

Conflict of Interest—Engineer Inspecting Own Work

Case No. 04-9

Facts:

Engineer A is a professional engineer in private practice. Development Contractor X (Contractor) for whom Engineer A works from time-to-time as a consultant, was asked by a local building inspector to have a foundation the Contractor built inspected by a Professional Engineer since the foundation had cracks that were visible to the inspector. Since Engineer A's firm designed the house foundation for the Contractor, Engineer A performed the inspection for the Contractor. Engineer A determined the foundation had some minor surface cracks but nothing that Engineer A considered unsafe. In Engineer A's estimation, the cracks were not unusual for the type of foundation involved. Engineer A sends the building inspector a letter (which Engineer A also sealed) stating that Engineer A had inspected the foundation and in Engineer A's professional opinion, the foundation was structurally safe. The building inspector responded with a letter to the contractor stating he was not accepting Engineer A's letter and told the contractor to hire another engineer to inspect the foundation.

Question:

Was it ethical for Engineer A to inspect his own work or should an independent professional engineer be retained to inspect Engineer A's work?

References:

- Section II.4.a. - NSPE Code of Ethics: *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.*
- Section II.4.d. - NSPE Code of Ethics: *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 services solicited or provided by them or their organizations in private or public engineering practice.*

Discussion:

Over the years, the question of an engineer reviewing his or her own work has been the subject of NSPE Board of Ethical Review opinions. In the strictest sense, an engineer reviewing his/her own work can raise basic questions of objectivity and impartiality, particularly under circumstances where a public agency is involved and the public health and safety is concerned.

For example, in NSPE BER Case No. 97-4, Engineers A and B were in a joint venture in an engineering and construction management practice that provided civil and municipal engineering and construction management services for clients in a number of townships in the state. The joint venture was hired by a developer to design a 90-lot subdivision in Township A. Engineer A provided the engineering design and Engineer B provided

construction management services for the project. During a review by officials in Township A, it was determined by the officials that a second road would be needed to access the subdivision. However, the second road exited into Township B, which was adjacent to Township A. Engineer A and B's joint venture owned undeveloped property in Township B, and their joint venture also served as municipal engineer in Township B. It was clear that the property owned by Engineers A and B would be positively affected by the construction of the new road. As municipal engineer for Township B, the joint venture of Engineers A and B disclosed its relationship with the developer to Township B with regard to Township A, but did not disclose its ownership of the property in Township B. On that basis, Township B did not object to Engineers A and B making a recommendation regarding the feasibility of the construction of the proposed road. Thereafter, as municipal engineer for Township B, Engineer A and B's joint venture recommended that Township B approve construction of the proposed road.

In deciding that (1) it was not ethical for Engineers A and B to serve as the engineers for the developer and also serve as municipal engineer for Township B, because there was only partial disclosure and no disclosure of the engineers' ownership of undeveloped property in Township B; and (2) it was not ethical for Engineers A and B to recommend approval of the road because, as employees or advisors in public service to Township B, the engineers could not participate in decisions involving professional services provided by them in their private practice, the Board explored a variety of issues. Among the issues included was the fact that Engineers A and B did not meet the requirements of NSPE Code of Ethics Section II.4.a. because the engineers provided only limited disclosure of their conflict or potential conflicts-of-interest. By disclosing their relationship with the developer with regard to Township A, but failing to disclose their ownership of undeveloped property in Township B, the engineers did not provide Township B with a full range of all known or potential conflicts-of-interest or other circumstances that could influence or appear to influence their judgment or the quality of their services. It was not clear to the Board what the reasons were for the engineers' not providing full and complete disclosure, but it appears that had the engineers provided full disclosure, it is at least a possibility that Township B's decision not to object to the engineers' making a feasibility recommendation regarding the new road may have been different. In the interests of full and timely disclosure, the Board was of the opinion that Engineers A and B owed this information to Township B and their failure to provide it was a violation of the NSPE Code.

With regard to a possible violation of NSPE Code Section II.4.d., the Board assumed from the facts that the engineers' recommendation to Township B regarding the new road was based upon a review of documents and information involving professional services solicited or provided by them in their public or private engineering practice—the services they had provided for the developer in connection with the subdivision project in Township A. The Board noted that there was nothing in the facts or circumstances of this case to indicate that Engineers A and B had solicited or reviewed any other plans,

drawings, documents, reports, recommendations, or alternatives that were prepared by unrelated or disinterested parties. On that basis, there appeared to the Board to be a clear violation of NSPE Code Section II.4.d., which prohibits engineers in public service as advisors or employees of a governmental body to participate in decisions involving such information.

Turning to the facts in the instant case, the issues do not appear to turn upon lack of disclosure in connection with any interest that Engineer A might have had in connection with the project. There is nothing to suggest under the facts that Engineer A was attempting to limit disclosure or conceal any information from any interested party or governmental agency. In addition, there does not appear to be any evidence that Engineer A was performing any service other than that which is customary when a consultant is called upon by a private client to perform design and other possible services.

In many jurisdictions, local code enforcement officials are granted significant authority in approving/rejecting engineering plans, drawings and reports, and inspecting the contractor's work to determine if it meets the code requirements. As a general rule, rejection may be based upon the fact that, for example, an individual's plans, drawings and reports are inadequate, that the individual lacks the technical competence to submit the report or that upon inspection, the actual construction work is inadequately performed. Sometimes, the code enforcement official identifies a potential violation and requests additional professional or technical review before approving or rejecting the work.

In most cases it is not uncommon for the design engineer to also perform construction inspection services within the scope of customary services for the benefit of the client. Those services are entirely consistent with the role of the design engineer in providing professional services to the client. However, there may be situations such as here where an independent review may be necessary to resolve issues raised by public officials charged with approving the work on the site. In the instant case, Engineer A was involved in the actual design of the house foundation about which actual questions were raised by the inspector. In this connection it was inappropriate for Engineer A to perform an inspection of foundation for the benefit of the party that retained Engineer A. Reviewing one's own work raises fundamental issues relating to conflicts of interest. In view of the fact that a question has been raised by the building inspector concerning the sufficiency of the foundation, it would be appropriate for there to be an independent third party review of the foundation to determine if any additional measures are necessary to resolve any remaining engineering or construction-related questions.

Conclusion:

It was not ethical for Engineer A to inspect his own work. In view of the fact that a question has been raised by the building inspector concerning the sufficiency of the foundation, it would be appropriate for there to be an independent third-party review of the foundation.

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