BER Case 91-2

APPROVED BY BER
November 1, 1991

Section III.7.a. - Code of Ethics

CONTINGENT CONTRACT -- ERRORS & OMISSIONS

FACTS:

Client, a non-engineer retains Engineer A, a consulting engineer, to perform certain design services in connection with a waste-water treatment facility. Engineer A performs the design services and client reviews the documents prepared by Engineer A. Following review, client makes the judgment that the documents prepared by Engineer A contain errors and omissions. Client terminates his relationship with Engineer A. Client then contacts Engineer B and proposes an arrangement whereby Engineer B will review the work prepared by Engineer A and identify errors/omissions contained in the documents in contemplation of a suit for breach of contract. Engineer B's fee will be dependent upon the ultimate court judgment or settlement made with Engineer A. Engineer B accepts the assignment under the terms proposed by client.

QUESTION:

Was it unethical for Engineer B to accept the assignment under the circumstances described?

REFERENCE:

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:

Over the many years the Board of Ethical Review has functioned, it has had several opportunities to review circumstances that involve relationships with clients and others which could potentially call into question the independent judgment of an engineer. Sometimes the facts and circumstances examined by this Board have related to contractual arrangements and other relationships between an engineer and his client.

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Such was the case in BER Case 73-4. There, an engineer, a specialist in utility systems, offered to industrial clients a service consisting of a technical evaluation of the client's use of utility services, including where appropriate, recommendations for changes in utility facilities and systems, methods of payment for such utilities, study of pertinent rating schedules, discussions with utility suppliers on rate charges, and renegotiation of rate schedules forming the basis of the charges to the client. The engineer was compensated by his client for these services solely on the basis of a percentage of money saved for utility costs. In finding it was ethical for the engineer to be compensated solely on the basis of a percentage of savings to his client, the Board first noted that the Code does not rule out contingent contracts, pointing out that contingent contracts are improper only under circumstances in which the arrangement may compromise the professional judgment of an engineer. One example then cited by the Board as this type of restriction is found in BER Case 65-4 in which it was determined that it would be unethical for an engineer to enter into a contingent contract under which his payment depends upon a favorable feasibility study for a public works project. The Board commented in BER Case 65-4 that "the import of the restriction...is that the engineer must render completely impartial and independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project."

Another case with facts similar to those in the case presently before us is BER Case 66-11. There, an engineer expert was retained by an attorney to provide expert analysis and advice on the technical reasons for a failure which led to certain damage. Although in the past the engineer had provided these services on a per diem basis, it was proposed by the attorney that the engineer be compensated on the basis of being paid a percentage of the amount recovered by his client. If the judgment was in favor of the defendant, neither the engineer nor the attorney would be paid for their services. In concluding that it was not ethical for the engineer to provide technical advisory services or serve as an expert witness in a lawsuit on a contingent basis, the Board, agreeing with BER Case 65-4, noted that the "duty of the engineer as a technical advisor is to provide his client with all of the pertinent technical facts related to the case, favorable and unfavorable alike." The Board also stated that under the facts, the engineer "could not ethically serve on a contingent fee basis because his conclusions might be influenced by the fact that he stood to gain financially by having his conclusions coincide with his personal interest in his remuneration, which is dependent upon his client being successful in the litigation." Comparing the facts to those in BER Case 65-4, the Board noted that the engineer must not be in a position whereby his form of compensation might tend to prevent him from being completely impartial, or from rendering a full and complete report containing both favorable and unfavorable facts or conclusions.

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In reviewing the facts and circumstances in the present case, we are compelled to follow the reasoning in BER Cases 65-4 and 66-11. It is apparent that Engineer B is being placed in a position of identifying errors/omissions in Engineer A's work in order to pressure Engineer A into a settlement which will result in a fee for Engineer B. By finding no errors/omissions in Engineer A's work there would be no fee. These circumstances appear to be just the very factors for which Section III.7.a. was intended to guard against. We suggest the circumstances in this case are similar to those in BER Case 65-4 where the Board determined that a contingent arrangement based upon the results of a feasibility study was improper. It would be difficult to imagine a clearer set of circumstances involving a contingent fee arrangement in which an engineer's professional judgment could risk becoming compromised. The circumstances in BER Case 73-4 involved the engineer's compensation being based on the money saved by clients for utility costs under circumstances which do not appear to involve a significant possibility of a compromise in judgment. In this case, the nature of the services and the related contingency arrangement suggest a strong possibility that the engineer's judgment could be compromised or at the very least create the appearance of being compromised.

As the Board noted in earlier cases, the engineer must be free to provide objective, unbiased professional judgments to serve the best interests of his client and not be placed into a position in which the engineer will be perceived as compromising his integrity and judgment in pursuit of a professional fee or continuing relationship. We would also note that in our judgment, the contingency relationship may also disserve the interests of the client. The credibility and reliability of Engineer B's work could easily be called into question which could undermine the interests of the client.

We would also note in passing that under the facts, client was not an engineer and therefore it is at least a possibility that client's opinion as to the existence of errors/omissions may not be based upon a reasonable foundation. This factor in addition to the others cited should raise a question in the mind of Engineer B as to the facts and circumstances involved in the proposed work to be performed.

CONCLUSION:

It was unethical for Engineer B to accept the assignment under the circumstances described.

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