Report on a Case by the Board of Ethical Review

Case No. 74-9

Competitive Bidding—Selection Procedures

Facts:
Example 1: A public agency requests Engineer A to submit a statement of qualifications for a specific project without indicating whether other engineers are also being asked to submit similar statements of qualification. Engineer A furnishes the data requested and prior to any decision on selection is requested to submit a price proposal for the project.

Example 2: A public agency requests Engineer B to submit a statement of qualifications for a specific project together with a copy of his standard hourly engineering personnel rates and his most recently audited overhead percentage. Engineer B has not been selected for negotiations.

Questions:
Example 1. (a) Is Engineer A ethically required to determine whether other engineers are being considered before submitting his statement of qualifications? (b) Is Engineer A ethically required to specifically determine if he has been selected for negotiations before submitting a price proposal?

Example 2. Is Engineer B ethically permitted to furnish his standard hourly rates and overhead data prior to being selected for negotiations for the project?

References:
Code of Ethics-Section 11- "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods."

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 re- quested 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 if not successful he shall withdraw from consideration for the proposed work. These

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principles shall be applied by the Engineer in obtaining the services of other professionals."

Discussion:
We have consolidated a number of re cent questions and case examples in an effort to deal with various procedural aspects of the selection and negotiation procedures which arise in actual practice. It is abundantly clear from the language of the code itself and from previous decisions of this board that the basic principle to be observed by ethical engineers is the avoidance of a procedure whereby a prospective client is able to compare engineering services on a price basis prior to selection of the most qualified engineer or firm. Also, previous cases have spelled out the sound reasons for this ethical principle-to protect the public from the downgrading of the quality of professional services which will necessarily flow from a price competition procedure. (For a more detailed discussion of the reasons supporting the opposition to competitive bidding for engineering services as contrary to the public interest reference is made to various NSPE publications, which are available upon request.)

With regard to question (a) under Example 1, there is not and need not be any requirement that the engineer determine whether other engineers are being considered for the project. In fact, the engineer may properly assume that others are being considered by the client under the client's obligation to secure the best qualified engineer for his requirements. Such a procedure by the client conforms to the principle supporting the professional selection and negotiation procedure. NSPE Professional Policy 10-G further confirms the concept of "competition" among engineers on the basis of qualification by its statement: "Evaluation of capability, capacity, stability, experience and interest is essential in any selection proceeding in order that the best qualified engineer may be selected." It may be further noted that the basic Federal law governing procurement of engineering services (P.L. 92582, generally known as the Brooks Law) requires agency heads to consider statements of qualification and performance of at least three firms prior to selection of the best qualified firm for negotiations.

Question (b) under Example 1 raises somewhat more difficult aspects of the procedure. The question only arises in fact, however, if Engineer A believes or has reasonable grounds to believe that the client is engaging in a price competition procedure, either deliberately or in ignorance of proper procedure. The most that can be said is that the engineer must determine in his own mind the circumstances under which he has been re quested to submit a price proposal. In the normal situation the engineer "knows" whether or not he has been selected for negotiations by virtue of past dealings with the client, if any, the standing and reputation of the client for integrity, and most particularly the tenor and tone of the relationship during the selection process. In case of doubt the engineer may contact other engineers who may be able to shed some light on the possibility that the client is comparing prices submitted by several engineers unbeknownst to each other. The engineer who harbors doubts should ask the client the direct question and require a direct answer.

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The question posed in Example 2 requires an interpretation of the definition of competitive bidding as set forth in Section 11(c), and particularly the restriction as to furnishing estimates in terms of man days of work required. The framers of the code wisely closed a potential loophole when they included "man days of work" among the information that may not ethically be given a prospective client prior to the time one engineer has been selected for negotiation. They were also wise to include the phrase "other measures of compensation." For it establishes two things: (1) that "man days" is a measure of compensation; (2) that there is ethically objectionable material other than the information specifically cited in Section 11(c).

Conclusions:*

Example 1(a): Engineer A is not ethically required to determine whether other engineers are being considered before submitting his statement of qualifications, (b): Engineer A is ethically required to determine from all of the facts and circumstances that he has been selected for negotiations before submitting a price proposal and must, in case of doubt, ask the prospective client for a direct answer to the question before submitting a price proposal.

Example 2: Engineer B may not ethically furnish his standard hourly rates and overhead data prior to being selected for negotiations for the project.

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