BER Case 91-7

APPROVED BY BER
November 1, 1991

Section II.4.a. - Code of Ethics
Section II.4.b. - Code of Ethics
Section II.4.c. - Code of Ethics
Section III.5. - Code of Ethics
Section III.5.a. - Code of Ethics
Section III.9. - Code of Ethics

INDEMNIFICATION -- PRODUCT SPECIFICATION

FACTS:

Engineer A is retained to design a facility. Engineer A is developing a set of plans and specifications for the client's consideration. One of the manufacturers of a product specified by Engineer A includes in its information material a provision which indicates that in the event that the specified product does not perform according to the client expectations and the client brings a suit against Engineer A, the manufacturer will indemnify and hold harmless the Engineer A for any losses suffered by the engineer in connection with the Engineer A's specification of the manufacturer's product.

QUESTION:

Under the facts presented, does Engineer A have any ethical obligations?

REFERENCES:

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.

Section II.4.b. -Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to by, all interested parties.

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Section II.4.c. -Engineers shall not solicit or accept financial or other valuable consideration directly or indirectly, from contractors, their agents, or other parties in connection with work for employers or clients for which they are responsible.

Section III.5. -Engineers shall not be influenced in their professional duties by conflicting interests.

Section III.5.a. -Engineers shall not accept financial or other considerations, including free engineering designs, from material or equipment suppliers for specifying their product.

Section III.9. -Engineers shall accept responsibility for their professional activities; provided, however, that Engineers may seek indemnification for professional services arising out of their practice for other than gross negligence, where the Engineer's interests cannot otherwise be protected.

DISCUSSION:

Questions relating to the ethical obligations of engineers in connection with the specification of products have been considered by this Board on numerous occasions. As long ago as BER Case 59-3, the Board stated that the use of standard specifications by reference and the provisions for the preparation and submission of shop drawings by the contractor are well established customs within the construction industry and do not conflict with the Code of Ethics. A few years later, the Board considered BER Case 64-11. There a government agency programmed the construction of a bridge. It retained a consulting engineer to design the total structure. An engineer who was a sales representative of Firm A, which produced and sold prestressed concrete bridge members, contacted the consulting engineer and requested him to consider using Firm A's material. The engineer of Firm A indicated that his firm would provide the design of the superstructure incorporating its product at no charge to the consulting engineer, and that this design would be performed by licensed professional engineers. In finding that it would be unethical both for the engineer employed by Firm A to make such an offer and unethical for the consulting engineer to accept such an offer under the circumstances stated in the facts, the Board noted that if the consulting engineer believed the construction material (product) proposed by Firm A was best and in the client's interests, and proposed to contract for an appropriate fee with Firm A for the necessary engineering design, the engineer must first disclose such activity with his client.

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Later in BER Case 76-8, the Board considered a set of factual circumstances involving the design of a technical training school and concluded that the furnishing of a sketch and other information prior to selection of a firm for negotiations was a violation of the Code of Ethics. Noting that changes in applicable Code of Ethics provisions at that time were made to permit the giving of free engineering services to civic, charitable and other eleemosynary organizations, the Board acknowledged that in everyday engineering practice, engineers must provide some degree of engineering information and expertise in discussions with potential clients. However, after weighing the facts and circumstance of the case, the Board concluded that the firm in question went further than what would be permissible under the Code.

Turning to the facts in the present case, it appears that in this age of increased liability, engineers, architects, materialmen, suppliers and others have sought to employ new and innovative techniques to address liability concerns, market services and products and deal with client concerns. The question for us is whether a specifying engineer may specify a product where the product manufacturer, in an attempt to make its product more attractive, has in essence agreed to "insure" the specifying engineer, is proper. We can foresee circumstances where such an arrangement would create a conflict of interest between the specifying engineer's obligation to specify products consistent with the best interests of the client and the specifying engineer's self interest in achieving the maximum protection from potential liability. For example, the specifying engineer's self interest could lead to a decision to specify the product and not some other more appropriate or less expensive product.

Based upon our reading of the Code of Ethics and earlier BER cases, particularly BER Case 64-11, we believe such conduct would be improper. We believe the facts and the Board's discussion in BER 64-11 is quite relevant to our consideration of the facts in the instant case. Like BER Case 64-11, a contractor had promised the specifying engineer something over and above the product or service being specified. Such an arrangement would appear to be in direct conflict with Section III.5.a. of the Code of Ethics.

We are of the opinion that the proposed indemnification is a form of financial consideration and its acceptance would be in violation of Sections II.4.b., II.4.c. and III.5.a. Full disclosure must also be made in accordance with Sections II.4.a. and II.4.b.

The Board finds it disconcerting that a manufacturer would offer indemnification as an inducement for specifying a product.

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CONCLUSION:

Engineer A has an ethical obligation to (1) discuss the informational material with the client; (2) not accept the indemnification for his own personal benefit; and (3) recommend that the client explore the possibility of client's indemnification with manufacturer.

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