Report on a Case by the Board of Ethical Review

Case No. 78-9

Conflict of Interest—Services on Same Project

Facts:
John Doe, P.E., is city engineer of a municipality and is authorized by the city council to select engineering firms for project assignments on the basis of experience, competence, and expertise and thereafter to negotiate a contract with the selected firm, subject to review and approval of the city council. Doe selected a firm headed by Richard Roe, P.E., for a large water sewer project for an initial study of the technical and economic feasibility of the project and thereafter negotiated a lump sum agreement for the study, which was approved by the city council. Roe's firm completed the study, concluding that the proposed project was feasible from both technical and economic standpoints and that the project could be designed and constructed within currently available funds and anticipated user revenues.

The city council approved the project concept and directed Doe to proceed with the selection of an engineering firm for the design of the project and professional services during the construction phase. Doe invited submission of technical proposals from all interested engineering firms in the geographical area for the design and related work, making available to all the complete feasibility study report submitted by Roe's firm. Following review of the technical proposals from a number of firms, including Roe's, Doe determined that Roe's firm was best qualified and proposed selection of that firm to the city council for authorization to proceed with the negotiation of a contract for the design and related services. John Smith, P.E., head of one of the other competing firms, protested the selection of Roe's firm on the ground that such selection would constitute unfair competition and preferential treatment by Doe and would indicate a conflict of interest on the part of Roe's firm because the favorable feasibility report could have been influenced by the intention or hope of receiving the design contract if the project was found feasible.

Questions:
1. Was Doe unethical in selecting the same firm which had performed the feasibility study for the design services on the same project?

2. Was Roe unethical in seeking a contract for the design service following his firm's favorable feasibility report on the same project?

References:
Code of Ethics - 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."

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

Discussion:
Until recent years the situation described in this case would hardly have been considered worthy of ethical review. It has long been the practice for clients, both public and private, to utilize the same firm for feasibility studies and subsequent project design and related services. The issue has been raised, however, whether this practice should be allowed to continue, particularly in the public sector. The argument is made that the firm which performed the feasibility study may be tempted to make it come out favorably. A negative report likely would terminate the project and thereby eliminate the possibility that the firm would be engaged for the design work, which is usually more lucrative than a study contract. This more recent attitude on the part of some governmental bodies reflects the unfortunate belief in the decline in the integrity of the engineer to act only in the interests of the client and to forego the mandate of the philosophical requirement in the Engineers' Creed: "To place service before profit, the honor and standing of the profession before personal advantage, and the public welfare above all other considerations."

Yet the fact remains that there now does exist this attitude of wariness or cynicism on the part of some governmental bodies or individuals, leading to a policy to not permit the same firm to perform both the feasibility study and the later design services if the project goes forward. We recognize that governmental agencies are within their proper right in making such policy decisions, and it is not our function to comment on the wisdom of such policy decisions.

We are concerned, however, with the ethical question now being raised under these kinds of circumstances. Turning first to 8(a), it is clear that Doe obviously knew of the prior connection of Roe with the project through the feasibility study and has determined that Roe's previous connection with the project would not be a negative factor in having his firm do both parts. And it follows that Roe is not required to give Doe notice of a fact already known to him. In our view, a conflict of interest exists only when the engineer's dual role in a given situation would work to the detriment of the client.

Despite the development alluded to above of clients pursuing a policy of separating the feasibility study from the design aspect of the project, we are not prepared to say that the client's interest is compromised when one engineer or firm does both. An engineer who would prepare a biased feasibility report would be guilty of a serious breach of ethical standards. In the absence in the facts before us of any evidence or reasonable indication

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that there was such a breach, we assume that Roe's favorable conclusion in the feasibility study was an honest evaluation of the available data.

Regarding Smith's claim that the selection of Roe for the design contract was unfair competition and preferential treatment, nothing in 11 can be construed to hold that in every case an engineer may not seek a follow-on assignment after a feasibility study. As previously noted, it has long been a common practice in the profession for this type of arrangement, and whether it is now changing to some extent by policy decision of some clients is not a basis to declare that traditional procedures constitute unfair competition or a questionable method. Smith's charges must likewise fail under the known facts. To the extent that an engineer in charge of selecting another engineer or firm for a project under normal professional procedures is concerned, there is always what some might call "preferential treatment" by the choice of judgment as to which engineer or firm is best qualified. We would prefer to regard that exercise of judgment not as preferential treatment but rather a necessary subjective decision. Every selection, no matter how carefully and impartially made from among those competing for the work, is and must be subjective. Subjectivity, not influenced by personal benefits or improper motivation by the selecting authority, is the essence of professional responsibility in making the choices after fair consideration of all pertinent factors of competence and quality.

Conclusions: *

1. Doe was not unethical in selecting the same firm which had performed the feasibility study for the design services on the same project.

2. Roe was not unethical in seeking a contract for the design services following his firm's favorable feasibility report on the same project.

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