CONFLICT OF INTEREST
SPECIFYING EQUIPMENT -- WITH OWNERSHIP INTEREST

Case No. 99-9

Facts:

Engineer A was requested by Client Z to prepare specifications for a curtain wall system. Engineer A immediately makes Client Z aware that he is a minority shareholder in a curtain wall manufacturing company and that if Client Z agreed, Engineer A would be pleased to prepare a set of generic specifications for a curtain wall system. Client Z agrees but silent on the point of having Engineer A's firm submit a proposal. Later, Engineer A provides Client Z with the names of three manufacturers that prepare curtain wall systems for bidding purposes. Engineer A includes the name of his firm among the three manufacturers, but does not include the full specifications and other supporting material about Engineer A's curtain wall manufacturing firm with the bidding material provided to the client. Engineer A's reasoning is that he could answer any questions that Client Z might have about the curtain wall manufacturing system in his company. After evaluating the proposals solicited through documentation prepared by Engineer A, and upon Engineer A's recommendation Client Z selects Engineer A's company.

Question:

Was it ethical for Engineer A to prepare bidding criteria, bid, evaluate bids, and recommend his company for owner selection?

References:

Section II.4.a.	-	*NSPE Code:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section II.4.b.	-	*NSPE Code:*	*Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all interested parties.*
Section III.5.b.	-	*NSPE Code:*	*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.*

Discussion:

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The Board considered at least one case with similar facts in recent years. In Case 98-11, Engineer A was asked by a firm to prepare specifications for an air compression system. Engineer A made the firm aware that she was the President (and major shareholder) of a company that manufactures and sells air compression systems and that she had no problem with preparing a set of generic specifications. Engineer A also provided the firm with four other manufacturers that prepare air compression systems for bidding purposes, and Engineer A did not include her company as one of the four specified manufacturers. The Board ruled that, although Engineer A was the President and major shareholder in a company that manufactured and sold air compression systems, clearly Engineer took all necessary and reasonable steps to disclose all potential conflicts of interest in order to avoid any appearance of a conflict. By immediately disclosing the fact that she had a major interest in an air compression manufacturing company, by suggesting the name of four other alternative manufacturers, and by raising the issue before it surfaces as a result of possible appearances, Engineer A has acted consistently with the NSPE Code. The Board also noted that unlike the previous versions of the NSPE Code that required the engineer to "avoid" conflicts of interest, the current code acknowledge that conflicts do arise and imposes upon the engineer the responsibility to take all reasonable steps to notify and advise the client – leaving it up to the client whether to proceed with the services of the engineer. It was the Board's view that Engineer A's conduct was in keeping with NSPE Code provision that engineers must disclose all known conflicts of interest which could influence or appear to influence their judgment or the quality of their services.

Engineers are always cautioned by the NSPE Code to disclose all known or potential conflicts of interest by promptly informing clients of any business association, interest or other circumstances which could influence or appear to influence their judgment or the quality of their services. Under the facts of the current case, it is not entirely clear why and on what basis Client Z selected Engineer A to provide the curtain wall specifications on behalf of Client Z. It could be that in the rendering of consulting services, Engineer A performed professional services to the satisfaction of Client Z and this fact may have persuaded Client Z to select Engineer A's curtain wall company to manufacture the required equipment. At the same time, the Board believes the early and complete disclosure by Engineer A, needs to be balanced against Engineer A's later inclusion of his firm on the list of potential curtain wall manufacturers without the client's prior affirmative approval. The Board believes this point is instructive because it demonstrated Engineer A's recognition of the potential for a conflict of interest in connection with the services provided to Client Z and the actions he took in regard to that potential conflict. In this connection, the Board is somewhat troubled by Engineer A's conduct and lack of initial full disclosure in the face of Client Z's failure to expressly approve Engineer A's actions.

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Although the facts do not totally and completely detail Engineer A's roles and functions, the Board was concerned that all interested parties, including other bidders, were aware of and voluntarily participated in this process knowing that Engineer A prepared the specs, bid the job, evaluated the bids, and recommended a selection to Client Z. The criteria for selection (i.e., cost or cost+time+quality) and handling of the bids (i.e., public opening or private with results published) would also be appropriate data to share with all interested parties.

While it is difficult to speculate what Client Z's thinking and considerations were in connection with its selection of Engineer A's company, we do have a concern over Client Z's selection of Engineer A's curtain wall manufacturing company under the facts. The Board is also concerned that the decision to select Engineer A's firm was made without Client Z affirmatively approving in the early stages Engineer's A's firm's participation in the bidding process. The Board is of the opinion that Engineer A's actions could be interpreted as being calculated to result in the selection of his firm from the beginning despite the fact that Engineer A provided early partial notice of the potential conflict of interest.

In addition, the Board is troubled that Engineer A did not provide Client Z with initial complete and appropriate information about the products available from Engineer A's firm, the manufacturing process, services provided, warranty information, operation and maintenance, and other important issues. In this connection, the Board believes that once Engineer A made the decision to include his firm in the bidding process, Engineer A should have provided Client Z with the same information and under the same circumstances that Engineer A provided Client Z with the information about the two other competing firms so that Client Z would have complete information upon which to make a decision, review with other Client Z representatives and compare the information objectively with the other proposals. As a consultant to Client Z, Engineer A had the same obligations to Client Z with respect to his firm as Engineer A had with respect to the other two firms being considered by Client Z.

While there is nothing under the facts to indicate such, Engineer A also needs to be careful that his documentation soliciting proposals by the two other curtain wall manufacturing firms did not in any way cast the competing firms in a bad light that would cause Client Z not to select a qualified firm among the two other firms. An engineer that engages in such conduct would be in clear violation of the language and the intent of the NSPE Code.

Conclusion:

It was not ethical for Engineer A to prepare bidding criteria, bid, evaluate bids, and recommend his company for owner selection. Engineer A would have been better advised to avoid this conflict of interest.

BOARD OF ETHICAL REVIEW

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