Report on a Case by the Board of Ethical Review

Case No. 81-1

Contingent Contract

Facts:
A village board made known its interest in receiving what it called "proposals" in connection with a contemplated water project, with an estimated construction cost of $500,000, to be financed in part with funds under a federal-aid program. Three engineering firms submitted so-called proposals, one of which (from Firm A) included a pre-application study for submission to the federal agency, including a feasibility study, a general system layout, and a cost estimate. The other firms submitted less detailed proposals primarily in the nature of information of the background, experience, and qualification of their firms for the project. The proposal from Firm A was accepted by the village board on the basis of Firm A's condition that it would be given a letter of intent for the work, stating that if the village secures the financing and proceeds with the project a contract will be negotiated with Firm A, but otherwise Firm A would not be entitled to any fee or other payment. The other two firms have protested that the proposal by Firm A was unethical as constituting free engineering, or a contingency contract.

Question:
Was it ethical for Firm A to submit a contingent contract proposal including the type of technical data stated in the facts?

Reference:
Code of Ethics - Section III.7.a. - "Engineers shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which their professional judgment may be compromised."

Discussion:
We treat first the allegation that the proposal by Firm A constituted an improper offer of free engineering, contrary to the Code of Ethics. At the time the facts of this case developed, the Code contained a rule against free engineering, except for civic, charitable, religious, or eleemosynary nonprofit organizations, and only when such professional services were advisory in nature. In January 1981, however, the NSPE Board of Directors adopted the present Code in a revised format to be consistent with the development of a proposed "uniform" Code of Ethics for the engineering profession, and at the same time deleted the rule on free engineering. We deal with cases based upon the Code of Ethics as it stands at the time of our deliberations, and thus we need not consider the case before us on the basis of whether the facts would or would not come within the proscription as to free engineering services.

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We are not constrained to limit the application of the Code of Ethics to points raised by those submitting the information, and therefore can and do treat this case under a related Code reference, as cited. The provision on contingent contracts was revised at the time of the adoption of the present Code by deleting the previous clause to the effect that a contingency provision may not be used as a means of promoting a professional assignment. Thus, the controlling question as the Code wording now stands is whether Firm A's proposal, including the technical data described, was in circumstances which might compromise the professional judgment of the firm. Put another way, was it likely that the feasibility study, general system layout, and cost estimate as part of the proposal might have been influenced in favor of going ahead with the project in order that the firm would secure the professional commission?

We treated a similar question in an earlier case under a then-existing federal advance planning program in which an engineer assisted a community in preparing an application by furnishing preliminary technical data (Case 65-14). We concluded in that case that the degree of engineering data was not of a magnitude to conclude that it would conflict with the duty of the engineer to "prevent situations in which the engineer's judgment may be influenced during the course of his preliminary studies to produce a favorable finding that will result in his being retained for the full project." That conclusion was distinguished from a different result in Case 64-5, in which it was held that the engineer had crossed the ethical line in providing on a contingent basis field investigations and studies as required for the issuance of bonds to finance the project.

As noted in Case 65-14, the guiding principle in NSPE Board of Ethical Review cases of this kind is that " . . . the engineer must be careful not to include such degree of engineering service or opinions or conclusions on the economic and technical feasibility of the project that he would run afoul of the restrictions imposed by [the Code of Ethics]."

Although commonly used in the profession, and by prospective clients, the use of the word "proposals" from firms competing for selection for a project has never been entirely clear. In practice, under regular selection procedures such as the federal (Brooks) law and similar state laws, the proposal is actually a statement of background and qualification of the firm for the particular project. And a proposal, in its more meaningful sense, occurs when the selected firm negotiates the details of the agreement with the client.

In that sense, Firm A went beyond the presentation of its qualifications and sought to influence the village by volunteering certain technical data to show its interest and desire for the project assignment by including certain preliminary information of how it would see the project's development. In short, Firm A was more aggressive than the other firms in going after the work.

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Whether in its aggressiveness Firm A went beyond the criteria set out above to the point of allowing its interest to overlap with its independent professional judgment depends upon the extent, nature, and degree of the technical data furnished with the proposal. We cannot be certain on that point without a detailed examination of the technical data themselves, which is beyond our procedures.

In this set of facts it would appear that the engineering data were of such detail that Firm A necessarily had reached engineering conclusions as to the feasibility of the project. It follows that Firm A has placed itself in a position of commitment and could not any longer be impartial with regard to the future analysis of the client's interest in proceeding or not proceeding with the project.

Conclusion:
It was not ethical for Firm A to submit a contingent contract proposal including the type of technical data stated in the facts.

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.

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