Report on a Case by the Board of Ethical Review

Case No. 77-5

Use of Another's Project Study

Facts:
A state agency contacted Firm A and requested preliminary data regarding the possibility of designing a facility of a somewhat unique nature and which required special expertise in the field of solar energy. Firm A had previously proposed the concept for that special type of facility to a federal agency, which apparently was made known by the federal agency to the state agency. Firm A submitted the requested preliminary information to the state agency, which in turn made the information available to a private foundation in the form of a proposal to secure additional funds for the project. During this process the state agency and representatives of Firm A engaged in a series of informal discussions on the contemplated project, leading Firm A to believe it had been assured it would be awarded the design of the project if it went ahead.

Some months later the state agency advised Firm A that it had received both public and private funds for the project but not in sufficient amount for the full scope of the facility. Firm A was requested to then evaluate whether a more limited facility could be provided for the limited funds. Firm A then made subsequent investigations, including out-of-state visits, at its own expense, upon its belief that it would be awarded the design contract. Based upon the further studies, Firm A submitted a revised proposal to the state agency. Firm A estimated it expended approximately $3000 in its endeavors.

Subsequently, the chief engineer of the state agency advised Firm A that he had turned over all the data furnished by Firm A to Firm B for its use. This was followed by a notice from the state agency that it was conducting initial negotiations with Firm B, and that if these negotiations were not successful it would contact Firm A for negotiations for the project assignment. Firm B was aware of the involvement of Firm A prior to its initial negotiations. During the course of these developments Firm B did not contact Firm A for any discussion of the project or the earlier submissions of Firm A to the state agency. Firm A has protested to the state agency, alleging that the procedure followed by the agency and the action of Firm B violated the Code of Ethics.

Questions:
1. Was it ethical for Firm A to expend approximately $3000 under the circumstances?

2. Was it ethical for the chief engineer of the state agency to turn over the studies, reports, and data provided by Firm A to other firms?

3. Was it ethical for Firm B to enter into negotiations for the project under these circumstances?

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References:
Code of Ethics-Section 7-"The Engineer will not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent.

Section 9-"The Engineer will uphold the principle of appropriate and adequate compensation for those engaged in engineering work."

Section 11-"The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding, by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods.

Section 11(a)-'The Engineer will not attempt to supplant another engineer in a particular employment after becoming aware that definite steps have been taken toward the other's employment."

Section 11(g)-"An Engineer will not use "free engineering" as a device to solicit or otherwise secure subsequent paid engineering assignments."

Section 14-"The Engineer will give credit for engineering work to those to whom credit is due, and will recognize the proprietary interests of others."

Discussion:
The problem posed by the first question is similar to the problem that confronted us in Case 76-8. In the previous case an engineer provided free engineering services with the knowledge that he had not yet been selected and was then still in competition with other firms. In the discussion in that case we acknowledged the practical difficulties faced by engineers in this phase of negotiations. "On balance" we concluded it was not ethical to provide the services described in that case. In the case before us Firm A was under the impression, as mistaken as subsequent events found the impression to be, that it was going to be awarded the design of the project if the project went ahead. So the situation anticipated by §11(g() did not really exist since Firm A thought it already had the assignment.

Turning now to the actions of the chief engineer of the state agency, we do not find a section of the code which deals directly with the question his actions pose. However, we look with interest at §7, which states in part, "The Engineer will not disclose confidential information concerning…technical processes of any present…employer without his consent." The facts in this case indicate that Firm A had special expertise in a narrow field. Despite this expertise, Firm A had to make investigations at considerable expense in order to submit a proposal to the agency. It seems to us that it is logical to assume that Firm A's proposal contained much highly specialized technical information.

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Even though the chief engineer did not violate the letter of any part of the code in turning over the data to Firm B, he skirted the spirit of several code provisions which are generally intended to protect engineers from improper use of their technical accomplishments (see §§7, 9 and 14).

We cannot find any specific provision of the code which deals either directly or indirectly with the ethical obligations of an engineer on behalf of or as an agent of the owner to avoid taking advantage of another engineer who has, in good faith, provided substantial valuable information for a proposed project on an understanding (even if an imperfect one) that the engineer providing the assistance will receive the commission for it. We deplore this lack of specificity in the code and within the limits of our charter can only suggest that consideration be given to an appropriate revision or addition to the code to cover such a situation. Our reluctant conclusion may meanwhile serve the purpose of alerting engineers in private practice who are tempted to expend substantial time, effort, and funds to secure a commission to the danger they run when that expenditure exceeds a nominal investment.

Under the stated facts we cannot say that §11(a) has been offended on the part of Firm B because there is no showing that "definite steps" had been taken to retain Firm A. We are inclined to note as to Firm B under these facts, that while it did not apparently initiate the contact with the agency to secure the work, it did have actual knowledge of the previous services provided to the agency by Firm A. The practice of professional courtesy should have dictated that Firm B contact Firm A to discuss Firm B's involvement.

At this point we gratuitously note that some of the difficulties that developed would have been avoided if Firm A had not relied upon its belief that it would be awarded the contract.

Conclusions:*

1. It was ethical for Firm A to expend approximately $3000 under the circumstances.

2. It was not unethical for the chief engineer of the state agency to turn over the studies, reports, and data provided by Firm A to other firms.

3. It was ethical for Firm B to enter into negotiations for the project under these circumstances.

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Board of Ethical Review

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