Report on a Case by the Board of Ethical Review

Case No. 76-6

Gifts to Foreign Officials

Facts:
Richard Roe, P.E., is president and chief executive officer of an engineering firm which has done overseas assignments in various parts of the world. The firm is negotiating for a contract in a foreign country in which it has not worked previously. Roe is advised by a high-ranking government official of that country that it is established practice for those awarded contracts to make personal gifts to the governmental officials who are authorized to award the contracts, and that such practice is legal in that country. Roe is further advised that while the condition is not to be included in the contract, his failure to make the gifts will result in no further work being awarded to the firm and to expect poor cooperation in performing the first contract. He is further told that other firms have adhered to the local practice in regard to such gifts.

Question:
Would it be ethical for Roe to accept the contract and make the gifts as described?

References:
Code of Ethics--Section 11b--"He will not pay, or offer to pay, either directly or indirectly, and commission, political contribution, or a gift, or other consideration in order to secure work, exclusive of securing salaried positions through employment agencies."

Discussion:
On its face, the code is clear and direct to the point. There is no question under the factual situation that the gifts are a direct consideration for securing the work, and there is here no pretense about the intention of the foreign government officials.

In Case 60-9 we acted upon a domestic case under Rule 4 of the then-prevailing Rules of Professional Conduct, which was the same as the present. In that case we dealt with three levels of gifts, involving 1. taking employees of a public agency to luncheon or dinner a few times during the year at an average cost of $5 per person; 2. engineers of an industrial firm receiving cash gifts of from $25 to $100 from salesmen for certain products, which may be specified by the engineers; and 3. a consulting engineer giving the chief engineer of a client an automobile of the value of approximately $4000 at the completion of a project as an expression of appreciation for the cooperation of the recipient of the gift. (Realistically, these figures would now be much higher than those amounts on account of inflation since l960.)

It is now worth repeating the language used at that time to indicate the basic principles which should govern the question:

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"The question of when a gift is intended to or becomes an inducement to influence one's impartial decision, as distinguished from an expression of friendship or a social custom, has remained a perplexing one over the years. No blanket rule covering all situations has been discovered. The size of the gift is usually a material factor, but must be related to the circumstances of the gift. It would hardly be felt a token gift, such as a cigar, a desk calendar, etc., would be prohibited. It has been customary in the business world for friends and business associates to tender such tokens of recognition or appreciation, and 'picking up the tab' at a business luncheon or dinner is commonplace and well accepted in the mores of our society."

"Recognizing the difficulties inherent in passing judgment on each instance, we believe the canons and rules state, in substance, that an engineer may neither offer nor receive a gift which is intended to or will influence his independent professional judgment. The full application of this principle requires the impossible--that we read the state of mind of the donor or donee. Therefore, we must apply a criterion which reasonable men might reasonably infer from the circumstances; that the giving or acceptance of the benefit be a matter of 'good taste,' and such that among reasonable men it might not be of a nature which raises suspicions of favoritism."

"Applying these general principles to the situations at hand, we think that an occasional free luncheon or dinner, or a Christmas or birthday present when there is a personal relationship is acceptable practice. On the other hand, cash payments to those in a position to influence decisions favorable or unfavorable to the giver are not in good taste and do immediately raise a suspicion that there is an ulterior motive. Likewise, a very expensive gift has a connotation of placing the recipient in a position of obligation."

From those principles we then concluded that the practice in Situation 1 was ethically permissible, but those in situation 2 and 3 were unethical.

In the case before us we are not told the amount of proposed gifts, but we take it in context that they would be substantial. Accordingly, they would clearly be a violation of the code if offered in the United State.

The basic issue remaining is whether the flat prohibition in Section 11b applies to work in a foreign country where the laws and customs permit the gifts to government officials. It is worth noting in considering this point that in a different but related context, the NSPE Board of Directors in July l966 adopted a so-called "When in Rome" clause to permit the submission of tenders for work in foreign countries when such is required by laws, regulations, or practices of the foreign country.

However, after further discussion and debate, the Board of Directors in January l968 rescinded the "When in Rome" clause from the code as recommended by the Professional Engineers in Private Practice Section, which recognized a division of opinion on the policy but concluded, "... the profession should maintain a 'pure' position on

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competitive bidding; otherwise our opposition to competitive bidding will be chipped away, piece by piece."

The issue before us is a very current one. In recent months the press has been filled with reports of investigations of charges that certain industrial concerns have made improper gifts of large sums to foreign officials to secure contracts for their products. The defense to this activity has generally been that the companies making such gifts had "no choice," meaning that without such action they would not have been able to secure the contracts because competitors in other countries would have complied with the practice. There may be some appeal to this line of argument from a purely pragmatic standpoint, but it must of necessity fail in the final analysis.

Even though the practice may be legal and accepted in the foreign country, and even though some might argue o pragmatic grounds that United State commercial companies should "go along" to protect the jobs of employees in this country, we cannot accept it for professional services. No amount of rationalization or explanation will change the public reaction that the profession's claim of placing service before profit has been compromised by a practice which is repugnant to the basic principles of ethical behavior under the laws and customs of this country. Even if the "go along" philosophy is accepted as an exception only for foreign work, the result must be a "chipping away" of ethical standards, leading to contention that such conduct should also be accepted in the United States when and if it is argued that such is the local or area practice.

This approach is not dissimilar to the arguments advanced by those who have so recently been revealed as offering financial payments to public officials to influence the award of contracts for architect-engineer services. The rationale was "We had no choice. Others were doing it, and if we did not we would not be considered." The short answer is that there is a choice--the choice of declining to be drawn into a seamy procedure for self-gain.

We believe that the code must be read on this most basic point of honor and integrity, not only literally, but in the spirit of its purpose--to uphold the highest standards of the profession. Anything less is a rationalization which cannot stand the test of placing service to the public ahead of all other considerations.

Conclusion:*
It would unethical for Roe to accept the contract and make the gifts as described.

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Board of Ethical Review

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