Report on a Case by the Board of Ethical Review

Case No. 80-3

Designation of Engineering Firm by Public Agency

Facts:
A county public service authority has jurisdiction over the granting of permits to private developers for water-sewer facilities. The agency's regulations stipulate, in part, that "the owner-developer will be required to utilize the services of the authority's engineer to design off-site and on-site water facilities which will become the property of the authority."

The owner-developer has the option of turning the water-sewer facilities over to the authority upon completion and acceptance, and the authority thereafter takes responsibility for the maintenance of the facilities. The procedure followed in this arrangement is that the owner-developer is charged a fee of 8.5% of estimated construction cost, plus 3.5% for agency review, inspection, and other costs. The agency collects these fees, and the engineer (ABC in this case) bills the authority for the engineering services.

Pursuant to this arrangement, the public service authority has for some years retained the ABC engineering firm as its designated engineer. The owner-developers who choose the option of turning the facilities over to the authority for maintenance and operation (which is the usual case) therefore are required to use the ABC firm for the necessary engineering services. Several other engineers in the area have protested that the arrangement under the authority's policy is "monopolistic," and a conflict of interest, and also allege that the system fosters overdesign and a more expensive system than needed. This issue has attracted considerable public attention through newspaper articles, quoting engineers and authority spokesmen on the charges.

Question:
Are the principals of the ABC engineering firm in violation of the Code of Ethics for participating in the above-described arrangement?

References:
Code of Ethics - Section 8 - "The Engineer shall disclose all known or potential conflicts of interest to his employer or client by promptly informing them of any business connections, interests, or other circumstances which could influence his judgment or the quality of his services, or which might reasonably be construed by others as constituting a conflict of interest."

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."

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).

Discussion:
The apparent reason for the public service authority's policy requiring the owner-developer to use the engineering firm designated by the authority is to assure itself that a qualified firm performed the engineering services in relation to the future responsibility of the authority for maintenance and operation of the facility. It is understandable that the authority should seek some assurance along this line before it assumes the responsibility, but customarily this assurance is obtained by a public body by having its own staff or outside firms review the plans and specifications prepared by the engineer retained by the owner-developer.

The basic issue under this set of facts is whether the engineer has one or two clients, and, if the latter, whether they have divergent interests. In a technical sense, the facts would indicate that the engineer is retained by the owner-developer, but in reality the only meaningful client is the public service authority because it alone selects the engineer, fixes the method and amount of compensation, and makes the actual payments directly to the engineer. The owner-developer is merely a conduit with no discretion or control, which is the normal prerogative of an owner in a client-professional relationship.

We may observe that the substance of this kind of arrangement is not unusual, with the major difference being that in other procedures involving development projects the public authority directly retains the engineer, provides the criteria for his services in accordance with the development plan as approved by the public authority, and negotiates and fixes the method and amount of compensation. While it is not our function to comment on public policy procedures of public agencies, as such, this procedure is preferable in terms of avoiding confusion and public misunderstanding.

To the extent that the complaint of other engineers is motivated by self-interest in being "frozen" out of work by owner-developers, we find nothing in the code which addresses itself to that point. The Code of Ethics is not intended to prescribe rules governing equality of opportunity to secure professional engagements. However, we do note that the normal practice in public work, and one which is most desirable, is to require public announcement of projects and opportunity for all interested firms to submit their qualifications for consideration. This concept is embodied in the federal law governing engineering procurement (Brooks Law) and in many similar state laws.

It is not entirely clear as to what is meant by the claim that the system fosters overdesign and more expensive systems. Presumably, it may be argued that because the engineer receives his fee from the authority rather than the owner-developer from funds paid by the owner-developer to the authority there could be a temptation for the authority to award higher fees for higher cost facilities to the engineer. If that is true it would follow without doubt that participation in such a scheme by the engineer would be unethical.

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).

We cannot say under these circumstances that the engineers in the ABC firm have competed unfairly through "improper" or "questionable" methods by virtue of their designation for all of the work by the public service authority. It is not uncommon for public bodies to settle upon one engineering firm for all of its work of a certain type, and there is some advantage to the public agency in such an arrangement through continuity of relationships, expertise tied in to the agency's requirements, personnel contacts, and accumulation of background reference material. In such cases, the public agency, of course, retains the sole right to change engineering firms at any time for future work in general, or for specific projects.

Conclusion:
*The principals of the ABC engineering firm were not in violation of the Code of Ethics for participating in the above-described arrangement.

*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.

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

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).