Report on a Case by the Board of Ethical Review

Case No. 77-1

Use of Sales Organization on Basis of Stipulated Payments and Percentage of Contract Amount

Facts:
A marketing company has contacted an engineering consulting firm offering to provide marketing consultant services for the purpose of securing work for the engineering firm from public agencies and the private commercial world. The marketing firm proposes to identify possible clients for designation by the engineering firm as potential clients for contact on its behalf by the marketing firm.

The proposed agreement calls for the engineering firm to pay the marketing firm a stipulated monthly sum for an agreed-upon number of months, plus a percentage of the total contract amount received by the engineering firm as a result of selection of the engineering firm by the client flowing from the work of the marketing firm on behalf of the engineering firm. The proposed contract stipulates that it will be made subject to the provisions of federal regulations governing permissible arrangements by firms doing business with the federal government.

Questions:
Is it ethical for an engineer to solicit work by use of a commercial marketing firm?

Is it ethical for an engineer to pay a commission to a commercial marketing firm to secure work for him or her?

References:
Code of Ethics-Section 3-"The Engineer will avoid all conduct or practice likely to discredit or unfavorably reflect upon the dignity or honor of the profession."

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."

Discussion:
In 1962 we dealt with a related issue in passing on a set of facts involving an engineering firm employing a representative, who was not an engineer, for the purpose of soliciting engineering service contracts on a salary-plus-commission basis. We held in that case, under the then-prevailing Rules of Professional Conduct (which is now §11(b) of the code) that it was permissible for the firm to employ a nonengineer as a representative of the firm to solicit work, provided that the nonengineer representative did not discuss engineering aspects of a project (including contract negotiations) with a prospective client. More directly in point to the facts before us, we also held then that while it was not

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unethical to compensate the employed representative on a commission basis, "…this method of compensation is undesirable since it could lead to loss of confidence by the public in the professional nature of engineering services."

Before turning to the purely ethical aspects of the issue before us, we note that contrary to what may be a general assumption that the federal "Covenant Against Contingent Fees" (alluded to in the proposed agreement offered by the marketing firm) bars all forms of contingent contracts, this is not the case. For informational purposes of the reader, we quote the applicable provision from the Federal General Provisions (Architect-Engineer Contract), Standard Form 253:

"9. Covenant Against Contingent Fees

> The Architect-Engineer warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Architect-Engineer for the purpose of securing business. For breach or violation of this warranty the government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee."

Even though the above-cited provision permits the use of "bona fide established commercial or selling agencies…" (which accurately describes the marketing firm here involved), there remains the broader ethical issue of whether such relationships are proper and appropriate for professional services.

On its face, §11(b) rules out not only the payment of any commission to secure work but also bars "other consideration" for the same purpose. In the 1962 decision we dealt only with the role of he nonengineer representative as an employee of the firm. We then distinguished the facts of that case regarding payments to "bona fide employees" of the firm, suggesting in the context of the facts before us now that there is an important difference when the sales effort for the firm is made by an employee of the firm rather than an outside commercial sales or marketing organization. We further noted in the 1962 case that it was "an accepted practice for principals or qualified engineering *employees* of engineering firms to solicit project assignments…."(emphasis added). And, "This practice has not been questioned and is proper, provided, of course, that these contacts and discussions are on a professional plane and do not offend any of the canons or rules."

Applying the criteria and principle stated in the earlier case, we believe that the distinctions remain valid today. Leaving aside the question of how an employee of a firm should be compensated for soliciting work, the important difference to note in the facts before us is that the engineering firm has control over the conduct of an employee,

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whereas it has little or no control over the conduct of an outside marketing firm which operates on a commercial basis. The danger is thus much enhanced that a commercial marketing firm may more readily in its zeal to earn its compensation engage in conduct which may adversely reflect upon the dignity or honor of the profession.

It requires little discussion to deal with that aspect of the agreement which calls for the marketing firm to be paid partially on a commission basis. The language of §11(b) leaves no room for doubt that a commission basis of payment is totally barred.

Conclusions:*

1. It is not ethical for an engineer to solicit work by use of a commercial marketing firm.

2. It is not ethical for an engineer to pay a commission to a commercial marketing firm to secure work for him.

**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

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Additional views:

The undersigned members of BER take this opportunity to express additional views on the issues described in Case 77-1, the conclusion of which were unanimously agreed to by board members present.

It should be understood by all that the BER is constrained to decide cases on the basis of the wording of the Code of Ethics then in effect. In some instances the language of the code is broad enough to require an interpretation as to its applicability in a specific situation; however, there is no doubt that a literal reading of §11(b) makes the employment of a commercial marketing company and the payment of a commission to secure work a "per se" violation of this section of the code. Hence the unanimous opinion of BER members on Case 77-1 as described.

It is axiomatic that the principal thrust of the NSPE Code of Ethics is the advancement and protection of the public welfare. Viewed in the context of modern business practices as required by our complex society and the increasing number of U.S. firms exporting their technical expertise on a global basis, there is a serious question as to whether the present language of the code is unduly restrictive while offering at best a limited measure of protection of the public interest. There are many circumstances where it becomes

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desirable if not actually necessary for engineering firms to employ outside services to assist in obtaining work. Marketing firms specializing in the representation of professional engineering firms may well be controlled by qualified professionals fully aware of the proscriptions involved in the marketing of professional services, thus it appears unreasonable to assume that these firms would be unduly susceptible to improper conduct in their zeal to earn their compensation. In any event, clearly it should be the responsibility of the engineering firm to assure that the marketing group which has been authorized to represent its interest does so in a proper manner.

The payment of a "commission" based on actual sales vis-à-vis a specified payment schedule or salary if a bona fide employee of the consulting firm presents a more complex issue. It is apparent that the pressures and temptations inherent in this type of financial arrangement could "…lead to a loss of confidence by the public in the professional nature of engineering services," as stated in a previous case. There are many engineers, however, who feel that the financial arrangement between the engineer and his employees or representatives is a business consideration not directly relevant to ethical considerations.

It would be well for the NSPE Ethical Practices Committee to review the issues raised by Case 77-1 in the light of current conditions of practice.
Robert R. Evans, P.E.; James G. Johnstone, P.E.; James F. Shivler, Jr., P.E

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