Report on a Case by the Board of Ethical Review

Case No. 77-4

Contingent Contract—Engineer Retained on Speculative Basis

Facts:
A county agency published an open announcement to consulting engineering firms soliciting expressions of interest in providing services for a water system project. The announcement made it clear that the engagement would be for the purpose of preparing an engineering report to be submitted to a federal agency to seek financial assistance for the proposed project. It was also made clear that the agency did not have any present funds to pay the consultant, that the agency was not committed to carrying through the project to construction, that if the report shows that the project is not feasible either from an engineering or financial standpoint, "…or that there is discerned a majority sentiment against the project for whatever reason, prior to federal funding commitment, then the project preparation will be terminated."

The announcement further stated, "The consulting engineer would be retained solely on the basis of speculation that the project may proceed through the construction phase. If the project is stopped at any time before federal funds are committed, then the [agency] would have *no* legal obligation to remunerate the consulting engineer for services performed."(Emphasis in original.) The announcement closed with the statement that all interested consultants were invited to attend a public hearing "…to observe personally the public sentiment about the project."

Question:
Would it be ethical for an engineer to undertake to provide the services indicated under the stated conditions?

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:
As we noted most recently in Case 73-4, §11(d) of the code does not rule out all contingent contracts but rather recognizes that contingent contracts are improper only under circumstances in which the arrangement may compromise the professional judgment of the engineer or when used as a device for promoting or securing a professional commission. We can discard the latter part of §11(d) under the circumstances of this case because the conditional arrangement is being proposed by the agency (owner) rather than the engineers seeking work.

Copyright © 1977 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

The first question before us, then, is whether under the clear stated conditions imposed by the agency it could be said that the engineer's professional judgment may be compromised. Inasmuch as part of the criteria to be used in determining whether the project will proceed is a finding of technical and economic feasibility, it can be readily determined that the engineer retained under the circumstances could be influenced to provide a favorable report.

In Case 66-12, however, we recognized a distinction between a condition that funds become available to the client and a condition that payment to the engineer not depend upon a finding of economic feasibility, permitting the former but not the latter. That conclusion was in accord with an earlier opinion in Case 65-4, in which it was stated:

> "Payment to the engineer under the facts stated clearly is dependent upon approval of the bond issue, and the success of the bond issue, in turn, is dependent upon a showing that the project is technically and financially sound. Accordingly, in determining the most economical and proper method for the design and construction of the project, the engineer must be influenced by this knowledge and by the knowledge that the estimated cost of the project and the bond issue will be a material factor in determining whether he receives any compensation for his work."

We then concluded in that case that "The import of the restrictions in §11(d) is that the engineer must render completely impartial and independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project."

The second and new contingent element in the facts before us is the broad, sweeping, and abundantly clear condition that the consultant is not to be paid for the services if the project does not proceed for any reason, even including public expressions of disapproval as determined by the public agency after public hearings. While we do not look with favor on the procurement procedure outlined above, we commend the agency for its very clear statement of intent in this regard. Engineers receiving the announcement and invitation to be considered could not possibly be misled as to the intent and the restrictive arrangement.

As to this second aspect of the case, we do not find that the code by its specific language bars an engineer from entering into a purely speculative contract. If the engineer wishes to take chances on being compensated for the services because negative public comment causes cancellation of the proposed project or because the owner may not ultimately obtain the needed funds for any reason, he or she may do so.

To relate these two different elements of the agency's approach, the engineer could ethically comply with all the terms and conditions stated in the announcement if the services were designated as designing the water system for a stipulated fee subject to public approval and the availability of funds. However, the engineer may not provide the

Copyright © 1977 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

technical and economic feasibility study for the project under the restrictive conditions. This may appear to be an odd result, but, as often stated in earlier cases, we take the code as it is written. If the distinction appears to some to be an arbitrary one, they may seek a change in the code language or concept, but we believe that there is a valid ethical basis in the two situations from the standpoint of one practice providing a temptation for the engineer to compromise professional judgment, hence knowingly or unknowingly subverting the public interest, whereas in the second instance there is no cause to compromise judgment in providing the design of the best possible facility. In that circumstance the only consideration is whether he or she will be paid for those best efforts for the client. This is a business decision he or she may make at will without sacrifice of ethical standards.

Conclusion:*
It would not be ethical for an engineer to undertake to provide the services indicated under the stated conditions insofar as they include an engineering report to be used as a basis for determining the economic and technical feasibility of the project.

**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
Robert R. Evans, P.E.; James G. Johnstone, P.E.; Joseph N. Littlefield, P.E.; Donald C. Peters, P.E.; James F. Shivler, Jr., P.E.; L.W. Sprandel, P.E.; William J. Deevy, P.E., chairman

Copyright © 1977 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).