BER Case 95-9

Approved
December 7, 1995

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

CONFLICT-OF-INTERESTS -- SERVICES TO A VILLAGE

FACTS:

ABC Consulting, an engineering firm, through a joint venture with another company VB Services, has been selected as the prime consultant to provide design services for a water and sewer development within a village. On the project in a subconsultant capacity are XYZ Consulting and LMN Consulting. To date, ABC has been providing the project management and support design to its subconsultants. XYZ and LMN have been providing primary project design services.

ABC was contacted by the General Contractor on the project and requested to provide a construction survey service proposal to them on the project. This occurred during the Contractor's negotiations with the village to provide construction services. A letter was issued by the village to ABC indicating a conflict might exist because ABC appeared on the Contractor's list of subcontractors. Neither ABC, XYZ or LMN participated in construction negotiations for either party.

ABC sent a letter back to the village explaining the nature of the services to be provided and agreeing that a conflict may exist and that resolution was necessary to enable the Contractor and village to move forward with negotiations and allow the Contractor to select another firm to provide construction services if that was what was required.

A review by the village of the services ABC was proposing to provide for the Contractor resulted in the village's position that a conflict did not exist. This was relayed to ABC verbally and followed up with a letter. The issue was also discussed between ABC's project manager and the chairman of the state engineering board.

Subsequently, XYZ sends a letter to ABC and the village indicating that it believes that a conflict-of-interest exists.

Copyright © 1995 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

QUESTION:
Does ABC Consulting's relationship with the village and with the General Contractor constitute a conflict-of-interests?

DISCUSSION:
We interpret from the facts of the case that the contractural obligations of ABC, XYZ and LMN to the village were complete with the preparation and delivery of contract documents. It appears that none of the three firms had a continuing responsibility of professional engineering services to the village during construction.

If this were not the case, and assuming that ABC retained a contractual obligation to the village during construction, the exchange of correspondence would appear to satisfy the requirements of the Code of Ethics -- except one. XYZ has stated in writing to the village and to ABC that it believes that a conflict-of-interest exists.

XYZ is more than an interested party. As primary project designers, XYZ and LMN may have an ultimately greater stake in guarding their liability interests than does ABC, and would find a potential for ABC's dual-master role to be highly compromising. In this scenario we would conclude that ABC's relationship with the general contractor is a conflict-of-interest.

What conclusion may be drawn if, on the other hand, all three consultants are contractual free agents, as the fact suggest? The language of II.4.b. is comprehensive. It's clause "or pertaining to the same project" preclude any necessary interpretation that the acceptance of "compensation from more than one party on the same project" must be concurrent rather than sequential. And, XYZ is no less an interested party to the project. Accordingly, even though the village and ABC have concurred that a conflict does not exist, it remains the case that XYZ, an interested party, does not agree. We retain our conclusion that ABC's relationship with the General Contractor is a conflict-of-interest.

Copyright © 1995 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

The Board is further of the opinion that the consultant must proceed with the highest level of ethical interpretation in these situations, whether or not a third party consultant is involved. From the perspective of the Village, an eventual litigious conflict may seem highly remote, and it may be an incidental procedure to agree in writing that no conflict exist.

Experienced consulting engineers, on the other hand, know full-well that such an arrangement -- acceptance of compensation from both the client-village and a client-contractor on the same project -- is a given scenario for conflict, regardless of the exchange of letters that it is not.

CONCLUSION:

ABC consulting's relationship with the village and with the General Contractor constitutes a conflict-of-interest.

BOARD OF ETHICAL REVIEW

William A. Cox, Jr., P.E.
James G. Fuller, P.E.
Donald L. Hiatte, P.E.
Robert L. Nichols, P.E.
William E. Norris, P.E.
Jimmy H. Smith, Ph.D., P.E.

William W. Middleton, P.E., Chairman

Copyright © 1995 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).

(G:\BER\1995\BER95-9.APP)

Copyright © 1995 National Society of Professional Engineer (NSPE) www.nspe.org . All rights reserved.
To request permission to reproduce this NSPE Board of Ethical Review Case, please contact the NSPE Legal Department (legal@nspe.org).