## Report on a Case by the Board of Ethical Review

## Case No. 80-1

## Protest of Low Fee Proposal

**Facts:**

A state agency, operating under a new procedure for selection of engineering services, advertised its intention to retain an engineering firm for the design of a highway bridge. The announcement called for all interested firms to submit a statement of qualification, following which the agency selection board would prepare a "short list" of the three best qualified firms. Thereafter each of those firms would be requested to attend a "scope of project" meeting for more information about the requirements, following which those firms would be asked to submit a price proposal. The agency procedure states that it is not required to accept the lowest price, but that price will be a factor in the selection decision.

After a review of the competency of all the firms by the agency engineering staff, Firms A, B, and C were placed on the "short list" and principals of those firms attended the "scope of project" meeting. The firms then subsequently submitted the following price proposals: Firm A: $50,000; Firm: $120,000; and Firm C: $200,000.

The agency announced its intention to award the contract to Firm A. Representatives of Firms B and C promptly filed protests with the agency and called for a public hearing on the ground that the proposal of Firm A was so out of line with realistic costs for proper engineering performance for the project that the result would most likely be an inadequate design, with higher construction and maintenance costs over the life of the facility, and the possibility that the design could be unsafe and jeopardize the public health. A principal of Firm A charges that the engineer principals of Firms B and C have acted unethically. In return, the engineer principals of Firms B and C counter that the engineer principals of Firm A have acted unethically in making their proposal under these circumstances.

**Questions:**

1. Were the engineer principals for Firm A unethical in submitting their price proposal as stated?

2. Were the engineer principals of Firms B and C unethical in filing a public protest and calling for a public hearing regarding the award of the contract to Firm A?

**References:**

Code of Ethics - Section 2 - "The Engineer will have proper regard for the safety, health, and welfare of the public in the performance of his professional duties. If his engineering judgment is overruled by nontechnical authority, he will clearly point out the consequences. He will notify the proper authority of any observed conditions which endanger public safety and health."

Copyright © 1980 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Section 2(a) - "He will regard his duty to the public welfare as paramount."

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."

Section 12 - "The Engineer will not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of another engineer, nor will he indiscriminately criticize another engineer's work. If he believes that another engineer is guilty of unethical or illegal practice, he shall present such information to the proper authority for action."

**Discussion:**
We note preliminarily that competitive bidding is not at issue in this case. Accordingly, previous opinions of the Board of Ethical Review based on provisions relating to bidding are not pertinent in this case.

We also note preliminarily that the procedure described in the facts is contrary to the practice of most public agencies, local, state, and federal, which select engineering firms on the basis of professional qualification, followed by negotiation with the best qualified firm, in accordance with state and local laws, ordinances, and regulations, and in accordance with federal law under the Brooks Act. However, because a few public bodies have adopted the method described in the facts above, the profession is in need of ethical guidance with respect to compliance with those procedures.

It is fundamental to engineering ethics that the engineer may not offer or perform services which endanger public safety and health. This principle is articulated in 2 and 2(a) of the code, cited above.

Section 11 of the code also states a principle which applies to Firms A, B, and C, namely that engineers shall not attempt to obtain professional engagements by "improper or questionable methods."

Section 12 of the code makes it clear that Firms B and C are not permitted to attempt to injure the interests of Firm A for the purpose of advancing the interests of Firms B and C. Section 12 also dictates, however, that Firms B and C are permitted, or required, to present information to the responsible government agency (i.e., "the proper authority") if Firms B and C believe that Firm A's action endangers public health and safety.

Copyright © 1980 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

This board has not been presented with technical analysis of the engineering requirements for the facility at issue, and expresses no view as to whether any or all of the bids are consistent with professional standards. We observe that Firm A's bid was $70,000 less than the bid of Firm B, and that Firm B's was $80,000 less than the bid of Firm C. These facts, in and of themselves and in the abstract, give rise to no inference of unethical activity.

We assume for the purpose of this discussion that Firms A, B, and C, having made an analysis of the engagement, are intimately familiar with the engineering requirements for design of the facility. We further assume for the same purpose that the conduct of Firms B and C in protesting Firm A's bid was motivated by a sincere and genuine desire to protect the public safety and health, and not for the purpose of self-aggrandizement. We leave for another day and time the question whether in circumstances such as those presented Firms B and C could properly be selected for the same assignment if the award to Firm A was cancelled.

It requires no special insight or acumen to note the obvious fact that in engineering, as in other endeavors, there comes a point in cutting fees at which it is economically infeasible to render competent service. It is not necessarily unethical for an engineer to lose money on an engagement or to subsidize an engagement by applying to its profits made on other work. However, it would be unethical for an engineer to cut fees to such an extent as would lead to the rendition of incompetent and dangerous service. In that context, the initial fee which is "too good to be true" may in reality represent the bait-and-switch deception of an unethical practitioner.

In accordance with 12 of the code engineers have no less right to bring practices which they believe to be deceptive to the attention of appropriate instrumentalities than do others in our society who become aware of such practices. Indeed, in a fundamental sense, the purpose of professional ethics is to elevate to a duty conduct of the type in which all public spirited and civic-minded citizens engage.

**Conclusions:***

1. The submission of a price proposal by the engineering principals of Firm A was not unethical.

2. The engineering principals of Firms B and C were not unethical in filing a public protest and calling for a public hearing regarding the award.

*Note: This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

Copyright © 1980 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

Board of Ethical Review: Louis A. Bacon, P.E. F. Wendell Beard, P.E. James G. Johnstone, P.E. Robert H. Perrine, P.E. Marvin M. Specter, P.E.-L.S. L.W. Sprandel, P.E. Robert R. Evans, P.E., chairman

**Additional Comments**: Although we agree with the conclusions in this case, we feel that Firms B and C are walking a very thin line of ethical practices when they made a public statement that because of Firm A's low fee the project would "most likely" be inadequately designed and the owning and operating costs would be unduly high. The engineers of Firms B and C could likely be charged with unethical practices following the public hearing if they were unable to produce adequate proof of their statements.
*Louis A. Bacon, P.E., F. Wendell Beard, P.E., L. W. Sprandel, P.E.*

Copyright © 1980 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).