Report on a Case by the Board of Ethical Review

Case No. 86-3

Engineer's Proposal to Act as Arbitrator In Owner/Engineer Disputes

Facts:
Engineer A seeks to enter into a contractual agreement with Owner. Engineer A proposes a contractual agreement whereby Engineer A would have the authority to "review and determine any and all questions in relation to the contract and its performance."

Question:
Would it be ethical for Engineer A to propose in an Owner-Engineer agreement that the engineer would be empowered to act as arbitrator in disputes between the Owner and Engineer A?

Reference:
Code of Ethics-Section III.5.-"Engineers shall not be influenced in their professional duties by conflicting interests."

Discussion:
This case presents an issue never squarely addressed by the Board. May an engineer ethically propose by contract that the engineer will be the arbitrator of controversies and disputes as between the Owner and the Engineer? Although the Board has not confronted this issue in the past, a number of cases over the years have touched upon some of the ethical concerns which are present under the facts in this case.

In Case 76-3 an engineer under retainer with a county for general advisory services was retained by a developer. The developer filed a petition with the county zoning board to rezone a substantial area of the county for commercial purposes.

The county department of public works filed several engineering reports adverse to the zoning petition, recommending denial of the petition. The development company called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the zoning petition. In finding that the engineer was unethical in appearing for the development company while serving as engineering consultant for the county, the BER found that the engineer was doing more than offering his expertise in engineering matters as an aid to a fuller understanding by the zoning board--he was in fact a paid advocate of a private interest in open conflict with the engineering opinions of the county engineers. In this regard, we noted that the engineer "is seen to be on both sides of a divided issue."

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Similarly, in the recent Case 82-6 where an engineer was retained by the U.S. government to study the causes of a dam failure, and was later retained by the contractor on the original dam project to testify as an expert witness in a claim against the government for additional compensation, the Board found that the activity in question was unethical.

Obviously, the facts in the two aforementioned cases are somewhat different from those in the instant case. Nevertheless, those two cases, as well as other earlier cases, have emphasized the ethical duty of the engineer to strive to avoid placing himself in a position of conflict as between himself and the interests of his client. (see Section III.5.). The two earlier cases pose situations where the engineer was seeking to service the interests of two parties in conflict with one another. However impartial a person may view himself, it is presumptuous to believe that one could be so impartial that nothing could sway an objective result. Equally important is the appearance that such an attitude suggests. However well intended an engineer may be in pursuing a course of action meant to serve the interests of all concerned, it would be naïve for an engineer to think his actions would be interpreted as anything more than a self-serving act.

That last point brings us squarely to the issue presented before the Board in the instant case. However well meaning and well intended an engineer may be under the facts, it is crucial for him to understand that in the eyes of the public, the engineer's desire to serve as arbitrator of disputes between himself and his client would be viewed, at least by some, as an effort to service his own particular interests. We can perceive of no factual situation in which such a relationship could ethically exist between the parties. The very definition of arbitrator suggests a "disinterested person chosen to settle a dispute between two or more parties." For a party to possess a tangible interest in the outcome of the proceedings would, we think, compromise his role as an arbitrator.

What we are saying here should be contrasted with the role of the engineer in the construction process as an interpreter of the requirements of the contract documents between the Owner and the Contractor. Under those circumstances the engineer is plainly not a party to the contract between the Owner and the Contractor.

Finally, we note that the Standard Form of Agreement Between the Owner and the Engineer for Professional Services published by the Engineers Joint Contract Documents Committee, of which NSPE is a member, states in Paragraph 7.6.1.: "All claims, counterclaims, disputes, and other matters in question between the parties hereto arising out of or relating to this agreement or the breach thereof will be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association."

We would simply note that the AAA rules require that one arbitrator or a panel of them selected shall be "neutral."

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Conclusion:
It would be unethical for Engineer A to propose a contractual agreement where by Engineer A would have the authority to "review and determine any and all questions in relation to the contract and its performance."

**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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