

Signing and Sealing Subcontractor's Calculations

Case No. 11-1

Facts:

Engineer A is the engineer of record for a building renovation project on behalf of Client B. The plans and specifications for the project include the installation of skylight curbs for roof skylights. Smith, the owner of XYZ Skylight Curbs, was selected as a subcontractor on the project to provide the specified skylight curbs. Since Engineer A prepared the plans and specifications and is knowledgeable about building renovations, although not specifically with respect to skylight curbs, Smith proposes to retain Engineer A to review and stamp XYZ Skylight Curbs' calculations and design documents in connection with the project.

Question:

Would it be ethical for Engineer A to review and stamp the calculations and design documents as requested in connection with the project?

References:

- Section II.2.b. - NSPE Code of Ethics: *Engineers shall not affix their signatures to any plans or documents dealing with subject matter in which they lack competence, nor to any plan or document not prepared under their direction and control.*
- Section II.4. - NSPE Code of Ethics: *Engineers shall act for each employer or client as faithful agents or trustees.*
- 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.b. - NSPE Code of Ethics: *Engineers shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed and agreed to by all parties.*
- Section III.5. - NSPE Code of Ethics: *Engineers shall not be influenced in their professional duties by conflicting interests.*

Discussion:

During any design and construction project, engineers are frequently called upon by various parties (contractor, subcontractor, subconsultants, vendors, etc.) to provide clarification, design expertise, and other information for the overall benefit of the final project. While in many instances these types of services are considered to be within the normal scope of services provided by the engineer for the benefit of the engineer's actual client, in other cases these activities may cross a line as to what is acceptable

professional practice. Engineers need to be mindful of these factors and respond accordingly based upon appropriate ethical considerations as well as professional practice concerns.

The NSPE Board of Ethical Review has considered cases over the years where parties involved in the design and construction process sought assistance from the engineer in different capacities. For example, in an earlier BER Case No. 85-4, Engineer A was a forensic engineer, hired as a consultant by Attorney Z to provide an engineering and safety analysis report and courtroom testimony in support of a plaintiff in a personal injury case. Following Engineer A's review and analysis, Engineer A determined that he could not provide an engineering and safety analysis report favorable to the plaintiff because the results of the report would have to suggest that the plaintiff and not the defendant was at fault in the case. Engineer A's services were then terminated and Engineer A's fee was paid in full. Thereafter, Attorney X, representing the defendant in the case, learned of the circumstances relating to Engineer A's unwillingness to provide a report in support of Attorney Z's case and sought to retain Engineer A to provide an independent and separate engineering and safety analysis report. Engineer A agreed to provide the report. In concluding that Engineer A's actions were not ethical, the Board noted that the mere fact that Engineer A had ceased performing services for Attorney Z would not be an adequate solution to the ethical dilemma at hand. Nor was the fact that Engineer A had agreed to provide a "separate and independent engineering and safety analysis report." On the former point, the fact that Engineer A ceased performing services for Attorney Z did not mitigate the fact that Engineer A, throughout his first analysis, had access to presumably confidential information, documents, etc., that were made available to him by the plaintiff and plaintiff's attorney in a cooperative and mutually beneficial manner. In its analysis, the Board did not accept the proposition that following the termination of Engineer A's relationship with attorney for the plaintiff, Engineer A could somehow "blot out" confidential information from his mind and start from "square one" in performing his engineering and safety analysis report. It was clear to the Board from the facts that the real reason for the defendant's attorney's decision to hire Engineer A was that the attorney believed Engineer A would provide a report that would be favorable to the attorney's client. The Board believed that Engineer A had to have been aware of the reasons why his services were being retained by virtue of the sequence of events. Said the Board, "even if Engineer A was so naive as to believe that Attorney X was unaware of the circumstances of his termination, the Board did not believe this would excuse Engineer A's actions. At a bare minimum, Engineer A should have fully discussed the issue with Attorney Z." The Board also noted that while it could be argued that Engineer A's loyalties were not divided because he had terminated his relationship with the plaintiff's attorney (see BER Case No. 74-2), Engineer A still had an ethical obligation to that client to protect certain confidential information and facts, as well as a duty of trust and loyalty.

The case at hand provides a set of circumstances somewhat different than BER Case Nos. 85-4 and 74-2. In the present case, there clearly was an existing relationship between Engineer A and Client B, suggesting the potential for a clear conflict of interest. As the Board has stated on numerous occasions, it is generally not possible to serve two masters with competing or potentially competing interests. In addition, the facts indicate the obvious circumstances where Engineer A could be placed in a situation where he may be called upon to review his own work—a clear violation of the NSPE Code of Ethics. Such actions could expose Engineer A to potential liability and endanger the interests of Engineer A's client. Further, based upon the facts, there is a clear question as to whether and to what extent Engineer A had any direct involvement in the preparation of the calculations and design documents in question and if not, whether Engineer A could properly stamp the calculations without exercising the requisite responsible charge over the work.

Conclusion:

It would not be ethical for Engineer A to review and stamp the calculations and design documents as requested in connection with the project, because he was not in responsible charge for the design of the skylight curb.

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