Report on a Case by the Board of Ethical Review

Case No. 79-4

Conflict of Interest—Public Advisory Board

Facts:
Engineer A, a principal in a consulting engineering firm, serves as chairman of the local storm drainage board. The board was established by the city council as an advisory body on general engineering needs of the city with regard to the city's drainage and related facilities. The board periodically reviews the present facilities in light of economic and environmental considerations and submits recommendation for improvements to the city council. When the city council determines that it requires engineering expertise to design changes or additions to the facilities it directs the city's engineering staff to secure statements of interest and qualification from engineering firms. The responses submitted by the firms are provided to the storm drainage board for review and recommendation to the city council, which makes the selection of a firm for negotiation of a contract.

To the present time Engineer A has advised the city council and its engineering staff that his firm should not be considered because of his membership on the advisory board. However, the city engineering staff has now requested Engineer A's firm to submit its qualifications for a pending project along with other firms with full knowledge of the role of Engineer A and his previous policy position. Engineer A discussed the matter openly with the members of the city council, the city attorney, and city manager, each of whom expressed the view that it would be proper for the consulting firm to be considered and accept the project, if selected, provided Engineer A did not participate in the consideration or judgment of the advisory board. Some of the principals of the firm believe it would be appropriate under these circumstances to allow the firm to be considered.

Question:
May the consulting engineering firm of which Engineer A is a principal ethically respond to the request for a submission of qualifications if Engineer A disqualified himself from the consideration and recommendation of the advisory board as to the selection of the engineering firm?

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."

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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Section 8(c) - "An Engineer shall not solicit or accept an engineering contract from a governmental body on which a principal or officer of his organization serves as a member."

Discussion:
In an earlier related case, 75-7, the engineer was a member of a commission which controlled the issuance of permits for projects. The engineer in that case undertook to perform engineering-surveying work for a private facility which was being developed on the basis of a permit granted by the commission on which the engineer served, but the engineer had abstained from the discussion and vote on the particular permit application. We held in that case that the engineer could ethically perform the engineering-surveying services, with an additional comment from one member of the Board of Ethical Review that the engineer in that situation should not serve on the commission because of the nature of his practice being so related to the authority of the commission.

In reaching our conclusion in Case 75-7, we stated that the relationship between his service on the commission and the taking of a contract for private work related to the issuance of the permit by the commission was sufficiently indirect to allow the arrangement, but we conditioned that conclusion on the fact that the engineer had abstained from voting on the permit. "Clearly," we said, "if he had not abstained from voting for the permit he would not ethically have engaged in work flowing from its issuance." And we added the further caveat, "and we would reach the same result (not ethical) even with his abstention if there was any showing to any degree that he had influenced the decision on the permit."

The case before us is different in principle only in that the contractual arrangement with the firm of Engineer A would be directly with the city rather than a private party operating under a permit issued by the city.

Turning our attention first to 8(c) of the Code, the contract in this case is not to be awarded by a governmental body on which Engineer A serves; it is to be awarded by the city itself through the decision of the city council.

The language of 8(b) poses a more difficult question in that on its face it bars even an "advisor" of a governmental body from participating in considerations or actions with respect to the services of his firm in private engineering practice. Inasmuch as Engineer A will apparently not "participate" in the "considerations" of the advisory board or in the considerations of the city council, there remains the question of the meaning of "actions" under 8(b). We take it that "actions" in the context of 8(b), however, relate to the actual decision-making process. Under that reading Engineer A would not be a participant in the actions of either the advisory board or the city council.

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In this situation, Engineer A has "endeavored" to avoid a conflict as stipulated in 8 by fully disclosing the circumstances to appropriate public officials. We recognize the importance of not creating an impression of a conflict in the eyes of the public, but here Engineer A has done all that he could to eliminate or minimize an apparent conflict, short of denying the potential services of his firm, or declining to perform a civic service.

In reaching our conclusion for the reasons stated, we again emphasize the overriding importance of engineers disqualifying themselves from any degree of consideration or action of the public agencies on which they serve if they are to be considered for direct or indirect work related to their service on public bodies.

Conclusion:
The consulting engineering firm of which Engineer A is a principal would not be unethical in responding to the request for a submission of qualifications if Engineer A disqualified himself from the consideration and recommendation of the advisory board as to the selection of the engineering firm.

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

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