Report on a Case by the Board of Ethical Review

Case No. 74-4

Conflict of Interest—Part-Time Consultant

Facts:
The consulting engineering firm of Jones & Smith conducted a design study and prepared the specifications for a system for a city. The city put the project out for construction and installation bids. Company X was the successful bidder and was awarded the construction and installation contract. Company Y was one of the unsuccessful bidders. Engineer Doe, who had headed up the design effort for Jones & Smith, was hired by Company Y about six months before the bidding was conducted. Jones & Smith will be under contract to the city to coordinate the implementation, acceptance and evaluation of the system to be supplied by Company X. The city insists that Jones & Smith give a part-time consulting contract to Engineer Doe, who now works for Company Y, citing Engineer Doe's familiarity with the design study as the reason. Company X has indicated its concern about a potential conflict of interest in having an employee of a rival bidder associated with the firm (Jones & Smith) which is to evaluate its performance on a fixed price contract.

Questions:
1. Would it be ethical for Jones & Smith to retain Engineer Doe under the circumstances stated?

2. Would it be ethical for Engineer Doe to provide professional services while in the employ of Company Y under the circumstances stated?

References:
Code of Ethics-Section 7(a)-"While in the employ of others, he will not enter promotional efforts or negotiations for work or make arrangements for other employment as a principal or to practice in connection with a specific project for which he has gained particular and specialized knowledge without the consent of all interested parties."

Section 8-"The engineer will endeavor to avoid a conflict of interest with his employer or client, but, when unavoidable, the engineer shall fully disclose the circumstances to his employer or client."

Discussion:
The facts presented paint a most unusual picture wherein a client, having awarded a competitive contract to one company insists upon having an employee of a rival company which was not successful in obtaining a construction and installation contract nevertheless serve as a consultant to the design firm which prepared the specifications for the construction and installation. The reason given by the city for this unusual arrangement may appear reasonable on first examination in wanting to have Engineer

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Doe's expertise and experience on the project. What is questionable, however, is the dubious position of Engineer Doe as a part-time consultant to Jones & Smith in evaluating the work of Company X while still an employee of Company Y, which was an unsuccessful bidder. On the basis of that questionable relationship we have to inquire whether Engineer Doe's basic loyalty in performing his function would be to his present employer, Company Y, to his immediate client, which will be the Jones & Smith firm, or to his ultimate client, the city.

Section 7(a) of the code states that an engineer may not engage in practice in connection with a specific project in which he has gained particular and specialized knowledge without the consent of all parties. However, we believe the intent of Section 7(a) is to protect an employer and parties having an interest in his practice from a former employee utilizing this special knowledge to their detriment and therefore does not apply in this case. As we expounded at some length in Case 72-9, the duty of an engineer under Section 8 of the code is "to prevent the conflict of interest from arising." We recognized in that discussion that the avoidability of a conflict of interest is a subjective judgment related to the time when the conflict becomes or should become apparent.

In the facts before us the victim of the conflict of interest is not the city-at least the city must be presumed to believe it will not suffer from the conflict because it is the party insisting upon the arrangement. Rather the potential victim of the conflict is Company X. Even though Section 8 of the code refers to the interests of employer or client and Company X is in neither category as regards Engineer Doe, we believe it is reasonable and proper under these circumstances to extend the logic of Section 8 to other innocent parties in interest as being consistent with that reference in Section 7(a). Jones & Smith has the responsibility to monitor the installation for the benefit of the city. It should not therefore acquiesce in the demand that it retain a particular individual to perform that responsibility, particularly when the retention of individual in question gives rise to a conflict of interest. Applying the rationale expressed in Case 72-9 we believe that Engineer Doe would also be in conflict with Section 8 of the code in going ahead with the arrangement.

Conclusions:*

1. It would be unethical for Jones & Smith to retain Engineer Doe under the circumstances stated.

2. It would be unethical for Engineer Doe to provide professional services while in the employ of Company Y under the circumstances stated.

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