BER Case 95-11

Approved
December 7, 1995

Section II.4.c. - Code of Ethics
Section III.3 - Code of Ethics
Section III.5.b - Code of Ethics
Section III.7.a. - Code of Ethics

RECEIPT OF REBATE CHECK FROM A VENDOR

FACTS:

Engineer A is a principal in X Company, a firm that performs utility audits for large corporations. As part of the services Engineer A's firm reviews the corporations activities, budget, business forecast, needs and requirements and other factors and makes recommendations concerning the most appropriate use of equipment and utilities in the performance of its services. Generally, Engineer A recommends an approach that includes a request for proposals and a list of potential service providers who generally prepare a proposal and bid to perform services for the firm.

In recent years, utility service providers have established a custom of providing a "rebate" to utility audit firms that perform the audits for the corporation, which is calculated to reflect the savings the audit firm has provided for its clients. As a business practice, when Engineer A receives a copy of a rebate check from one of the service providers, Engineer A makes a copy of the check and sends the copy with half the amount of the check to the client with a note "Another benefit provided to you by X Company." The general practice among many other utility audit firms is to keep the check and provide nothing to the client.

QUESTION #1:

Is it ethical for Engineer A accept the rebate check?

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QUESTION #2:
Is it ethical for Engineer A to send a portion of the rebate check to the client in the manner indicated?

DISCUSSION:
The facts in this case bring together a reality of certain trade practices which are in a collision course with the ethical constraints of many practicing professionals. The issue of rebates, bonuses, kickbacks, gifts and other "emoluments" directly raises the specter of conflict of interest with few mitigating circumstances. While the general aspect of conflict arises in the practice of engineering in many forms, the direct circumstances of this case afford the opportunity for analysis from several points of view.

Taken at face value X Company, either exclusively, or as part of a larger set of services, is in the business of finding economic savings for their clients, in this case, one might see electric and water utility audits, contract operations of many types and even possibly analysis of equipment performance, either owned or leased, among others.

Beyond the protection of the public health safety and welfare, engineering as a profession has an inherent objective of optimization, in this case economic usage or cost/benefits. Directly then, the elements of the Preamble relating to professional behavior and ethical conduct impact the work of this firm in all of its endeavors in this particular type of work.

Business practices have changed significantly in recent years making for a more competitive operations less tightly bound to old and customary practices. While these changes evolved also did new customs. This forms the crux of the advent of "rebates", "bonuses" and other forms for rewards of finding cheaper ways of doing business...with savings sufficiently large to attract the development of utility audit firms, something euphistically called earlier "efficient experts".

Part II Section 4.c. of the Code is unequivocal in the edict that "Engineers shall not...accept financial or other valuable consideration directly or indirectly, from contractors, their agents or other parties in connection with work for

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employers or clients for which they are responsible." While the original intent of this was

directed to "kickbacks", the introduction of an element relating to "third party custom legitimacy" does not create any mitigating measure to the specifics of the Code.

Part III Section 5 of the Code, is again, forthright in stating "Engineers shall not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with clients or employers of the Engineer in connection with work for which the Engineer is responsible." This tenet adds further dimension to the issue in that any form of added renumeration above and beyond the contractual fees involved are directly impacted by these provisions.

Since, either by implied formula or other algorithm the monetary payment to Company X is determined, it has all the elements of "contingency." To this end, Part III Section 7.a. edicts "Engineers shall not request, propose or accept a professional commission on the contingent basis under circumstances in which their professional judgment may be compromised. This clear "conflict-of-interest aspect" again devoled on mitigation from the "customary trade aspects" issue. Further, any willingness to engage in this practice in any form would appear to invoke the provisions of the tenet to imply that such renumeration would be, de facto, a part of any contract with the client in the first instance.

In Part III Section 3, the general premise that "Engineers shall avoid all conduct or practice which is likely to discredit the profession and deceived the public" clearly and concisely wraps the three provisions, along with the Preamble into an unmistakable "field of mines" in which any engineering firm would give more than "pause" to enter.

On the opposite side of the coin and using the utility field as a case in point, recent events pointing to "demand side management" has provoked an opportunity for saving on both the side of the utility as well as for their clients. In a given instance, an "audit company" by the recommendation of new operational procedures, could effect substantial advantages to the serving utility as well as the client. Going a step further, a more intense audit and recommendations might reveal an even more highly effective measure by

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moving to another server (e.g., a co-generation producer) or to in house co-generation. In to this potential tangled web, involving a variety of professional engineering aspects, does it seem fair to exclude some form of added

renumeration to the engineering firm, and the savings fall to those who are recipients of the largess, even though in a passive manner? Obviously, this has a philosophical as well as an ethical connotation which may be often at cross purposes, when ethical imperatives of fairness and equity may be involved as well.

In this instance, whether or not Company X retains part of the "rebate" or not, or that by sending one half to the client "under any set of explanations" affords no mitigating element to the question of ethical conformity or not.

The fundamental question of being a party to such a "trade custom" whether formal or informal, moves the issue back into the area of the basic agreements with clients for these services. While "disclosure" relating to any conflict of interest aspect has not been surfaced, any implicit or implied inclusion of the "rebate" process should have widespread implications, obviously of concern to the public and of perhaps significant legal improperties.

In researching some historical background BER 60-9 was found to have visited situations of "largess" being presented to client employees ranging from occasional lunches to a valuable automobile in the instance of a client's chief engineer. Under the environment constraints and the Code provisions at that time (1960) the occasional lunch or cigar was deemed ethical. Other circumstances were judged to have a perceived compromising capacity and thus were considered unethical.

Case 73-4, which ironically involves utility audits but where the engineering agreement called for fees based on a percentage of the savings occurring to the client, was deemed to conform to ethical mandates. It was, however, noted that, although not prohibited by the Code, there was a question as to whether this was the wisest method of compensation for the engineer.

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Thus it can be concluded that conditions may occur where perception may lie close to the letter of the Code but facts may alter the interpretation so as to still comply with the spirit and not be unethical.

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CONCLUSION:

It was unethical for Engineer A to accept any "rebate" check despite the conditions created by the customary trade practice. No facts have been presented to deny or confirm that the "audit" practioneers are all involved as engineering practioneers or not, or not, or that many firms may be involved in work of a non engineering nature. Likewise, some case in this arena may well involved work that has little or no engineering, but it is good "alternative" work for engineering firms.

The act of forwarding one half of the client reflect an additional step that "digs a deeper hole" as it directly involves a contingency circumstance for which the client is already paying and thus could be implied as being a "kickback" relating to the contingency aspects of how well Company X did their work. Under such circumstances, the client could very well question if the work Company X did was in any way compromised and thus reflected in the amount of the part remitted to the Client.

The actions in each of these instances was unethical.

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