Report on a Case by the Board of Ethical Review

Case No. 76-9

Conflict of Interest—Turnkey Procedure

Facts:
Engineer Jones was retained by a public agency to develop technical guidelines for an incinerator facility at a major government installation. Following submission, approval, and payment to Jones for the technical guidelines, the public agency owner decided it wanted to proceed with the design and construction by a "turnkey" method of one entity providing both the design and construction. The owner requested Jones to participate in this approach through a joint venture arrangement with a construction contractor, or if preferable, by performing the design function as a subcontractor to the construction contractor, or if he preferred, to bid the complete "turnkey" contract and subcontract the construction to a construction company. In any of these arrangement, the owner proposes to secure bids for the design and construction.

Question:
May Engineer Jones ethically participate in the enterprise through any of the above design/construct procedures?

References:
Code of Ethics **-** 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."

Section 8(a)-"The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer."

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 fees schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested 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 principles shall be applied by the Engineer in obtaining the services of other professionals."

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Discussion:
We first dispose of the question of bidding under the described procedure by noting our opinion in Case 65-5, holding that it is ethically permissible for an engineering firm to submit a combined bid for design and construction services, provided that the combined bid does not include a separate price proposal for the engineering services alone. More recently the NSPE Board of Directors has reinforced that 1965 opinion through its adoption of a policy statement in July 1976, stating in pertinent part: "The inclusion of engineering services within the scope and price of a design/construct proposal or bid is an acceptable practice, provided the engineering services are not separately priced before selection of the firm."

In this situation, the engineer will work out with a construction firm the appropriate division of one price for design and construction by a legal entity, whether it be a joint venture, or through a contractor-subcontractor relationship. In either event, there is no indication that the engineering services will be provided through a competitive bid basis in terms of comparing design service prices between competing design firms, thereby avoiding the danger of competing prices for design driving down the quality of the engineering work.

We find nothing in the code which stands for the proposition that engineers may not engage in design/construct or "turnkey" procedures. We have cited §8(a) of the code only as a tangential reference, noting that it is not controlling by its terms because here the owner not only has knowledge of the possibility of a conflict through the business relationship of the parties, but is in fact the moving party desiring the design/construct method.

There is no apparent basis under these facts to be concerned about the business relationship influencing the judgment or the quality of services of the engineer because he will jointly with the contractor have the duty to provide the owner with quality engineering services which are basic to sound construction. The situation might well be different, however, if an engineer held separate contracts for both design and construction. In that event it may be found that there is an inherent conflict of interest, or at least a temptation, for the engineer to design the project in a way to favor his competitive advantage in the construction bidding process.

It is immaterial for the purpose of this case that Jones provided the original guidelines because the danger that Jones' development of these guidelines might generate a conflict of interest or give him an unfair advantage for the design/construct contract would be minimal (see Example 2 of Case 76-2). We note this aspect only as a cautionary point lest our opinion here be misread to sanction one firm, engaged in both design and construction, being allowed to perform both functions under separate contracts. In this case, however, the contemplated contract is a single contract for one entity to perform both functions.

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Conclusion:*
Engineer Jones may ethically participate in the enterprise through any of the design/construct procedures stated in the facts.

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