Report on a Case by the Board of Ethical Review

Case No. 85-2

Conflict of Interest—Engineer Serving On Private Hospital Board and Performing Services

Facts:
A county hospital board owns a hospital facility and contracts with a private health care provider to manage, administer, and generally operate a hospital facility. Engineer A, a principal in a local engineering firm, serves on the board of directors of the private health care provider. Certain engineering and surveying work will need to be performed at the hospital facility. Engineer A seeks and receives a contract from the private health care provider to perform the engineering and surveying work at the hospital. The decision to select Engineer A's firm was made by the private health care provider's board of directors and Engineer A participated in the decision.

Question:
Was it ethical for Engineer A to seek a contract with the private health care provider to perform the engineering and surveying services at the hospital?

References:
Code of Ethics - Section II.4.d. - "Engineers in public service as members, advisors, or employees of a governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice."

Section II.4.e. - "Engineers shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves as a member."

Copyright © 1985 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 issue of conflicts of interest has been visited by this Board on several occasions. In BER Case 62-7, the Board reviewed a case concerning an engineering consultant who had been retained by a county commission to perform all necessary engineering and advisory services. The commission did not have an engineering staff so the engineer acted as the staff for the commission in the preparation of sewage and water studies, the financing of sanitary districts, and the approval of plans submitted by others. The engineer was also retained by a private company to perform engineering design for the development of several thousand housing units which involved extensive contract negotiations between the commission and the developer. This Board found that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements which the engineer performed or in which he participated. This obviously involved the self-interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, he was put into the position of assessing his recommendations to two clients with possibly opposing interests. Given these realities, we concluded that a conflict of interest existed.

More recently in BER Case 74-2, a case in which a state law required every municipality to retain a municipal engineer with that engineer's firm usually retained for engineering services for capital improvements needed by the municipality, we found that the engineer was not a bona fide "employee" of the municipality but a consultant, thus it was not unethical for him to serve as "municipal engineer" and participate in a consulting firm providing engineering services to the municipality. We reasoned that the public interest was best served by providing to small municipalities the most competent engineering services that they could acquire. It was assumed that the state law was intended to achieve that end.

The following year, in BER Case 75-7, the Board examined the question of whether an engineer who serves as a member of local governmental boards or commissions that involve some aspects of engineering may provide engineering services through his firm to the board of commissions. There we concluded that an engineer serving on a commission could ethically provide services to the private owners because the engineer had abstained from the discussion and vote on permit applications. We cautioned, however, that care must be taken that the engineer in such a situation not have taken any action to influence a favorable decision on the permit.

Copyright © 1985 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).

Finally, in BER Case 82-4, this Board, in reviewing the aforementioned decisions, ruled that an engineer who serves as a city engineer and a county engineer for a retainer fee may not ethically provide or render judgment on behalf of the city and county relative to projects on which the engineer has furnished services through a private client. "To do so," we noted, "is a useless act because it is basic to the Code of Ethics that an engineer will not submit plans or other work which he does not believe represents the best interest of his client." We noted that we could not see how an engineer can wear two hats and still represent the best interests of his client; to do so would constitute a conflict of interest. "If the county or city wishes to obtain a recommendation on the merits of the work," we stated, " . . . it should retain another engineer for review . . . "

A review of the facts in the instant case suggests a situation in which a county hospital board has delegated authority to a private health care provider to act in a quasi-public manner. This point raises an important question which must be examined in light of recent changes in the manner in which state and local governments have sought to deliver services to communities. In recent years, there has been a dramatic shift toward the innovative concept of "privatization" among state and local governments. In order to strive toward greater efficiency and economy, many local governments have delegated the responsibility for management and administration of certain services (e.g., trash collection, prisons, sewage treatment, hospitals) to private vendors with particular expertise in those areas. This trend raises an interesting question regarding Sections II.4.d. and II.4.e. which refer only to "engineers in public service as members, advisors, or employees of a governmental body or department." Query: Is an engineer who is not in public service as a member, advisor, or employee of a governmental body or department, but is "acting for" a governmental body, in a quasi-public capacity, covered under the language of Sections II.4.d. and II.4.e.? We think the inquiry must be answered in the affirmative. While it is true that under a literal reading the activities of Engineer A would not come under the plain meaning of those provisions, we think that where an engineer is acting in a quasi-public capacity and performing certain functions that are normally performed by a public body, that engineer should be covered under the language. Any other reading of the Code would render those provisions virtually meaningless in situations involving privatization, because privatization would "insulate" engineers from the requirements contained in Sections II.4.d. and II.4.e.

In view of these findings, it is our position that as a board member of the private health care provider, which was acting in a quasi-public capacity, Engineer A, consistent with Section II.4.d., could not have ethically participated in decisions with respect to professional services solicited or provided by his firm. Engineer A, a principal in an engineering firm, was serving on a body that was exercising judgment and discretion in place of a governmental body and therefore should be treated as a governmental official for purposes of conflicts of interest. By participating in the private health care provider's decision to select his firm, Engineer A acted in conflict with the Code.

Copyright © 1985 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).

Consistent with this view, we also find that Engineer A acted unethically in seeking a contract from the private health care provider. Section II.4.e. is clear in this regard. While both BER Cases 75-7 and 82-4 suggest that it would not be unethical for an engineer to solicit such work under similar circumstances, we cautioned in both cases that "care must be taken that the engineer in such a situation not have taken any action to influence the favorable decisions" of the board. In view of the fact that Engineer A actually participated in the decision to select his firm for the engineering and surveying work, we conclude that Engineer A sought to influence a favorable decision of the board and therefore acted unethically.

While this Board holds that the conduct of Engineer A under the aforementioned circumstances was unethical, we stress that our conclusion in this case hinges upon our interpretation of the facts as demonstrating that the private health care provider was actually acting as a quasi-public authority. Had the private health care provider purchased or leased this hospital facility in an arms-length relationship from the board without any delegation or transfer of authority, our opinions may very well have been different. In addition, had the decision to select Engineer A been made by the county hospital board or with the concurrence of the county hospital board, our opinions may also have been different. However, we shall leave for another day our discussion of those issues.

Conclusion:
It was unethical for Engineer A to seek a contract with the private health care provider to provide engineering and surveying services.

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: F. Wendell Beard, P.E., Robert J. Haefeli, P.E., Ernest C. James, P.E., Robert W. Jarvis, P.E., James L. Polk, P.E., Everett S. Thompson, P.E., J. Kent Roberts, P.E., chairman

Copyright © 1985 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).