

Report on a Case by the Board of Ethical Review

Case No. 77-12

Contingent Contract—Industrial Design

Facts:

Mary Smith, P.E., a consulting engineer who practices primarily in the field of industrial product design for clients, is requested by the XYZ Manufacturing Company to review an amplifier design developed by the company which has not been successful in producing an acceptable product. The company is under pressure to deliver a final model to a customer within three months. Smith spends a few days reviewing the XYZ design and makes several recommendations to improve the product. She is paid her usual per diem fee, as earlier agreed upon. However, XYZ advises Smith that it will need her further assistance for the product to make it fully acceptable and proposes to retain her for the further services on a basis that she will be paid a fee for the additional service only if the amplifier, as a result of her assistance, will meet the company's requirements. During this period XYZ will pay Smith her out-of-pocket costs, e.g., travel, lodging, computer time, etc.

Question:

Would it be ethical for Smith to enter into a contract arrangement as described?

References:

Code of Ethics-Section 1(c)-"He will advise his client or employer when he believes a project will not be successful."

Section 11(d)-An Engineer shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which his professional judgment may be compromised, or when a contingency provision is used as a device for promoting or securing a professional commission."

(We note that §1(c), and other parts of the code, use the masculine pronouns "he," "his," and "him." The code applies with equal force to all engineers regardless of gender.)

Discussion:

We have not heretofore been called upon to consider the application of §1(c) to a specific set of facts and thereby determine under what circumstances an engineer has a duty to state a belief that a project will not be successful. This case indicates the kind of situation in which the engineer must consider the application of §1(c). However, the facts before us do not imply that Smith had a sufficient doubt as to her ability to reach a satisfactory result to require a warning to the client.

The best known, and often discussed, ethical aspect of the case is whether Smith offends §11(d) by the contingent contract arrangement. Taking the latter portion of §11(d) first, the facts indicate that Smith did not first propose the contingent arrangement as a device to secure work. Rather, XYZ made the contingent overture to Smith, apparently because it retained some doubt that a fully acceptable result could be achieved and hence did not want to make a further investment in Smith's technical skills if that turned out to be the case.

The remaining question is whether the contingent arrangement could induce Smith into a situation which might compromise her professional judgment. We stated in Case 77-4, quoting from Case 65-4, "The import of the restriction in §11(d) is that the engineer must render completely independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project."

Applying that standard to these facts, it seems clear enough that Smith's judgment could not be effectively compromised because the client manufacturing company would be in a position to effectively judge if the product was acceptable based on Smith's technical contribution. Thus, both XYZ and Smith would have the same economic motivation to bring about a favorable result.

Conclusion:

It would be ethical for Smith to enter into a contract arrangement as described.

**Note:* This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

Board of Ethical Review

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