

Section II.4.d. - Code of Ethics
Section III.8.a. - Code of Ethics

CONFLICT OF INTEREST
PROVIDING BOTH CITY ENGINEER AND INSPECTION SERVICES

FACTS:

City engages the services of a private consulting engineering firm, Firm A, to provide design review and construction inspection. In accordance with local ordinance governing land development, private developers are required to submit plans to the city for review and approval. The developer must pay the city's expenses for having Firm A review the drawings. Additionally, during construction the developer must also pay for inspection services, to be provided by Firm A on the city's behalf.

The ordinance states specifically that these inspection services are solely for the purpose of ensuring the construction of infrastructure within the development, which is to be turned over to the city, is constructed in accordance with the city's design standards. The developer must pay for separate inspection services in order to protect his interests. Firm A also provides design and inspection services for private developers within the city. In fact, Firm A uses its position as the city's engineer as a marketing tool, openly telling prospective clients that they can save 50% on inspection costs by using their firm.

QUESTION:

Was it ethical for Engineer A to serve as city engineer and also provide review and inspection services for private developers within the city?

REFERENCES:

Section II.4.d. - Engineers in public service as members, advisors or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to professional services solicited or provided by them or their organizations in private or public engineering practice.

Section III.8.a. - Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.

DISCUSSION:

The Board has considered cases similar to this type on other occasions. In one, BER Case 62-7, an engineering consultant had been retained by a county commission to perform all necessary engineering and advisory services. The commission did not have an engineering staff so the engineer acted as the staff for the commission in the preparation of sewage and water studies, the financing of sanitary districts, and the approval of plans submitted by others. The engineer was also retained by a private company to perform engineering design for a development of several thousand housing units which involved extensive contract negotiations between the commission and the developer.

The Board found that the engineer was in a position of passing engineering judgment on behalf of the commission on work or contract arrangements which the engineer performed or in which he participated. This obviously involved the self-interest of the engineer and divided his loyalties. Even if the engineer acted with the best of intentions, he was put into the position of assessing his recommendations to two clients with possibly opposing interests. Given these realities, the Board concluded that a conflict of interest existed.

More recently in BER Case 74-2, a case in which a state law required every municipality to retain a municipal engineer with that engineer's firm usually retained for engineering services for capital improvements needed by the municipality. The Board found that the engineer was not a bona fide "employee" of the municipality but a consultant, thus it was not unethical for him to serve as "municipal engineer" and participate in a consulting firm providing engineering services to the municipality. The Board reasoned that the public interest was best served by providing to small municipalities the most competent engineering services which they could acquire. It was assumed that the state law was intended to achieve that end. In all honesty, it is difficult to reconcile these two cases, as the two cases were based in pertinent part on identical language.

In BER Case 82-4, the Board noted that this change was significant and particularly relevant. There, Engineer A, who was in full-time private practice, was retained by the county as county engineer for a stipulated monthly fee. His duties include reviewing plats and construction drawings to determine whether they meet county requirements, and making recommendations to local developers, county commissions, and the planning and zoning board. In addition, Engineer A was retained by the city as city engineer for a stipulated annual fee. His duties included making recommendations to the city council concerning the approval of completed engineering work.

Engineer A also served as project administrator for the county airport authority and as such was responsible for formulating a plan for the continued development of an airport industrial park. Finally, Engineer A was administrator of the city block grant program, and as such oversaw engineering work on various projects. Engineer A had been retained as a consultant by several private firms to help develop city and county project proposals. The Board found that Engineer A did not actually participate in "decisions" with respect to services solicited or provided by him or his organization in private or public engineering practice but rather reviewed, recommended, formulated, and oversaw plans. Although it was arguable that under the older Code provisions, Engineer A's activities would have constituted a conflict as he may have in fact participated in consideration of actions, the Board found that his activities were within the meaning of the amended Code provisions and did not constitute "decisions" under Section II.4.d. Therefore the Board concluded that one who serves as both city and county engineer for a retainer fee may provide private engineering consulting services to the city and county.

The question of whether an engineer who serves as a member of local boards or commissions which have some aspect of engineering may provide engineering services through his private firm to the boards and commissions was addressed in BER Case 75-7. The Board concluded there that an engineer serving on a commission could ethically provide services to the private owners because the engineer had abstained from the discussion and vote on permit applications. The Board cautioned, however, that care must be taken that the engineer in such a situation not have taken any action to influence the favorable decision on the permit.

In BER Case 82-4, there was nothing to suggest Engineer A had taken any action to influence decisions as administrator of the city block grant program or project administrator of the county airport authority. Finally, in BER Case 67-12, the Board indicated that when an engineer serves as a part-time county engineer and as a private consultant and in the latter capacity submits the plans of a private developer to the county for approval, he should not offer any recommendation for their approval. To do so is a useless act because it is basic to the Code that an engineer will not submit plans or other work which he does not believe represents the best interests of his client.

Based upon the earlier cited decisions and the facts presented, the Board reaffirms the view that the circumstances described are in violation of Section II.4.d. The Board cannot see how an engineer can wear the multitude of hats herein described and still represent the best interest of his clients. As described by the facts, Firm A is a private consulting engineering firm that regularly prepares drawings for developers and at the same time reviews those drawings at developer expense for the benefit of the city, and also performs inspection services at developer expense for the benefit of the city. We cannot see how Firm A can adequately represent the separate and sometimes differing interests of its clients under the facts presented. We are particularly troubled by the fact that Firm A is expected to perform review and inspection services for one client while being compensated for those services by another client. We are also uncomfortable with Firm A using its position as city engineer to openly market his services with prospective clients. Since the beneficiary of the services in question is the city, the marketing technique suggests that Firm A may

be offering developers less than the full range of services required to perform the services adequately but sufficient enough to cause the work to be approved by the city.

CONCLUSION:

It was unethical for Engineer A to serve as city engineer and also provide review and inspection services for private developers within the city.

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