Report on a Case by the Board of Ethical Review

Case No. 78-5

Post Interview Change in Joint Venture Team

Facts:

A public utility authority announced plans to build a large and complex addition to its power facilities, and publicly invited qualification statements from interested engineering firms. The state law and a local ordinance, which applied to the authority, required that all firms submitting statements of interest be considered, that not less than three firms deemed most highly qualified be interviewed to consider in more detail the ability of the professional personnel; past performance; ability to meet time and budget requirements; location of the firms; recent, current, and projected workloads of the firms; and other qualification factors determined by the agency. Following these interviews, the agency is required to select the "most qualified" firm for negotiation of a contract. If the parties are not able to agree on the terms of an agreement, the agency then undertakes negotiations with the second-ranked firm.

The utility authority narrowed a large number of qualification submissions to seven qualified firms, one of which proposed a joint venture in view of the size and complexity of the project and the technical requirements for special areas of expertise. Firm A, one of the seven, following an initial interview, was advised that the screening committee of the authority felt that its joint venture proposal did not indicate sufficient experience in certain technical aspects, nor reflect a desirable backup of specialized technical personnel. Upon learning of this reaction from the screening committee at a public meeting and prior to a selection by the authority, Firm A proceeded to arrange for other participation as part of the joint venture to overcome the apparent deficiencies in its overall ability to provide the total services needed to be selected for negotiations. Firm A requested the utility authority to allow it to modify its qualification statement and proposal in light of the change it had made in the team, with the understanding that all competing firms be allowed to likewise modify their statements of qualification, if desired.

The utility authority, after receiving advice that there was no legal impediment involved, granted the request of Firm A and a revised qualification proposal was submitted to it. Subsequently, some members of the public and of the city council objected to allowing Firm A to alter its qualification proposal, alleging that in doing so it violated the intent of the governing procurement law, and that Firm A had acted unethically in making its request.

Question:

Was it ethical for Firm A to seek to alter its qualification proposal in order to improve its position to secure the contract?

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Reference:
Code of Ethics – Section 6 – "The Engineer will undertake engineering assignments for which he will be responsible only when qualified by training or experience; and he will engage, or advise engaging, experts and specialists whenever the client's or employer's interests are best served by such service."

Discussion:
It is beyond our charter to pass judgment on the issue whether the utility authority violated the governing state law or the local ordinance on engineering services procurement. But we may note that the applicable laws are similar to the Federal A/E selection law (Brooks Act) and the laws of other states, which contemplate a procedure whereby the public body may select the "best qualified" firm. In the context of this case the "firm" would include a joint venture, which is a legal entity for the one project. We further observe that it would indeed be a peculiar result that a state or local law intended to have the client select the "best qualified" firm be interpreted to preclude a procedure intended to present each "firm" in its best light of technical and other professional qualifications.

Turning, however, to the ethical issue, we observed in Case 71-2 that 6 of the code "...recognizes the propriety and value of the prime professional or client retaining the services of experts and specialists in the interest of the project." And further in that case, ". . .Section 6 contemplates that a prime professional will be expected to retain or recommend the retention of experts and specialists in situations in which the prime professional is performing substantial services of a project."

The earlier case related to a single firm employing other firms as associates for part of the work, with the prime firm retaining full legal responsibility for the project assignment. But we see no real difference in the ethical obligation when instead of one "prime" firm the legal entity is to be a joint venture in which all the involved firms are jointly responsible.

The remaining issue, presumably, is whether it is fair to allow a competing firm to revise the elements making up the team of its joint venture in order to meet a higher level of qualification on the basis of public comments made by the screening committee. We do not see any basis to question the fairness of such a procedure when all competing firms are given the same opportunity. In fact, under the mandate of 6 of the code, Firm A might be held in violation if it did not make a reasonable effort to upgrade the qualifications of the joint venture for the assignment once it was indicated that additional technical support was required by the client. When that aspect was indicated on behalf of the client by the screening committee Firm A had no ethical choice but to upgrade its qualifications through either internal or external revisions in its proposal, or eliminate itself from further consideration.

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Conclusion:*
It was ethical for Firm A to seek to alter its qualification proposal in order to improve its position to secure the contract.

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

Note: Member James F . Shivler, Jr ., P.E., did not participate in the consideration of this case.

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