Report on a Case by the Board of Ethical Review

Case No. 78-7

Commission Basis of Payment Under Marketing Agreement

Facts:
John Doe, P.E., has been engaged extensively in recent years in a variety of engineering activities in the international market. He determines that on the basis of his experience, familiarity with the special requirements of engineering work in other countries, and personal contacts with officials of certain foreign countries he could better serve the interests of the engineering profession, as well as his own economic interests, by representing United States firms which wish to engage in international engineering and lack a background in the special fields of knowledge required for that purpose, or which do not have the resources to develop the necessary skills to successfully enter that field.

Recognizing the inability of many U.S. firms to commit themselves to a substantial capital outlay to develop their potential in the international market pending the award of a contract, Doe drafts a plan, called a "Marketing Agreement," under which he offers his services to represent U.S. firms interested in obtaining international work. The agreement calls for Doe to provide information and develop contacts within stated geographical areas, to evaluate potential projects for the firms he represents, to coordinate project development, arrange contract terms between the client and the represented firm, and provide such other special services as the represented firms may authorize.

For these services Doe is to be paid a basic fee, the amount of which is to be negotiated on an individual firm basis, a monthly retainer fee of a negotiated amount on an individual firm basis, and a "marketing fee" of a negotiated percentage of the fees actually collected by the firm he represents for projects which were "marketed" by Doe.

Question:
Is it ethical for an engineering firm to enter into such a "Marketing Agreement" with Doe?

Reference:
Code of Ethics - 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:
We presume that the instant case does not violate federal laws or laws of the country involved. We dealt with a similar situation in Case 77-1, but with certain differences in the facts, and concluded it was not ethical for an engineer to pay a commission to a commercial marketing firm to secure work for him.

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In the case before us, it is clear that the "commercial marketing firm" involved is an individual professional engineer offering his services on a commission basis, in part.

In reaching our conclusion in Case 77-1, we noted an earlier decision in Case 62-4 in which a paramount factor was that a sales representative of an engineering firm to be paid on a combined salary-commission basis was not an engineer. In that case it was concluded that the firm could utilize the sales promotion of a non-engineer, provided he did not discuss engineering aspects of the project, and only commented on the commission payment issue that ". . .this method of compensation is undesirable since it could lead to loss of confidence by the public in the professional nature of engineering services."

Extending that comment in the 1977 case, however, we said that the use of a commercial marketing firm would offend the Code of Ethics because ".... the engineering firm has control over the conduct of an employee, 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."

Three members of the Board of Ethical Review, while signing the opinion in Case 77-1, expressed "additional views" to the effect that ". . . 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." The members of the BER subscribing to the additional views suggested that the issue should be reviewed for a possible change in the pertinent code language or concept. To date, however, 11(b) of the code has not been revised.

When the prohibition of commission fees as a basis to secure work is read in conjunction with other parts of 11(b), i.e., political contributions or gifts, it would appear that the original purpose and intent were to foreclose circumstances which might arouse doubt or suspicion of impropriety in securing engineering assignments.

It is clear, however, that 11(b) prohibits the payment of "any" commission in order to secure work (other than salaried positions), thereby ruling out the permissibility of a commission basis coupled with definite sums as a retainer fee or basic fee.

Conclusion:*
It is not ethical for an engineering firm to enter into such a "Marketing Agreement" with Doe.

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Board of Ethical Review: Louis A. Bacon, P.E. Robert R. Evans, P.E. James G. Johnstone, P.E Robert H. Perrine, P.E. James F. Shivler, Jr., P.E. L.W. Sprandel, P.E. Donald C. Peters, P.E., chairman

Note: All members of the board concur in the "Additional Views" expressed in Case 77-1 and urge revision of the code along those lines. For the information of the reader those additional views were:

"The undersigned members of BER take this opportunity to express additional views on the issues described in Case 77-1, the conclusions 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 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 interests 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

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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."

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