BER Case 92-5

APPROVED
November 1, 1992

Preamble	-	Code of Ethics
Section II.4.d.	-	Code of Ethics
Section II.4.e.	-	Code of Ethics
Section III.5.	-	Code of Ethics

CONFLICT OF INTEREST – COMMUNITY SERVICE

FACTS:

In the early 1980s a community service corporation was established for the purpose of revitalizing a city's downtown area. One of the actions was the hiring of a consultant. After making a survey of the retail area influenced by retailers and doing an economic feasibility study, the consultant concluded that a significant catalyst needed to be established in the downtown area. The consultant suggested an "off-price mall". The group, using the statistical data developed, put together a brochure to entice developers to undertake the project. Approximately 120 brochures were sent to developers but none responded.

In 1986, Engineer A, a principal in a small structural, environmental and civil engineering firm, was elected president of the community service corporation. He receives no compensation for any of his services. The corporation concentrates on persuading the state government to build a state office building in the downtown area and to concentrate a number of its offices in the building. The effort is successful and the state office building is built. A second effort, to encourage the federal government to fund the construction of a federal courthouse and office building is also successful. A third effort, the construction of a high rise county office building with an underground connection to the federal and a city building along with a central fire station, police station and city hall is also begun. Engineer A has had a high profile and has generally been acknowledged as a leader in these efforts.

Selections are in the process of being made for the design work of the federal courthouse and office building. Larger design firms are beginning to contact smaller local consulting firms, including the firm headed by Engineer A's son, Engineer B, who is the president and chief executive officer. Engineer A is the chairman, principal stockholder of the firm. A major design firm submitting a proposal to the federal government to lead the design effort asks Engineer B to perform civil, structural and environmental engineering services in connection with the project. Engineer B agrees to perform the services.

QUESTION:

Would it be ethical for the firm of Engineer A and Engineer B to agree to perform services in connection with the federal project?

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REFERENCES:

Preamble -Engineering is an important and learned profession. The members of the profession recognize that their work has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness and equity, and must be dedicated to the protection of the public health, safety and welfare. In the practice of their profession, engineers must perform under a standard of professional behavior which requires adherence to the highest principles of ethical conduct on behalf of the public, clients, employers and the profession.

Section II.4.d. -Engineers in public service as members, advisors or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice.

Section II.4.e. -Engineers shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves as a member.

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

DISCUSSION:

Fundamental to engineering ethics is the principle that engineers should not use public positions that they hold in a manner than will benefit themselves in their private dealings (Code Section II.4.d.). In particular, a basic ethical principle for engineers to be mindful of is that engineers should not seek or accept work from public agencies where a principal or an officer serves as a member (II.4.e.).

The Board of Ethical Review has on numerous occasions had an opportunity to address these two key ethical principles and the policy considerations relating to these principles. For example, in BER Case 62-7, the Board reviewed a case concerning an engineering consultant who had been retained by a county commission to perform all necessary engineering and advisory services. The commission did not have an engineering staff so the engineer acted as the staff for the commission in the preparation of sewage and water studies, the financing of sanitary districts, and the approval of plans submitted by others. The engineer was also retained by a private company to perform engineering design for the development of several thousand

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housing units which involved extensive contract negotiations between the commission and the developer. The Board found that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements which the engineer performed or in which he participated. This obviously involved the self-interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, he was put into a position of assessing his recommendations to two clients with possibly opposing interests. Given these realities, the Board concluded that a conflict of interest existed.

In BER Case 74-2, a case in which a state law required every municipality to retain a municipal engineer with that engineer's firm usually retained for engineering services for capital improvements needed by the municipality, the Board found that the engineer was not a bona fide "employee" of the municipality but a consultant, thus it was not unethical for him to serve as "municipal engineer" and participate in a consulting firm providing engineering services to the municipality. The Board reasoned that the public interest was best served by providing to small municipalities the most competent engineering services that they could acquire. It was assumed that the state law was intended to achieve that end.

In BER Case 75-7, the Board examined the question of whether an engineer who serves as a member of local governmental boards and commissions that involve some aspects of engineering, may provide engineering services through his firm to the board and commissions. There the Board concluded that an engineer serving on a commission could ethically provide services to the private client because the engineer had abstained from the discussion and vote on certain permit applications. The Board cautioned, however, that care must be taken that the engineer in such a situation not have taken any action to influence a favorable decision on the permit.

In BER Case 82-4, the Board, in reviewing the aforementioned decisions, ruled that an engineer who served as a city engineer and a county engineer for a retainer fee may not ethically provide or render judgment on behalf of the city and county relative to projects on which the engineer had furnished services through a private client. "To do so", noted the Board, "is a useless act because it is basic to the Code of Ethics that an engineer will not submit plans or other work which he does not believe represents the best interests of the client". The Board could not see how an engineer could wear two hats and still represent the best interest of his client; to do so would constitute a conflict of interest. "If the county or city wishes to obtain a recommendation on the merits of the work", the Board stated, "it should retain another engineer for review."

In BER Case 85-2, a county hospital board owned a hospital facility and contracted with a private health care provider to manage, administer, and generally operate a hospital facility. An engineer, principal in a local engineering firm, served on the board of directors of the private health care provider. Certain engineering and surveying work needed to be performed at the facility. The engineer sought and received a contract from the provider to perform the engineering and surveying work at the hospital. The decision to select the engineer was made by the private health care provider's board of directors and the engineer participated in the decision. In deciding that it was unethical for the engineer to seek a contract with the private health care provider to provide engineering and surveying services, the Board relying on BER Cases 75-7 and 82-4 noted that the engineer's services on the board was of a quasi-governmental

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nature and that the engineer had an obligation under Code Section II.4.d. and II.4.e. not to participate in the decision to award the engineer the contract. Following BER Case 85-2, the NSPE Code of Ethics Section II.4.d. was modified to include activities of a "quasi-governmental" nature.

Most recently, in BER Case 89-6, which involved an engineer who was chairman of a condominium association, the essential principles contained in BER Case 85-2 relating to Code Section II.4.d. were reaffirmed.

Turning to the case at hand, we believe the facts involved can be readily distinguished from the line of cases discussed above. In fact we are of the view that based upon the plain meaning of the language, neither Code Section II.4.d. nor II.4.e. would be particularly pertinent to this case. As applied to the fact in this case, these two Code provisions are essentially intended (1) to prevent an engineer who serves as a member, advisor or employee of a governmental or similar entity from serving, for example, on the design selection, oversight, review committee of that entity (e.g, federal government) where the engineer's firm is competing for the work and (2) to prevent an engineering firm whose officer or principal serves as a member of a governmental body from soliciting or accepting a professional contract with that governmental body. Based on the facts, there is no indication that either Engineer A or Engineer B are serving as members, advisors, or employees of the governmental body procuring the design services. Under the facts, the design services are being procured, overseen and reviewed by an agency of the federal government and not by the community services corporation on which Engineer A served. Also, importantly Engineer A and B had no direct relationship with the federal agency procuring the A/E services.

CONCLUSION:

It would be ethical for the firm of Engineer A and Engineer B to agree to perform services in connection with the federal project.

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Note: In regard to the question of application of the Code to corporations vis-a-vis real persons, business form or type should not negate nor influence conformance of individuals to the Code. The Code deals with professional services, which services must be performed by real persons. Real persons in turn establish and implement policies within business structures. The Code is clearly written to apply to the Engineer and it is incumbent on a member of NSPE to endeavor to live up to its provisions. This applies to all pertinent sections of the Code.

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