

- Section II.4.a - Code of Ethics
- Section II.1.f - Code of Ethics
- Section III.7 - Code of Ethics
- Section III.8.a - Code of Ethics

### **PROFESSIONAL SERVICE CONTRACT NEGOTIATIONS**

#### **FACTS:**

Owner is in the process of selecting an engineering firm to perform design services in connection with the construction of a manufacturing facility. The owner employs a qualifications-based selection procedure in which firms submit their qualifications and the best qualified firm is selected subject to negotiations on the fee. Following selection by the owner of Engineer A, owner contracts with Engineer B, one of the firms that had submitted its qualifications to the owner, to assist the owner in its negotiations with Engineer A. Engineer B agrees to perform the services.

#### **QUESTION:**

Was it ethical for Engineer B to agree to assist the owner in its negotiations with Engineer A?

#### **REFERENCES:**

- Preamble - Engineering is an important and learned profession. The members of the profession recognize that their work has a dirt 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.
- Section II.4.a - Engineers shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or appear to influence their judgement or the quality of their services.

- Section III.1.f - Engineers shall avoid any act tending to promote their own interest at the expense of the dignity and integrity of the profession.
- Section III.7. - Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.
- Section III.8.a. - Engineers in private practice shall not review the work of another engineer for the same, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.

DISCUSSION:

The facts in this case are unique and have never been considered before by the Board. The Preamble requires that services by engineers be with "...honesty, impartiality, fairness and equity..." We find it difficult to believe that Engineer B can approach the negotiations complying with this criteria having lost the assignment to Engineer A. The facts do not indicate that Engineer B has disqualified himself from future considerations should the owner fail to negotiate a satisfactory fee arrangement. It is conceivable, therefore, that Engineer B might have another opportunity for this assignment; hence, possibly affecting his impartiality. Under this circumstance there can be a perception that Engineer B could be in violation of Section III.7.

While the owner and Engineer A are aware of the prior involvement of Engineer B in the selection process, Engineer B apparently has not withdrawn from future consideration for this assignment and other future assignments for this owner. Section II.4.a calls on the engineer to "disclose all known or potential conflicts of interest to the employers or clients by promptly informing them of any business associations, interest or other circumstances which could influence or appear to influence their judgment..." It is not enough for Engineer B to assume, and probably correctly so, that all parties are aware of his potential conflict of interest. The Code clearly requires the engineer to call this to the attention of all parties. Apparently Engineer B did not do so.

Section III.1.f. requires the engineer to "avoid any act tending to promote their own interest at the expense of the dignity and integrity of the profession." While Engineer B may make a reasonable effort to be impartial and fair in representing the owner in the negotiations, the perception will be to the contrary. Such perceptions are not in the best interest of the profession.

Another consideration in this case is whether in assisting the owner in its negotiations with Engineer A concerning the design fee, Engineer B is actually engaged in the "review of work of another engineer for the same client." We conclude that the negotiations concerning the design fee clearly falls within the functions and activities of involved in work perform by engineers. Such negotiations involve a careful analysis of the scope of engineering services to be provided by the engineer to the client. Therefore we conclude that the activities of Engineer B involves the review of the work of Engineer A. Having concluded that Section III.8.a of the Code would apply to the facts under consideration and that the activities of Engineer B involves the review of the work of Engineer A, we are of the opinion that Engineer B would have an ethical obligation to provide notice to Engineer A that he would be assisting the owner in its negotiations with Engineer A. Again the Board notes that there is nothing to indicate in the facts that Engineer A, knew or had any reason to know, that Engineer B agreed to perform those services for the client.

CONCLUSION:

It was unethical for Engineer B to agree to assist the owner in its negotiation with Engineer since (1) Engineer B had not withdrawn from consideration for the assignment should the owner fail to satisfactory negotiate a fee and (2) Engineer B did not notify Engineer A that he would be assisting in the fee negotiations.

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DISSENTING OPINION:

1. It **was ethical** for Engineer B to agree to assist the owner in his negotiations with Engineer A. None of the facts indicate he would have any trouble being "honest, impartial, fair or equitable" as indicated in the preamble. He may have lost the manufacturing facility job to Engineer A but appears to have made a good impression on the owner that holds potential for the future. Who better to negotiate the contract for the owner than another engineer, a lawyer?

2. The facts give no indication that Section III.7 or III.1.7 even comes into the picture. Obtaining a position as the owners rep "by untruthfully criticizing" Engineer A is not even hinted at, and acting as the owners rep would not "promote his own interest at the expense of the dignity and integrity of the profession".

3. It is a far stretch of the imagination to think negotiating a contract is "a review of another's work" and if Engineer A believes this he will certainly "have knowledge" when negotiations begin. (no violation of III.8.a).

4. Section II.4.a requires the engineer "to disclose known or potential conflicts of interest to their clients". The client is already aware of Engineer B not receiving the manufacturing facility as he decided to award it to Engineer A. If there is any conflict, the client knows it.

James G. Fuller, P.E.

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