Report on a Case by the Board of Ethical Review

Case No. 83-2

Contingent Fees

Facts:
A city council adopted a resolution tentatively approving the construction of five parking lots to be built in the central business district. The city contacts Engineer A and requests that Engineer A make studies of the proposed project including field investigations, data collection, and environmental impact reports. The city proposed that compensation for those services be contingent upon approval of a general construction fund by the state agency responsible for funding the construction. Engineer A agrees to perform the services requested.

Question:
Was Engineer A's performance of the requested services under the above facts a violation of the Code of Ethics?

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:
The Board has addressed the issue of contingent fees on numerous occasions. Recently in Case 81-1, we found that it would not be ethical for a firm to submit a contingent-contract proposal that included opinions as to the feasibility of the project. In that case, the proposal was accepted by the local government based upon the engineer's condition that the engineer would be given a letter of intent for the work stating that if the government secures the financing and proceeds with the project, a contract would be negotiated with the engineer, but otherwise the engineer would not be entitled to any fee or other payment. There the Board recognized that the engineer had been placed 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.

Similarly, in Case 65-14, the Board recognized the critical problem where an engineer's judgment might be influenced during the course of preliminary studies to produce a favorable finding that will result in the engineer's being retained for the full project. Said the Board, "The guiding principle in these kinds of cases is that the engineer must be careful not to include such degree of engineering services or opinions or conclusions on the economic and technical feasibility of the project that the engineer would run afoul of the restrictions imposed by the Code of Ethics."

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Clearly, as the Board noted in Case 73-4, Section III.7.a. "does not rule out all contingent contracts but rather recognizes that contingent contracts are improper . . . under circumstances in which the arrangement may compromise the professional judgment of the engineer or when used as a device for promoting a professional commission." We are of the view that the facts presented in the instant case are significantly different in two important respects from those cases which found that contingent contracts were improper on the ground that the engineer's judgment may be compromised. The facts here are materially different from those that were presented in Case 81-1. In that case the engineer aggressively volunteered a great deal of information to the local government. As noted in that case, the engineer went beyond the presentation of qualifications and sought to influence the client by volunteering certain information to show interest and desire for the project assignment and how the engineer would see the project's development. By contrast, in this case, Engineer A simply responded to the requests made by the city and did not go beyond the city's requests by engaging in promotional activities. Thus it would be much harder to demonstrate in this case that Engineer A's professional judgment might be compromised.

The second and more important distinction between this case and earlier cases involves the particular contract contingency and whether it may cause Engineer A's judgment to be compromised. We are of the view that the contingency involved in the instant case is not one in which Engineer A's judgment may have cause to be compromised. Unlike those earlier cases in which particular contingencies related to whether a report demonstrated that a particular project was or was not feasible (see Cases 81-1 and 77-4), here the only contingency was whether a state agency responsible for funding the project would approve money from a general fund to the city.

The Board finds that there is nothing present under the facts of this case to indicate whether or not Engineer A would receive any type of preference or consideration in the selection of engineers for future design work in the event that the state agency approved the funding and the city proceeded with the project. This Board therefore presumes that Engineer A had nothing to gain or to lose with respect to the contents of the report. Rather, this arrangement appears to be a purely speculative contract which the engineering firm agreed to without receiving any future considerations. Thus, Engineer A agreed to perform certain services for the client on a speculative basis. As this Board noted in Case 77-4, " . . . we do not find that the Code by its specific language bars an engineer from entering into a purely speculative contract. If the engineer wishes to take the chance, . . . he or she may do so."

Conclusion:
*It was not unethical for Engineer A to perform the requested services under the contingency contract between Engineer A and the local government.

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Board of Ethical Review: Ernest C. James, P.E., James L. Polk, P.E., J. Kent Roberts, P.E., Alfred H. Samborn, P.E., chairman.

Minority Opinion:
Apparently the sole reference remaining in the Code of Ethics on contingent fees has narrowed over the years of reconsiderations and amendments to become the very limited Section III.7.a., see "Reference", above. Here we find the guiding principle to be "under circumstances in which their (engineers') professional judgment may be compromised." We continue to license generation after generation of fresh engineering faces who have been exposed to cursory, if any, information on ethics, much less mandatory training and inspiration, and then expect them, by instinct perhaps, to adhere to the fundamental canons and rules of practice of our Code. So one must raise the question, why do we single out compromise of professional judgment on contingent fees?

The facts in this case leave broad areas of conjecture. For example, it is not clear whether the studies of the proposed project must develop data and information about the effects on public health, safety, and welfare (including economic benefits to the Central Business District) which will favorably influence the allocation (by the state agency) of the construction funds necessary to implement the project. The city council, one must presume, believes the project to be desirable and needed to have authorized it as they did, although that body may or may not have done so had city funds been involved.

This city is not a small burg or wide place in the road. It is a city of some substance which has need (determined by whom?) for five (5) municipally owned parking lots in its central business district.

Engineer A may or may not be qualified to perform the final design and construction engineering for a project of this kind. If Engineer A is not, but is presumed to be qualified for this investigation, collection of data, and assessment of the project, Engineer A certainly would establish a fee (when and if collected) calculated to yield fair and reasonable profits. This fee likely cannot be, say, high three figures or low four figures, but must range from high four to low five figures. If Engineer A is qualified to perform the complete engineering, it is logical to assume Engineer A will succumb to natural impulses and weigh the prospects for the full assignment in consideration of the fee and other bases of the original assignment.

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We do not know whether the state agency has a lot of money to parcel out over the state or must deal with limited funds. We do not know, if the latter case exists, whether, alternatively, partial funding (for, say, two parking lots) is a possibility, and, if so, whether 40 percent of the engineer's fee or the whole 100 percent would be payable to Engineer A. We must, however, credit Engineer A with enough acumen to ascertain the probabilities in that regard before agreeing to perform those services on a contingency-fee basis.

Let us assume that Engineer A believes chances for funding to be none to slim. Engineer A agrees to perform the city assignment on a contingency basis for a consideration of $10,000 but then succumbs to temptation to hedge on this very speculative venture by skimping on performance with a $1000 to $2000 quickie outlay to "get by" and reduce exposure. Results will be a set of poor data, off-the-cuff evaluation, and a report too poor in quality to do justice to the merits of the city's proposed project. Engineer A's professional judgment has been compromised, and the public has been ill-served.

On the other hand, let us say that Engineer A concludes that chances for funding are excellent if the project is determined to be a sound and proper investment of state agency funds. Engineer A again agrees to perform the study, etc., for $10,000. The city came to Engineer A in the first place. The city obviously considers Engineer A to be competent. So Engineer A not only sets about to prove it by the quality of work, but also may lean towards embellishing the reports and data to enhance and insure the city's already good chances of getting the funds. At the same time, Engineer A turns out an attractive work product which the city council cannot fail to admire. Once again Engineer A's professional judgment has been compromised.

That may be straining at gnats and placing too little faith in Engineer A's professional commitment to perform a completely objective and adequate assignment for the city. Political subdivisions, however, are ongoing entities with varied sources of funding, and should never even ask an engineer or other professional to perform services on a contingency-fee basis. If an entity has no available, current, budgeted funds, it can certainly provide them in the next fiscal year(s) and, thus, merely postpone, under prior agreement, the actual payment of its obligation. The only exceptions should be the rare cases where under the statutes such expenditures may be illegal for some reason or other.**

The Society should make it clear that engineers furnishing services on a contingency-fee basis are in violation of Section III.7.a. of the Code of Ethics because there is virtually no way under that practice that they can avoid, in some measure, compromise of judgment.

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Furthermore, we must always be concerned about the public's perception. The average citizen would never be convinced that even the most ethical engineer in the world will risk substantial losses in job costs under a contingency for assignment without excellent prospects of extra large compensating profits when the engineer wins the speculative venture. In totally private enterprise, the same would hold but there are different implications regarding the public welfare. Consequently, the average citizen would rather pay fair and reasonable fees for competently rendered services provided by the outside professionals engaged by the local, state, or federal government. "Pay as you go" for what you get is the best policy.

Minority Conclusions: Engineer A's agreement to perform the requested services on a contingent-fee basis violates Section III.7.a. of the Code of Ethics.
F. Wendell Beard, P.E., Robert W. Jarvis, P.E., Lawrence E. Jones, P.E.

******During the period in which new special districts or other local governmental entities are being created, the organizing group is often without funds and has no means of creating a deferred obligation payable by the entity after its complete validation. When engineering and surveying services are essential predicate to the formation of the new entity, contingent-fee basis should be deemed ethical.

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