BER Case 91-6

APPROVED BY BER
November 1, 1991

Section II.4. - Code of Ethics
Section II.4.a. - Code of Ethics
Section III.4.b. - Code of Ethics

CONFLICT OF INTEREST – HAZARDOUS WASTE SERVICES

FACTS:

Engineer A contracts to serve as a consultant to a federal environmental agency for the development of an overall hazardous waste remedial strategy. Under the contract with the federal agency, Engineer A agrees to provide basic consulting services along with an understanding that the federal agency may request additional services at a later date. Nothing is contained in the contract between Engineer A and the agency concerning other work for other clients. Two years following completion of basic services to the federal agency, Engineer A is retained to provide environmental consulting services by a major industrial corporation which has been deemed by the federal agency to be responsible in a dispute over the clean-up of a hazardous waste site. Following the execution of its contract with the corporation, Engineer A is contacted by the federal environmental agency and is asked to provide consulting services to the agency per Engineer A's original understanding with the agency in connection with the specific hazardous waste site of the major industrial corporation which is now a client of Engineer A. Engineer A informs the federal agency that the performance of such services would constitute a conflict of interest and declines to perform the services requested.

QUESTION:

Was it unethical for Engineer to agree to perform services to the industrial corporation under the facts without the prior consent of the federal agency?

REFERENCES:

Section II.4. -Engineers shall act in professional matters for each employer or client as faithful agents or trustees.

Section II.4.a. -Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgement or the quality of their services.

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Section III.4.b. -Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.

DISCUSSION:

Issues involving conflicts of interests have long been some of the thorniest issues faced by engineers. The Board of Ethical Review has had numerous occasions to address issues of conflict of interest, particularly those involving public and private relationships.

One pertinent case is BER Case 87-3 where the Board considered facts involving a county that employed individuals to perform building inspections in the county. Dissatisfied with the services provided by in-house inspectors, and as part of an effort to "contract-out" certain county functions, the county decided to retain a private consulting engineering firm to perform building inspections. The county selected and retained an engineer to perform the work. One of the engineer's responsibilities was to inspect a building project developed by a client of the engineer. The client was a company for which she had regularly performed services in the past. Although the engineer did not provide any services in connection with the building project in question, the engineer and the client anticipated that they would continue to work together in the future. In contract negotiations with the county, the engineer disclosed the relationship with the client, and it became a matter of official record. In finding that it would not be unethical for the engineer to perform building inspection services for the county in connection with the project developed by the client, the Board, considering earlier BER cases, and noted that unlike other cases, the facts did not deal with a situation where an engineer was being retained as a paid advocate for a particular position or point of view on a pending matter in direct conflict with the engineering opinions of her county client. Nor was the Board faced with a situation where the timing of the retainer raises questions of impropriety. Rather, in BER Case 87-3, the engineer was being asked to perform basic inspection services in connection with a building with which she has never previously been involved but which was developed by a former and possibly future client. While the Board noted that the engineer had a professional obligation under Section II.4. and II.4.a. of the Code to disclose her relationship with the client to the county, the Board did not believe it would be necessary for her to decline to perform the inspection services. To prohibit the engineer from providing building inspection services would be an unrealistic intrusion into her practice and would inhibit the county from utilizing a flexible method of delivering services consistent with the public health and safety.

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Another case involving the question of conflict of interest was the earlier BER Case of 76-3. There an engineer, under a retainer agreement with a county to provide sewer design and expertise and general advisory services, entered into a second retainer agreement with a developer with county approval. Thereafter, the developer filed a petition with the zoning board to rezone a substantial portion of the county for commercial purposes. The county department filed several engineering reports adverse to the zoning petition, recommending denial of the rezoning because the proposed construction would overload available water and sewage facilities. The development company then called the engineer as an expert witness at the zoning hearing. The engineer testified in support of the zoning petition. The Board concluded that it was unethical for the engineer to appear for the development company while serving as engineering consultant to the county.

There are several aspects of the facts contained in the instant case which differ from earlier BER cases. BER Case 87-3 does not involve a set of circumstances where the engineer and his client had a current relationship -- circumstances which could raise a question of conflict of interest between the engineer and the public client, here the federal environmental agency. In addition, unlike the facts of BER Case 87-3, here the engineer was involved in the development of the overall strategy for the federal agency. In this regard, the engineer was apparently not involved an any aspects of the work for the federal agency which was specific to any particular project or site, but rather was involved as a consultant in the program planning for the agency. Also in BER Case 87-3, the engineer disclosed his relationship with the client during contract negotiations with the public authority. Here, apparently because of the timing of the relationships between the engineer and his clients, the engineer did not disclose his proposed relationship with the industrial corporation to the federal environmental agency.

The facts in BER Case 76-3 are quite different from those in the immediate case as well. There, the engineer was attempting to serve the interests of two separate masters at the same time. Unlike the facts of this case, an objective evaluation of the circumstances should have led the engineer to conclude that there was the potential for a collision to occur between the interests of his two clients.

Here, we are dealing with a somewhat vague and indefinite understanding between a consulting engineer and a federal agency for ongoing planning support to effectuate an important federal program. In areas such as hazardous waste remedial work, innovative approaches are being implemented to address these important societal concerns. Without getting into the technicalities of the law of government contracts and procurement and other arcane issues which are not the subject of this Board's inquiry, weighing all of the facts and circumstances involved in this case, we believe it would be proper for Engineer A to perform services for the industrial corporation in the manner indicated provided Engineer A obtains prior consent of the federal agency.

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CONCLUSION:

It was unethical for Engineer A to agree to perform services for the industrial corporation under the facts without the prior consent of the federal agency.

BOARD OF ETHICAL REVIEW

John F. X. Browne, P.E.
Herbert G. Koogle, P.E.-L.S.
Otto A. Tennant, P.E.

Robert L. Nichols, P.E., Chairman

DISSENTING DISCUSSION:

We share many of the reasonings of the Board. However in our opinion, the majority of this Board has given unjustified weight to "an understanding that additional services may be requested at a later date at the government's request." In this instance two years had passed without any exercise of such understanding by the government. Such a substantial period of silence would seem to free Engineer A of any reasonable expectation of further demand for services. We also question whether federal procurement regulations would permit or validate such a loose continuing arrangement. Further, we question whether having provided services in development of a "strategy" should preclude Engineer A from ever providing engineering services for clients over which the agency has oversight responsibility.

DISSENTING CONCLUSION:

It was not unethical for Engineer A to contract with the industrial corporation without obtaining prior consent of the federal agency.

William A. Cox, Jr., P.E.
William W. Middleton, P.E.
William F. Rauch, Jr., P.E.

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