Report on a Case by the Board of Ethical Review

Case No. 78-3

Conflict of Interest -- Binary Service to Same Client

Facts:
Engineers A and B are the sole partners in a consulting engineering firm. They also own and operate Water Services, Inc., a separate corporation. Water Services, Inc., has a management arrangement with a rural water district under which Water Services provides, on a regular full-time basis, such services as meter reading, billing, recommendations for maintenance and repairs, and other general management services, including recommendations from time to time for additions and improvements to the water system. The board of directors of the water district meets regularly and receives the reports and recommendations of Water Services, Inc. When the board approves recommendations from Water Services, Inc., for additions or improvements to the water system it awards the engineering assignments for the required professional services to the consulting firm of A and B under the terms of a continuing contract.

Question:
Is it ethical for A and B to accept and perform professional engineering assignments for the water district which stem from the recommendations submitted by Water Services, Inc.?

References:
Code of Ethics – Section 1 – "The Engineer will be guided in all his professional relations by the highest standards of integrity, and will act in professional matters for each client or employer as a faithful agent or trustee."

Section 1(g) – "He will avoid any act tending to promote his own interest at the expense of the dignity and integrity of the profession.

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 8(b) – "When in public service as a member, advisor, or employee of a governmental body or department, an Engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice."

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Discussion:
We have cited 8 and 8(b) of the code as being relevant to the issue of the case, although in the final analysis the primary question is whether Engineers A and B improperly used the management firm to promote work for the engineering firm and, if so, whether this arrangement was at the expense of the integrity of the profession under 1(g).

We note in passing, however, that a point can be made that the arrangement involved a potential conflict of interest which was avoidable, in that A and B were in a position through their management firm to make recommendations that were more for the benefit of their engineering firm than the water district. But we do not rest the result on 8 in light of the discussion and conclusion in Case 71-6 to the effect that 8(a) would not have been included in the code if the framers had intended an absolute ban on avoidable conflicts of interest.

Likewise, 8(b) is not conclusive of the issue because neither Engineer A nor Engineer B was a member or employee of the water district board, and was not an advisor in the sense of consulting with the board to guide the board in its decision making responsibility. They merely offered their advice to the water board through the management firm as an outside organization under an arms-length contract. On the basis of the facts available to us, we assume the water district board made an independent judgment to accept, reject, or modify the recommendations of the management firm. There is no showing of undue influence on the part of A or B in this relationship.

We come then finally to the controlling question of 1(9). On the face of the facts known to us there is no evidence that there was a collusive arrangement between the water district board and Engineers A and B to promote projects not warranted, or to deliberately limit the engineering design work to the one firm at unreasonable or improper fees.

There may well have been suspicion or doubt on the part of the public about the arrangement in that the water board had entered into what is referred to as a continuing services contract with one firm for all the work of the water district. We assume, however, that the water district board had authority to terminate that continuing contract with the engineering firm at any time it determined that the services were inadequate or unsatisfactory on either a technical or economic basis. Continuing service contracts are not unusual and often serve a proper need of clients who may require intermittent services on short notice, with the advantage of having agreed in advance on the general terms and conditions of the agreement. While we might speculate on a number of possible avenues of impropriety arising from this type of relationship in the public area, in the absence of facts to indicate such abuses we cannot reach a conclusion to ethically prevent the practices employed in this case.

Conclusion:
It was ethical for A and B to accept and perform professional engineering assignments for the water district which stemmed from the recommendations submitted by Water Services, Inc.

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Board of Ethical Review: William J. Deevy. P.E.; James G. Johnstone, P.E.; Robert H. Perrine, P.E.; Donald C. Peters. P E.; James F. Shivler. Jr.. P.E.; L. W. Sprandel, P.E., chairman.

Dissenting opinion:
The discussion representing the views of the majority identifies the primary question in the final analysis as being whether Engineers A and B improperly used the management firm to promote work for the engineering firm and, if so, whether this arrangement was at the expense of the integrity of the profession under 1(9).

The facts presented do not allow us to judge one way or the other, whether A and B used the arrangement improperly; therefore, we can hardly accept this as the primary question. Moreover, had facts been presented to substantiate improper use there should be little doubt that such action would be at the expense of the integrity of the profession. The question is not one of whether A and B abused the arrangement but rather whether the arrangement per se is a violation of the code.

Since A and B were paid on a full-time basis to manage the water system and since the rural water district is presumably administered by a group of volunteer lay people who are not expected to be technically knowledgeable, one might suppose that the advice and recommendations of A and B would carry the force of authority with the water district board of directors In addition, under the circumstances, it is most likely that in the eyes of the board and the local public, the individuals A and B were first and foremost engineers. They did not discard their professional identity when they sat as Water Services, Inc. Indeed, it was their technical competence as engineers which qualified them to manage the water system.

While we might speculate that A and B performed their binary responsibilities in an exemplary fashion, that they were able at all times to completely separate their dual roles so that their every decision was made without consideration of its effect on their other business interests, the facts do not speak to this. The total relationship between A and B and the rural water district is such that 8(b) should be conclusive.

Dissenting conclusion:
It was not ethical for A and B to accept and perform professional engineering assignments for the water district which stemmed from the recommendations submitted by Water Services. Inc. - *Robert R. Evans. P.E.*

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