

REFERENCES:

- I.4. - Code of Ethics: *Engineers, in their fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
- II.4. - Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- II.4.a. - Code of Ethics: *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.*
- III.4. - Code of Ethics: *Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
- III.4.a. - Code of Ethics: *Engineers shall not, without the consent of all interested parties, promote or arrange for new employment or practice in connection with a specific project for which the Engineer has gained particular and specialized knowledge.*
- III.4.b. - Code of Ethics: *Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.*

CONFLICT OF INTEREST –
OBLIGATIONS OF ENGINEER ON A DEFAULTED PROJECT

FACTS:

Engineer A was employed for many years by EFG Consulting. EFG was retained by a contractor, JKL, to perform a delay analysis on the defaulted project in which the contractor was involved. Engineer A was assigned to do the delay analysis and subsequent services, for which EFG was paid by JKL. While Engineer A was performing the delay analysis, JKL discussed with Engineer A the possibility of having another firm bid and bond completion of the project using JKL to perform the bulk of the required work. Thereafter, Engineer A contacted and later introduced JKL personnel to the personnel of PQR, a competing contractor, at a meeting. JKL and PQR discussed the project and Engineer A also attended the meeting, offering to provide professional services to schedule and coordinate project completion in the event the parties could agree to the type of arrangement proposed by JKL.

After several negotiations, JKL and PQR were unable to reach agreement and, therefore, negotiations ceased. Approximately one week after the meeting, EFG terminated Engineer A's employment when Engineer A declined to move to an EFG office in another city. PQR began negotiating with the bonding company on the defaulted project and obtained a contract to complete the defaulted project. PQR then contacted and hired Engineer A to coordinate and schedule the completion. Upon beginning to work on the completion contract, Engineer A met with JKL and advised JKL that he had been retained to schedule and coordinate the completion contract and invited JKL to participate under the terms earlier discussed between JKL and PQR. JKL refused to participate, reiterating its inability to successfully negotiate a contract with PQR.

QUESTION:

Was it unethical for Engineer A to agree to provide engineering services to PQR under the circumstances?

DISCUSSION:

As a fundamental matter, a professional engineer has an ethical obligation to act in professional matters for each employer or client as a faithful agent or trustee. In each and every professional situation the professional engineer confronts, he or she must be mindful of this basic responsibility.

Over the years, the Board of Ethical Review has occasion to consider this obligation in a variety of contexts. In Case No. 93-4, the Board considered a case involving an engineer who was retained by an Owner to provide both design and construction phase services. Following the commencement of construction, a dispute arises between the Owner and the General Contractor concerning the acceptability of a concrete pour by the Contractor. Engineer A seeks to remain impartial in the dispute, citing a provision in his contract with the Owner stating that the engineer is the initial interpreter of the requirements of the contract documents and judge of the acceptability of the work. The Owner and the Contractor ask Engineer A to review the dispute. Following his review, Engineer A agrees with the Contractor's position, noting that the Owner had approved certain changes in the work and that the Contractor complied with those claiming that because of Engineer A's ethical duty of loyalty to the Owner, Engineer A should have found in Owner's favor. The Board was faced with the issue of whether Engineer A owed an ethical duty to the Owner to find in the Owner's favor. The Board discussed NSPE Code Section I.4, as well as other provisions of the NSPE Code of Ethics, and concluded that the NSPE Code imposes upon engineers the ethical obligation to be objective and truthful in professional reports, statements or testimony and that under the facts, Engineer A owed a general duty of loyalty to the Owner.

In BER Case No. 93-4, the Board also noted that in acting impartially under the terms of the contract, Engineer A fulfilled that ethical obligation to the Owner. By acting in an impartial, neutral and objective manner as the initial interpreter of the requirements of the contract documents and judge of the acceptability of the work, Engineer A fulfilled his legal and ethical responsibility under the terms of the agreement. Engineer A's action provided the Owner with a candid and straightforward interpretation of the issues involved in the claim, expedited the claim, and avoided further delays and a potential for further misunderstandings between the parties. Engineer A's action also complied with the terms of the agreement and avoided a charge that the Owner and Engineer A may have "colluded" against the Contractor.

While the facts in Case No. 93-4 are somewhat different than those in the present case before the Board, Case No. 93-4 is instructive because it lays out a basic principle regarding the duty and obligations of the engineer to the engineer's client when the engineer is faced with competing considerations and factors. Specifically, in the present case, Engineer A is faced with the question of what obligations, if any, does Engineer A owe to a client of Engineer A's former employer.

Clearly, engineers have an ethical obligation to be honest and even-handed in their dealings with clients – past and present. NSPE Code Section I.4 uses the terms "faithful agents and trustees." In this regard, under the facts in Case No. 97-3, the Board is somewhat troubled by the actions of Engineer A in seemingly taking advantage of an opportunity, possibly at the expense of a former client. It appears to the Board that although no longer employed by his former firm, EFG Consulting, Engineer A retained certain basic ethical responsibilities in his dealings with JKL. Engineer A's subsequent agreement to provide services to PQR without the involvement of JKL appears at the very least unseemly. By appearing to be representing the interests of JKL at the outset and then later working on a project for a competing party, PQR, Engineer A appears to be "changing horses in mid-stream." Engineer A was working on behalf of JKL, which undoubtedly relied upon Engineer A to protect its interests in its negotiations with PQR and other parties. However, following Engineer A's termination of employment, Engineer A appears to have acted somewhat ambiguously in dealings with JKL.

Another troubling aspect of Engineer A's actions involved his acting in a somewhat conflicting manner, first as a representative and employee of EFG Consulting for the apparent benefit of JKL, and later as an independent contractor for the benefit of PQR, an apparent competitor of JKL. Although as noted earlier, Engineer A was no longer employed by EFG Consulting at the time Engineer A agreed to contract with PQR, Engineer A's actions appear to be in violation of NSPE Code Section III.4, which prohibits engineers from disclosing confidential information concerning the business affairs of a former client without the client's consent because (1) it is clear that in working with PQR, the successor contractor of JKL, Engineer A will be compelled to disclose confidential information concerning the business affairs of the former defaulting client, JKL, and (2) there is nothing under the facts to indicate that Engineer A ever sought or received the consent of JKL before establishing his business relationship with PQR.

While the Board clearly recognizes that in today's employment market, the loyalties and commitments between employees, employers, and clients are often strained, it is vitally important for there to be a level of consistency and clarity in relations between parties. It is not entirely clear whether Engineer A was motivated by opportunistic or other reasons or whether Engineer A was convinced that he owed no ethical obligation to JKL since, in his view, his relationship with JKL terminated when he was terminated by EFG Consulting. However, it is the Board's position that as a professional engineer bound by the NSPE Code of Ethics, Engineer A's obligation continued beyond his employment with EFG Consulting and through the remainder of his professional engineering services on the defaulted project. Although his primary responsibility was to JKL, when Engineer A was given the responsibility and chose to inject himself into negotiations between JKL and PQR for their mutual benefit, he could not act for the benefit of one at the expense of the other.

At the risk of over simplifying, the heart of the matter can be summed up in the DISCUSSION as follows:

Contractor JKL was involved in the defaulted contract which leaves him at risk for a portion of the cost to complete it. In addition, JKL is at least interested in some role in completing the project, albeit not in a relationship with competitor PQR. Engineer A did the delay analysis for JKL from which he gained particular specialized knowledge of JKL's sensitive, and probably confidential, business operations concerning this project.

CONCLUSION:

Given the above, and III.4.a. and III.4.b., without the specific consent of JKL, it is not ethical for Engineer A to represent competitor PQR on this contract.

BOARD OF ETHICAL REVIEW

Concurrence:

James G. Fuller, P.E.
Richard Simberg, P.E.
C. Allen Wortley, P.E.

Non-Concurrence:

William E. Norris, P.E.

Paul E. Pritzker, P.E.
Donald L. Hiatte, P.E., Chairman

- * BER member Jimmy H. Smith, P.E., was unavailable and did not participate in the discussion.

NOTE: *The NSPE Board of Ethical Review (BER) considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials and members of the public. The BER reviews each case in the context of the NSPE Code of Ethics and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.*

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.

This Opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and that appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.

Visit the "Ethics Button" on NSPE's website (www.nspe.org) and learn how to obtain complete volumes that include all NSPE Opinions (or call 1-800-417-0348).