

Conflict of Interest – Prior Employment with Vendor

Case No. 04-2

Facts:

Engineer A believes that several years ago, his former employer, Company X, acted improperly in connection with his employment and later, his employment termination. The nature of the conflict between Engineer A and Company X related to differences over professional practice and client selection philosophy. Five years after his employment with Company X, and in his new position with Company Y, Engineer A is responsible for reviewing proposals and making recommendations for new processing equipment. While reviewing proposals for a large expansion project, Engineer A finds that Company X has submitted a strong proposal—both in terms of quality and price. However, rather than recommending that Company Y accept Company X's proposal, Engineer A decides to recommend another firm that is equally qualified to perform the work but whose price quotation is higher than Company X.

Question:

Was it ethical for Engineer A not to recommend Company X's proposal but instead recommend another firm's proposal which, while equally qualified, was more costly to his employer Company Y?

References:

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| Section II.4. | - | NSPE Code of Ethics: | <i>Engineers shall act for each employer or client as faithful agents or trustees.</i> |
| Section II.4.a. | - | NSPE Code of Ethics: | <i>Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.</i> |
| Section III.7. | - | NSPE Code of Ethics: | <i>Engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Engineers who believe others are guilty of unethical or illegal practice shall present such information to the proper authority for action.</i> |

Discussion:

Engineers bring a broad range of experience and knowledge to each professional engagement or employment situation that they encounter. In addition to their technical and discipline-specific experience and knowledge, engineers also gain the benefit of contact with employers, clients, professionals, vendors, suppliers, and others. This exposure to a variety of individuals and groups acquaints the engineer with a variety of different professional practice settings, business cultures, and ethical attitudes.

The issue of employed engineers making comments or taking actions that have a negative effect on a former employer was examined in BER Case 01-1, and on earlier occasions. In each instance, the Board has sought to strike a fair balance between the

basic right of an individual engineer to demonstrate individual initiative and ambition in, for example, establishing an independent engineering business entity, coupled with the obligation and responsibility of that engineer to his/her former employer and/or clients. These cases are often not easily resolved because the two competing considerations are generally viewed as important positive values that should be encouraged for the benefit of the public as well as the engineering profession as a whole. However, it is clear from these cases that engineers must act in an unbiased and professional manner and not allow personal circumstances to color or taint their professional obligations.

As examples of earlier Board review of these important considerations, in BER Case No. 86-5, a city requested proposals from various consulting engineers for a major job that was planned. Engineer A, a principal in a large engineering firm in the city decided to have his firm submit a proposal. Engineer A asked three engineers on his staff, Engineers X, Y, and Z, to develop the proposal for the firm. Engineers X, Y, and Z developed the proposal which was ultimately submitted to the city. Soon thereafter, the city learned that Engineers X, Y, and Z were the engineers who actually developed the proposal for the firm and a city official approached Engineers X, Y, and Z and asked if they would agree to a contract as consultants, independent of Engineer A's firm. Engineers X, Y, and Z disclosed the facts to Engineer A, resigned from the firm, and entered into negotiations with the city.

The Board concluded that, according to a strict interpretation of the NSPE Code, it would be ethical for Engineers X, Y, and Z to agree to a contract for consulting services independent of Engineer A's firm. In reaching its conclusion in BER Case No. 86-5, the Board reviewed two earlier BER cases, Nos. 77-11 and 79-10.

In BER Case No. 77-11, the Board found that four engineers who left the employ of a firm, founded a new firm, and contacted the clients of the former firm were not in violation of the NSPE Code for doing so. However, the Board determined in BER Case No. 77-11 that the four engineers violated the NSPE Code with regard to projects for which they had gained specialized knowledge while in the employ of the firm. In BER Case No. 79-10, the BER determined that an engineer employed by a firm that was winding down its operations, and who sought to offer his services to complete projects under his own responsibility and risk without the concurrence of the principal of his employing firm, was ethical. In reviewing each case, the Board noted the need to balance (1) the interests of the client in retaining the firm of its choice; (2) the interests of the individually employed engineers; and (3) the interests of the firm and its interest in maintaining business goodwill with its clients. No one can deny that a client has a right to retain the engineering firm of its choice. What must be addressed is a method to effect that right in a manner that is both fair and equitable to all of the concerned parties. Clearly in this case, the Board focused on the need to balance the interests of all parties and not allow one particular interest or concern to override all other considerations.

In another BER Case 01-1, Engineer A, a professional engineer working for a small private practice firm, left the employment of Firm X. Engineer A had represented that he was going to start his own one-person consulting firm, Firm Y, and that he would not be in the position of competing with Firm X. A month after Engineer A departed from Firm X, Engineer B, a principal in Firm X learned that Engineer A has contacted one of Firm X's employees, Engineer C, and offered her a position with Firm Y. Soon thereafter, Engineer B learned that Engineer A has contacted Firm X's clients and is making representations that because Engineer C is going to be leaving Firm X to work for Firm Y, Firm X will be "hard pressed" to perform successfully on its projects and that Firm X's clients should hire Firm Y to perform engineering services. In deciding the second question of whether it was ethical for Engineer A to make a representation that "because Engineer C is going to be leaving Firm X to work for Firm Y, that Firm X will be "hard pressed" to perform successfully on its projects and that Firm X's clients should hire Firm Y to perform engineering services," the Board was somewhat troubled by the actions of Engineer A for several reasons. First, Engineer A made it clear at the time of his departure from Firm X that he was going to start his own one-person consulting firm, Firm Y, and that he would not be in the position of competing with Firm X. While Engineer A was not ethically obligated to make this statement, one must assume that Engineer A intended the statement to be a truthful and honest statement of fact. The Board noted that the NSPE Code of Ethics clearly states that (a) engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, and that (b) engineers shall not attempt to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment of other engineers. Under the facts, Engineer A had made at least one statement to the clients of Firm X stating or implying that Firm X might be incapable of fulfilling its professional obligations to them because of Engineer C's pending departure. The Board concluded that Engineer A's actions fell below the standards of appropriate ethical conduct.

While similarities exist, the facts in the present case are somewhat different than the earlier cited cases. In the present case, Engineer A appears to be permitting a desire to thwart the interests of Company X to negatively affect the interests of Company Y. As an employee and agent of Company Y, Engineer A's duties involve promoting the interests of Company Y, but his desire to thwart the interests of Company X appears to have made it impossible for him to discharge his official duties. Even though Engineer A does not stand to gain by his action (and might indirectly be hurt since by his actions, his employer, Company Y would not stand to benefit from the proposal of Company X), this situation involves a conflict of interests. Unless there is some other compelling reason involving the earlier actions of Company X toward Engineer A or some other reason that might cause Engineer A to not approve Company X's proposal, Engineer A has an obligation to approve Company X's proposal. Further, Engineer A has an ethical

obligation to disclose his experiences with Company X, including possible reasons for not selecting Company X, and depending upon the wishes of the company, may be required to recuse himself from the decision if the company believes Engineer A cannot make a reasonably objective decision or serve the interests of Engineer A's employer.

In closing, the Board would note that for purposes of this case, the Board interprets the term "equally qualified" in the facts to mean equally qualified in all respects.

Conclusion:

Engineer A has an ethical obligation to disclose his experiences with Company X, including possible reasons for not selecting Company X. Since there was nothing in the facts to indicate disclosure, it was not ethical for Engineer A to not recommend Company X's proposal but instead recommend another firm's proposal which while equally qualified, is more costly to his employer Company Y.

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