BER Case 92-9

APPROVED
November 1, 1992

Preamble - Code of Ethics
Section II.2.a. - Code of Ethics
Section III.6. - Code of Ethics

USE OF DISADVANTAGED FIRM AFTER LEARNING OF IMPROPRIETY

FACTS:

Engineer A is a principal in a large consulting engineering firm specializing in civil and structural engineering. Engineer A's firm does a large percentage of its engineering work for public agencies at the state, federal and local level. Engineer A is frequently encouraged by representatives of those agencies to consider retaining the services of small, minority, or women-owned design firms as sub-consultants to the firm, particularly on publicly funded projects.

For about a year, Engineer A's firm has retained the services of Engineer B's firm, a disadvantaged firm of a type described above, on several public and private projects. Engineer A's firm has gotten a good deal of public relations benefit as a result of its retention of Engineer B's firm, particularly among its public and private clients. The work of Engineer B's firm is adequate but not of high quality. In addition, Engineer B suddenly began charging Engineer A much higher charges and fees in recent months, particularly after an article appeared in a local publication that was very complementary of Engineer A's efforts to retain disadvantaged firms.

QUESTION:

What would be the proper action for Engineer A to take under the circumstances?

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.

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Section II.2.a. -Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.

Section III.6. -Engineers shall uphold the principle of appropriate and adequate compensation for those engaged in engineering work.

DISCUSSION:

Over the past several years a significant amount of socio-economic legislation and regulation has been enacted at the federal, state and local levels to promote the retention of businesses that had been heretofore under-represented in the procurement process. As a result, many engineering firms have been encouraged both by public and private clients to establish goals to retain qualified employees and consultants representative of such under-represented groups.

This Board has never had occasion to examine a case in the context of such a program. As a general proposition, we believe the Code of Ethics is generally supportive of the establishment of voluntary programs that provide engineers with the opportunity to be of constructive service in community affairs and to work for its advancement and well-being. We should also note that many governmental and private procurement procedures take into account such factors consistent with their procurement requirements and standards.

Having made these general observations, we turn to the case before us. It appears that while the philosophy of establishing voluntary targets or goals for the retention of disadvantaged firms is not inconsistent with the objective of the Code of Ethics, we believe that the continued retention of a firm that is abusing its relationship with its client may be at odds with the intent of the Code. As noted in BER Case 75-3, which involved the question of whether it was ethical for an engineer to joint venture with another engineer that had earlier been publicly reprimanded for an ethics violation, the Board concluded that in order for the engineer to ethically engage in the joint venture, the engineer must maintain a careful scrutiny of the operation of the firm of the other engineer to assure itself to the extent possible that further unethical conduct will not develop during and with respect to the joint venture. Obviously, the facts in 75-3 were somewhat different because there the ethical violation had occurred at an earlier time under different circumstances and the question for the Board related to a future association with the unethical firm. However, we believe that a logical extension of that case should be that if an engineer's scrutiny of the operation of the firm reveals improper action, the engineer has an ethical obligation to disassociate with that firm in a manner that would not be prejudicial to his client.

We would also note BER Case 78-2 to reinforce our earlier point regarding the Code's traditional concern and application to larger societal interests and affairs.

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Specifically with respect to the particular issue in the instant case regarding Engineer B's unjustified escalation of his firm's fees and charges, we would note the discussion in BER Case 77-3. There the Board noted in the context of a fee dispute between two engineers that Section III.6. is merely intended as generally descriptive and cannot be specifically defined or stated in any all inclusive manner. As the Board noted in BER Case 69-11, the key to avoiding misunderstanding in this area is through careful negotiation and discussion and through a "give-and take" procedure. In the context of the present case, we believe this type of negotiations was lacking as it appears under the facts, Engineer B unilaterally imposed an escalation of his firm's fees and charges. Instead, Engineer B had an obligation to negotiate any future increases in his fees and charges with Engineer A's firm. We would note that there may also be contractual issues involved in this case, but we do not pass judgment as to any legal questions that may have arisen as a result of Engineer B's conduct.

CONCLUSION:

Engineer A has an obligation to discuss and negotiate with Engineer B in an effort to improve the quality and relative value of Engineer B's services. If a mutual agreement cannot be reached concerning the terms and conditions of service, Engineer A should terminate his relationship with Engineer B and in the future continue to strive to retain qualified employees and consultants representative of such under-represented groups.

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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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