Report on a Case by the Board of Ethical Review

Case No. 86-5

City Engineer Seeking to Retain Employees of Engineering Firm

Facts:
The City of West Eastville requests proposals from various consulting engineers for a major job that it is planning. Engineer A, a principal in a large engineering firm in West Eastville, decides to have his firm submit a proposal. Engineer A asks three engineers on his staff Engineers X, Y, and Z to develop the proposal for the firm. Engineers X, Y, and Z develop a proposal which is ultimately submitted to the city. Soon thereafter, the city learns that Engineers X, Y, and Z are the engineers who actually developed the proposal for the firm. A city official approaches Engineers X, Y, and Z and asks if they would agree to a contract as consultants, independent of Engineer A's firm. Engineers X, Y, and Z disclose the facts to Engineer A, resign from the firm, and enter into negotiations with the city.

Question:
Was it unethical for Engineers X, Y, and Z to agree to a contract for consulting services independent of Engineer A's firm?

References:
Code of Ethics - Section II.4. - "Engineers shall act in professional matters for each employer or client as faithful agents or trustees."

Section III.4.a. "Engineers in the employ of others shall not without the consent of all interested parties enter promotional efforts or negotiations for work or make arrangements for other employment as a principal or to practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge."

Discussion:
Over the years the Board has been faced with a number of cases with facts similar to those present in the instant case. In Case 77-11, the Board ruled that four engineers who left the employ of a firm and founded a new firm, contacting the clients of their former firm, did not violate the Code of Ethics.

Copyright © 1986 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).

However, we found that the four were in violation of the Code with regard to projects for which they had particular knowledge while in the employ of the firm. As we understood the facts then, the four engineers did not undertake the promotional efforts with the former clients of the firm while in the employ of the firm, nor did they engage in negotiations for work while in the employ of the firm. We assumed that the four engineers possibly discussed among themselves the idea of soliciting work from former clients of the firm while still in its employ, but under a literal reading of that part of the Code, that degree of activity did not constitute a violation of the Code. However, we noted in Case 77-11 that such was not nearly so clear with regard to the latter portion of then-Section 7(a) (now Section III.4.a.) as related to practice in connection with a specific and specialized knowledge. We therefore found a violation of the Code provision.

Similarly in Case 79-10 where an engineer employed by a firm which was winding down its operations sought to offer his services to complete projects under his own responsibility and risk without the concurrence of the principal of his employing firm, we ruled that such a course of action would not be unethical. We did not construe the broader aspect of then-Section 7(a) as barring Engineer A from taking the step he contemplated if the client should agree to it. We noted that the thrust of Section 7(a) was that an engineer would not initiate self-promotional efforts to take over projects in which he has been involved while in the employ of another. In Case 79-10, however, the engineer did not initiate the idea of taking over the work of the projects; the idea was set in motion by his employer's proposed action. Accordingly, we found that the engineer would not be considered as attempting to compete unfairly under the principles embodied in the Code.

Reading both Case 77-11 and Case 79-10 suggests a need to balance (l) the interests of the firm and its interest in maintaining business goodwill with its clients, (2) the interests of the individually employed engineers, and most importantly (3) the interests of the client in retaining the firm of his choice. Obviously, the last interest is the most overriding interest of all. (See Code Section II.4.) No one can deny that a client has a right to retain the engineering firm of his choice. What must be addressed, however, is a method of effectuating that right in a manner which is both fair and equitable to all of the concerned parties.

Copyright © 1986 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 are of the view that whereas here a client approaches employed engineers who have been performing services for that client and initiates a request for services from those engineers independent of the firm, it would not be unethical for those engineers to agree to contract for professional services. We reach that conclusion here for two basic reasons. First, there does not appear to be any indication under the facts that Engineers X, Y, and Z had gained any "particular and specialized knowledge" which is required for a violation of Section III.4.a. We interpret the term "particular and specialized knowledge" narrowly in this context to mean unique and unusual information relating to certain specialized processes or trade secrets which are almost proprietary in nature. Were we to interpret "particular and specialized knowledge" to embrace, for example, any information relating to the work, we would be compelled to find the conduct of Engineers X, Y, and Z to be unethical. However, we have chosen not to reach that finding inasmuch as most proposals are general in nature.

On our second point, this case, like many before, involves a variety of considerations which must be balanced. In this context we note that the facts here presented involve a client who has made a determination that he would like to proceed in a professional relationship with three engineers of his choice. It cannot be disputed that the essential purpose of the Code of Ethics is to protect the interests of the public and in particular the interests of clients in their relations with members of the profession. When faced with a situation where the Code of Ethics can be interpreted to protect either the interest of engineers or the interests of the public or the client, barring unforeseen circumstances, we are compelled to find in favor of the latter. For us to hold otherwise would be to obstruct the ability of an individual client to select those engineers of his choosing to perform professional services on his behalf.

Although not indicated by the facts, we can foresee a situation where a client would not want to continue a relationship with an engineering firm but would like to retain the services of individual members of the firm. As we have noted many times, the Code of Ethics applies to individual members of the engineering profession and not to others. While we view the city official's actions with some reservation, where a client initiates contact with individual employees of a firm and seeks to retain their services, we do not think the Code of Ethics should be interpreted to deny the right of a client to undertake such action.

Conclusion:
A strict interpretation of the Code under the facts of this case leads us to conclude that it would not be unethical for Engineers X, Y, and Z to agree to a contract for consulting services independent of Engineer A's firm.

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.

Copyright © 1986 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).

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 © 1986 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).