Report on a Case by the Board of Ethical Review

Case No. 75-8

Selection of Engineers—Finders' Fees—Contingent Contract

Facts:

Example 1 – Mr. X, not an engineer, contacted on a personal basis Engineer A, a partner in a consulting engineering firm, whom he had known for some years, and advised him that he had information on a potential engineering assignment of considerable magnitude. Mr. X stated to Engineer A that he thought the engineering firm with whom Engineer A is associated would be qualified for the assignment and provided details on the appropriate person to contact if the consulting firm was interested. Engineer A made the contact and subsequently his firm was selected and awarded the engineering assignment. The work: was completed in a satisfactory manner and the engineering firm was paid for its services in accordance with the contract it had negotiated. Subsequently, Mr. X contacted Engineer A and requested that he be paid a finders' fee of five percent of the contract amount.

Example 2 – Smith Engineers, Inc., an engineering consulting firm, is interested in and offers its services to the Acme Development Corporation for a large project entailing an estimated construction cost of $10,000,000. However, Acme advises the engineering firm that it has not been able to date to secure the necessary financing for the project. Smith Engineers advises Acme that it has some contacts with financial institutions and may be able to help secure the financing. Smith believes, but does not have a formal agreement, that if it is able to secure the financing for Acme it will be given the contract for engineering services. In addition, however, Smith states that if it is successful in securing the financing, Acme will pay to Smith a finders' fee of two percent of the amount of the loan.

Questions:

Question 1: Is it ethical for Engineer A to pay Mr. X a finders' fee on the basis stated?

Question 2: Is it ethical for Smith Engineers, Inc. to secure the financing for Acme for a finders' fee?

Question 3: Is it ethical for Smith Engineers, Inc. to endeavor to secure the engineering engagement by this method in the absence of a commitment that it will be selected for the engineering services?

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."

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Section 11(b) – "He will not pay, or offer to pay, either directly or indirectly, any commission, political contribution, or a gift, or other consideration in order to secure work, exclusive of securing salaried positions through employment agencies."

Section 11(d) – "An Engineer shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which his professional judgment may be compromised, or when a contingency provision is used as a device for promoting or securing a professional commission."

Discussion:

Example 1 – We can dispose of Example 1 without extended discussion in view of the clear language of §11(b) of the code. Whether the so-called finders' fee is considered as a commission or a gift, it is a payment for assistance in helping an engineer obtain an assignment, and under the facts such payment would not be within the only permitted category the securing of a salaried position through an employment agency.

The only semantic point which may be raised is whether the prohibition runs only to future project assignments at the time of payment, whereas in this case the payment, if made, would be after the work had been secured and performed. We think such a distinction would be artificial and destructive of the purpose of §11(b).

To avoid misunderstanding, however, we note what we said in Case No. 62-4 regarding the permissible use of nonengineering salaried employees of a firm to assist in obtaining engineering contracts: "We do not construe Rule 4 (the then-prevailing Rule under the previous Rules of Professional Conduct, which is the same language now contained in §11(b) of the code) as applying to payments to bona fide employees of the firm. To interpret otherwise would forbid payments in any form to such employees for solicitation of clients for engineering services. . ." At the same time, we cautioned in that case that payment to an employee on a commission basis, in whole or in part, might lead to misunderstanding of the engineering profession.

Example 2 The facts here raise more complex and more subtle issues. Here the suggestion for a finders' fee is reversed coming as it does from the engineering firm to the prospective client for assistance in securing financing for a project which the engineering firm expects to handle.

It is well understood and recognized that in the commercial world there is a service of the type here involved wherein persons or organizations with expertise or contacts assist others in securing financing for a commission or fee. While there may be legal restrictions or disclosure requirements in some cases when this arrangement is used, our only concern is the ethical aspect.

It may be contended under these facts that Smith is only undertaking to engage in the kind of commercial business of the type indicated, and we do not suggest that an

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engineering firm is barred from engaging in commercial business activities in addition to its engineering services. In Case 62-16, in a different context, we concluded that ethical standards of the profession ". . . do not restrict the practice of engineering in association with nonengineering activities by the same organization, provided that the engineers in each phase of the operation treat the interest of the client as paramount to any other consideration." And more recently in Case 74-6, we cited with approval a statement in Case 68-5 to the effect that when an engineer enters a business apart from engineering services:

". . . it is poor practice for an engineering firm to operate a commercial business under the name and title of an engineering firm. If this is to be done it should be through a separate identity to avoid confusion as to the nature of the firm's operations and area of professional practice."

Applying the criteria of the earlier cases to the first point, then, we reason that if the rationale is that Smith wishes to enter into the commercial world of helping to find financing for projects for a fee it should not do so under the name of the firm as identified with engineering practice.

Beyond this point, however, lies the deeper issue of whether the procedure contemplated by the engineering firm is permitted by the code. The arrangement proposed does not directly involve Smith paying or offering to pay a commission to secure work, but it does indirectly involve a facet of the selection above and beyond the traditional and basic criteria that engineers should be selected solely on the basis of qualification. It is clear that the agreement to pay a finders' fee to Smith is independent and separate from the later selection of the engineer for the project.

At this point the introduction of the finders' fee element does not conflict with proper selection procedures because there is no commitment which ties the finders' fee to the selection for engineering services.

On the other hand, if an agreement had been reached with Acme to select Smith for the engineering services contingent on Smith securing the financing (with or without a finders' fee), there would be a conflict with the code. Under § 11 this would be considered a questionable method of securing an engineering engagement. Also, § 11(d) prohibits an arrangement of this type whereby the contingent feature is linked directly to securing the professional commission.

What we have said must be distinguished from the normal role of engineers in helping a client with engineering aspects of the financing of a project, such as preparing economic or other data necessary for the client to have to submit to the financing institution or to bond houses if the project is to be financed by bonds. In those cases, however, the engineer's services are a part of his engineering activity for which he may be properly compensated for his time and effort or within the normal fee arrangement. The distinction

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is that those procedures do not involve the engineer in a separate or special finders' fee unrelated to the rendition of engineering services.

Conclusions:*

Conclusion Q.1: – It is unethical for Engineer A to pay Mr. X a finders' fee on the basis stated.

Conclusion Q.2: – It is ethical for Smith Engineers, Inc. to secure the financing for Acme for a finders' fee on the basis stated.

Conclusion Q.3: – It is ethical for Smith Engineers, Inc. to endeavor to secure the engineering engagement by this method in the absence of a commitment that it will be selected for the engineering services, but it would not be ethical under similar circumstances if there were a commitment by Acme to select Smith contingent upon Smith securing the financing.

***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.

Board of Ethical Review: William J. Deevy, P.E.; William R. Gibbs, P.E.; Joseph N. Littlefield, P.E.; Donald C. Peters, P.E.; James F. Shivler, Jr.; Louis W. Sprandel, P.E.; Robert E. Stiemke, P.E., chairman

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