Report on a Case by the Board of Ethical Review

Case No. 76-11

Contingent Contract—Fee Dependent on Lower Construction Cost

Facts:
A state highway commission undertook the design of a major bridge, as one of several to be built under combined state and federal financing, by the use of in-house personnel on the premise that in-house design and the furnishing of services during construction would save the state a substantial amount compared to contracting out the design function and professional services during construction. Following completion of the in-house design, but prior to the taking of construction bids, a private engineering firm with extensive experience in bridge design contacted the commission to urge the use of that firm for design and services during construction on the basis that the outside firm's expertise would lead to a saving in construction cost exceeding the fee to be paid the outside firm.

In support of its position, the engineering firm offered to perform its services without payment of any fee if its design did not save the state the amount of the fee because of reduced construction costs. On that basis, the commission and the engineering firm entered into a contract providing in pertinent part that if the lowest acceptable construction bid on the engineering firm's alternate bridge design is not cheaper by at least five percent of the construction bid for the state's design the commission in its sole discretion may declare the contract null and void and owe the engineering firm nothing for its services. The contract further stipulates that alternate bids will be taken on the basis of the in-house design and the design by the engineering firm.

Question:
Is a contingent fee arrangement of the type described in conflict with the Code of Ethics?

Reference:
Code of Ethics-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:
This unusual contract arrangement clearly falls within the meaning of "contingent," in that the full implementation, and particularly the payment of the fee to the engineering firm, is dependent on the happening of an outside event, i.e., that the lowest acceptable construction bid saves the state money compared to the construction cost for the bridge designed by the in-house staff.

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The code does not prohibit all contingent contracts but applies only to those contingent arrangements which fall within one of two proscribed results: 1. If the professional judgment of the engineer would be compromised, or 2. When used as a device for promoting or securing a professional commission. In Case 65-4 we considered a situation in which the contingent contract depended upon the approval of a bond issue, noting that the necessary first step in that case was for the engineer to make an economic and feasibility study to support the bond issue. We concluded under then then-prevailing ethical standard that such an arrangement would violate the mandate of the code against contingent contracts "…if payment depends on a finding of economic feasibility…." That particular language has since been amended to apply more broadly to circumstances in which the engineer's judgment "may be compromised."

Under the facts before us, it does not necessarily follow that the independent judgment of the engineering firm would be compromised by its alternate design concept in competition with the design concept of the in-house staff, but it is equally true that to protect its position the firm may be tempted to specify an inferior design concept and materials to produce a lower construction cost.

Turning to the second standard in §11(d), there is no real doubt that the unusual fee arrangement is being proposed as a device to secure work by the engineering firm. As such, the contingent arrangement is barred under a literal reading of the code.

We recognize an argument to the contrary may be conjured by ascribing to the framers of the code an intent which they failed to mention or even imply. It can be asserted that the proposed arrangement is in the public good because a substantial savings of money may be realized without the sacrifice of safety or quality. We are constrained to reject this hypothesis. We recognize that we are often required to interpret portions of the code that are couched in subjective language. We sometimes deem it appropriate to interpret the code beyond the literal meaning of its words, when such an interpretation does no violence to any of the basic tenets of the code. However, in this instance we must insist that the code means what it says. Thus the only question is whether or not the proposed arrangement is a device to secure work. As stated earlier, we believe it is. No other pertinent questions remain.

Conclusion:*
The contingent fee arrangement of the type described is in conflict with the Code of Ethics.

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Board of Ethical Review

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