GIFTS TO FOREIGN OFFICIALS – APPLICATION OF CODE OF ETHICS TO NON-U.S. ENGINEERS

Case No. 98-2

Facts:

Engineer A, a legally recognized engineer and resident in his home country and an NSPE International Member, provides consulting, engineering, and construction contracting services to foreign national and local governments. Under the laws of Engineer A's home country, it is not illegal for individuals and companies to provide cash payments or in-kind property to public officials in foreign countries in order to obtain and retain business from those public officials. In fact, the laws of Engineer A's home country permit companies to claim a business tax deduction for cash payment or in-kind property to foreign officials in order to obtain or retain work.

Question:

Would it be ethical for Engineer A, an NSPE International Member governed by the laws of his home country and the local practices, to provide cash payments or in-kind property to public officials in foreign countries in order to obtain and retain business from those public officials?

References:

Section II.1.d.	-	*Code of Ethics:*	*Engineers shall not permit the use of their name or associate in business ventures with any person or firm which they believe is engaged in fraudulent or dishonest enterprise.*
Section II.5.b.	-	*Code of Ethics:*	*Engineers shall not offer, give, solicit or receive, either directly or indirectly, any contribution to influence the award of a contract by public authority, or which may be reasonably construed by the public as having the effect or intent of influencing the awarding of a contract. They shall not offer any gift, or other valuable consideration in order to secure work. They shall not pay a commission, percentage or brokerage fee in order to secure work, except to a bona fide employee or bona fide established commercial or marketing agencies retained by them.*
Section III.8.a.	-	*Code of Ethics:*	*Engineers shall conform with state licensure laws in the practice of engineering.*

Discussion:

The issue in this case relates to the application of the NSPE Code of Ethics to international members of NSPE who are non-U.S. engineers that reside and practice

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under the laws and customs of another nation. While it would seem clear that all NSPE members should and must be bound by the NSPE Code of Ethics, a basic question arises as to what are the appropriate and acceptable standards of behavior and conduct, where the NSPE member is a non-U.S. engineer who is licensed, residing, and practicing under the laws of another nation, where certain practices deemed unacceptable in the U.S. are determined to be legal and acceptable in the home country (See Code Section II.5.b.).

NSPE recently considered a similar set of facts in BER Case 96-5. There, an Engineer was a consulting engineer who did work in the U.S. and abroad. The Engineer was contacted by the government of Country A and asked to submit a proposal on a major water project being constructed in Country A. As part of the project, Engineer A was encouraged to associate with and retain Engineer B, a local engineer in Country A, who Engineer A had worked with in the past on private projects in Country A. One of the acceptable "customs" in Country A was for consultants such as engineers to give substantial gifts to public officials in connection with the awarding of public works contracts. Engineer A recognized that the giving of such gifts may be a violation of U.S. law -- although it might not technically have been a violation of the law in Country A. Engineer B proposed to Engineer A that if the project was awarded to Engineer A's firm, Engineer B would handle "business arrangements" in Country A and that Engineer A would be involved in overall management of the project, as well as all technical matters. The Board reviewed the case and determined that it would not be ethical for Engineer A to proceed with the project under these circumstances. The Board noted that with the increase in international engineering practice as a result of the North American Free Trade Agreement (NAFTA) and the General Agreement on Trade in Services (GATS), engineers are being exposed to differing design selection methods. These practices are in many cases quite similar to the practices used in the U.S. and elsewhere; however in some cases, particularly in the developing world and in some cultures, there are sometimes different methods of selection. Some of these methods involve a design selection process which is more deliberative, more subjective and more personal than the methods employed in the U.S. Engineers need to be sensitive to these differences, practicing in a manner that is consistent with the ethical principles of the U.S. engineering community, and at the same time being respectful of the differing cultural traditions and expectations that manifest themselves in other societies. Engineers must not take actions that bring dishonor on other engineers, and this is equally true when engineers are practicing in the international arena (See NSPE Code Section II.1.d.).

As the Board noted in Case 96-5, engineers must always follow their ethical compass on matters of this type, and there can be no doubt that as a matter of general

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principle, engineers must be consistent in their ethical conduct regardless of where it is the engineer is rendering professional services. While certain conduct may be acceptable or even the more generally accepted rule in other cultures, such conduct does not necessarily become acceptable for engineers who adhere to a code of ethics containing proscriptions in these areas. While engineers must be careful not to pass judgment on a particular matter, engineers who are faced with this type of ethical quandary should make every attempt to carefully, delicately, and diplomatically sidestep the matter in order to remove any appearance of an ethical conflict.

In the seventies, the Board of Ethical Review noted that the so-called "When in Rome..." rule, whereby engineers could engage in the legal and ethical practices of the host country was not consistent with the NSPE Code of Ethics (see BER Case 76-6). The Board of Ethical Review's decision at that time was proper then and continues to be proper today. It should be noted that the facts in BER Case 76-6 involved a direct "kickback" between engineer and public official, while BER Case 96-5 involved the "encouragement" by a foreign official to "associate" with a local engineer. Situational ethics cannot be practiced any more in the professional practice area than it can in any technical area of practice. If the Board was to decide otherwise, it would not be much of a leap to suggest that engineers practicing in another country could engage in practices that could weaken the minimal protections afforded to the citizens of that country because engineers would only be bound by the requirements, however minimal that might exist in that country. We believe that such an approach is wholly unacceptable and refuse to follow that path. Earlier and subsequent BER cases also support this view (See BER Case Nos. 87-5, 79-8, 87-4, 81-4).

Turning to the facts of the present case, it is clear that Engineer A, while not bound by U.S. law, has made a voluntary and conscious decision to be a member of the National Society of Professional Engineers and thereby adhere to the codes and standards of practice of NSPE. The NSPE Code of Ethics for Engineers is based upon basic and well accepted moral and ethical principles of professional conduct for the protection of the public health and safety. As noted in the aforementioned opinions, the NSPE Code has been clearly interpreted to prohibit the payment of any compensation in exchange for work. While the facts in earlier BER cases are somewhat different than the present case because they involved U.S. licensed engineers practicing abroad and not individuals who were licensed, residing, and practicing in their native country, the BER firmly believes that it would be a major error for NSPE to apply one standard of conduct to one set of NSPE members and another standard of conduct to another set of NSPE members (See Code Section III.8.a.). If the NSPE Code of Ethics is to gain increased meaning and application in

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this period of heightened global engineering practice, all NSPE members should be bound by the same high standards, notwithstanding national borders or cultural differences. NSPE is not serving the engineering profession or the public by concluding otherwise.

In closing, while the Board recognizes the reality that Engineer A may be placed at a significant competitive disadvantage in providing services in his home country, as noted before, Engineer A has voluntarily chosen to become a member of NSPE and is bound by the Code.

Conclusion:

It would not be ethical for Engineer A to provide cash payments or in-kind property to public officials in foreign countries in order to obtain and retain business from those public officials.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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