make an initial contact with the client and offer his services.

In Case 62-18 we dealt in more detail with the question under a set of facts in which the client had retained one engineer for a feasibility study and several years later retained a different engineer for the design of the project. We held in that case that there had not been an ethical breach under the "no supplanting" principle because the engineer who had performed the feasibility study could not be displaced inasmuch as he no longer held a contract with the client when it was determined to proceed with the project.

In contrast, in Case 64-9, we held that a competing firm was unethical in not withdrawing its offer to perform services on the same project when it learned that the firm which did the feasibility study some years earlier had a contract which gave it an opportunity to submit an agreement for the design services when and if the project proceeded. Our rationale there was that the firm which did the feasibility study had a continuing contract with the client. (For other supplanting cases see 65-8, supplanting out of state firm by

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local firm; 71-10, supplanting on basis of nonpayment of fee; and 72-4, prearranged plan to shift continued work on the project to a former employee of original firm.)

Throughout this series of cases we have adhered to the principle that the engineer may not seek to inject his services where there is an ongoing contractual relationship between an engineer and his client. In that event no other engineer may ethically try to displace the engineer who holds the contract.

That brings us to the sole question in this case - did the firm have a continuing contractual relationship with the industrial client? The fact that the services involved were rendered sporadically and without a definite timetable or schedule is immaterial. The facts state that there was an ongoing and continuing agreement between the firm and the client. Nor is there any basis in the facts to indicate that the client took the initiative in any way to indicate it wished to change to another engineer. The type of arrangement here involved is neither unusual nor ethically different than what may be the more common type of contract for a specific project most often used in public works. Each purchase order was an implementation of the basic contract and not a separate or isolated decision by the industrial client to go through the process of retaining an engineer of its choice. The client had made a choice through the basic agreement and the firm holding that contract was fully entitled to believe and act on the premise that the industrial firm was its client on a continuing basis unless and until the industrial client chose to exercise its sole prerogative to make a change in its engineering service arrangements.

Conclusion:
The former engineer employee of the firm was unethical.

BOARD OF ETHICAL REVIEW: William J. Deevy, P.E., Joseph N. Littlefield, P.E., James D. Maloney, P.E., Donald C. Peters, P.E., Robert E. Stiemke, P.E., William R. Gibbs, P.E., Chairman

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