

## **Reviewing Work of Another Engineer and Thereafter Performing Engineering Services for Client**

### **Case No. 11-12**

#### **Facts:**

Engineer A is the part-time town engineer for Smithtown and also has a consulting engineering practice. With Engineer A's advice and concurrence, Smithtown selects Engineer B to provide design services for a local road project. Following the selection and after Engineer B begins to perform preliminary design services, Engineer A, in his role as town engineer, reviews Engineer B's preliminary work and becomes convinced that Engineer B's performance on the contract does not meet the standards as outlined in Engineer B's contract with the town. Following the termination of Engineer B under the terms and conditions of his contract with the town, Engineer A offers, and Smithtown agrees, that Engineer A's firm should perform the design work for the local road project for Smithtown.

#### **Questions:**

1. Was it ethical for Engineer A to contact Smithtown and advise the town that Engineer B's performance on the contract did not meet the standards as outlined in Engineer B's contract with the town?
2. Was it ethical for Engineer A to offer and agree to perform the road design work for Smithtown?

#### **References:**

Section I.6.	- NSPE Code of Ethics:	<i>Engineers, in the fulfillment of their professional duties, shall conduct themselves honorably, responsibly, ethically, and lawfully so as to enhance the honor, reputation, and usefulness of the profession.</i>
Section II.4.d.	- NSPE Code of Ethics:	<i>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.</i>
Section II.4.e.	- NSPE Code of Ethics:	<i>Engineers shall not solicit or accept a contract from a governmental body on which a principal or officer of their organization serves as a member.</i>
Section III.1.b.	- NSPE Code of Ethics:	<i>Engineers shall advise their clients or employers when they believe a project will not be successful.</i>
Section III.1.e.	- NSPE Code of Ethics:	<i>Engineers shall not promote their own interest at the expense of the dignity and integrity of the profession.</i>
Section III.4. a.	- NSPE Code of Ethics:	<i>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.</i>
Section III.6.	- NSPE Code of Ethics:	<i>Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.</i>

- Section III.7. - NSPE Code of Ethics: *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.*
- Section III.7.b. - NSPE Code of Ethics: *Engineers in governmental, industrial, or educational employ are entitled to review and evaluate the work of other engineers when so required by their employment duties.*

**Discussion:**

It is not uncommon for a professional engineer in private practice or an engineering firm to serve as a city, town, or county engineer. Historically and particularly in this period of dwindling financial and other resources, it is not uncommon for communities with limited budgets to retain the services of a competent professional engineer or professional engineering firm to serve in an advisory or other capacity on engineering matters affecting the community. This relationship, while generally a reasonable response to the needs of the community, can sometimes raise ethical questions regarding whether and to what extent the professional engineer or professional engineering firm may go beyond the role of professional advisor, etc., and actually perform significant professional engineering or other services for that community. Questions naturally arise as to whether such work constitutes a clear conflict of interest and NSPE Code provisions clearly address many of these concerns.

On the flip side of the issue is the practical reality for many professional engineers and engineering firms that by serving in a limited professional advisory role, they are precluded from consideration on actual engineering projects; the professional engineer or the engineering firm is placed at a significant competitive disadvantage in relation to other engineers and engineering firms that may freely compete on such public engineering projects.

Since its inception in the late 1950s, the NSPE Board of Ethical Review has considered many cases involving conflicts of interest issues of this type. Conflicts of interest are clearly among the most prevalent ethical issues that engineers face in their professional lives.

For example, in an earlier case, BER Case No. 63-5, a small community retained a professional engineer, Engineer B, on a part-time basis to serve as city engineer. Engineer B was engaged in full-time private practice and treated his part-time service to the community as a public service. The duties of the city engineer usually included advising the city council on engineering problems, offering recommendations on engineering project considerations, and approving plans for engineering processes and works. In addition to general advisory services to the city, Engineer B was retained by the city council for the preparation of plans and specifications for a city project. In such cases, Engineer B was compensated on a normal professional fee basis over and

above his monthly retainer. The Board ruled that it is ethical for a professional engineer retained by a community on a part-time basis as a city engineer to prepare plans and specifications for a project for the same community, but in so acting the engineer must be scrupulously careful that his advice is not influenced by his secondary interest as the engineer likely to be retained for the design of the project. The Board noted that “it is axiomatic that a professional person may not take action or make decisions which would divide his loyalties or interests from those of his employer or client.” Among the issues the Board considered in BER Case No. 63-5 was the practical question of the engineer passing on the adequacy of his own plans in his capacity as city engineer. The Board noted that there is no requirement in the NSPE Code that an engineer’s plans for a client must be reviewed by an engineer employed or retained by the client. The Board noted that the client had the right of review by its own engineer, but it may waive its right, as it did in Case 63-5. Under those circumstances, the engineer was acting in a dual capacity but not a divided one.

Later, in BER Case No. 74-2, the Board considered a case involving a state law that required that every municipality have a municipal engineer whose duties and compensation were to be fixed by a municipal ordinance. The duties of the municipal engineer varied by size and nature of the municipalities but generally consisted of attending meetings of public bodies of the municipality, providing general advice on engineering matters, maintaining tax maps, reviewing site plans and subdivision maps, preparing cost estimates for proposed facilities, handling complaints from citizens on engineering-related problems (drainage, roads, and the like), and advising on the retention of consultants for project requirements. Many of the smaller communities in the state did not have and could not afford full-time municipal engineers or supporting staff personnel for a full-time office. In such instances the smaller communities retained the services of a consulting firm in private practice and appointed a principal of the firm as the municipal engineer. Such a municipal engineer was paid either on a cost-plus basis or a flat monthly retainer—usually a relatively low amount. The municipal engineer’s firm was thereafter usually retained for engineering services for capital improvement projects needed by the municipality. In deciding that it was ethical for the engineer to serve as a municipal engineer and participate in a consulting firm providing engineering services to the same municipality under the stated conditions, the Board determined that the public interest was best served by providing the small municipalities with the most competent engineering services which they can acquire. It was assumed by the Board that the state law was intended to achieve this end.

More recently, in BER Case No. 01-11, Engineer A was the president of WXY Engineers, an engineering firm. For many years, WXY had provided services directly to City H (a small city), and WXY currently had three engineering contracts directly with the city for separate engineering projects with City H. Engineer B, the full-time city engineer, then resigned from his position with City H. City H officials were considering whether to replace Engineer B with another full-time city engineer or, as a cost-cutting

and efficiency measure, to hire a consultant (such as WXY Engineers) as the city engineer to perform general consulting services and be under contract to provide specific design services on individual city projects. One city official raised a concern that because WXY was already under contract with City H, having WXY serve as city engineer would constitute a conflict of interest. Another factor was that WXY did not perform any private work for developers or other private parties within City H and, therefore, if WXY was designated city engineer for City H, WXY would not be reviewing the work it performed for private clients. In deciding that it would be ethical for Engineer A's firm, WXY Engineers, to serve as city engineer for City H, perform general consulting services, and also be under contract to provide specific design services, the Board determined that Engineer A and WXY Engineering had provided services to City H for many years and it appeared that City H would gain the benefit of that experience and expertise. Moreover, the Board did not concur with the City H official's concern that because WXY is under contract with City H, having WXY serve as city engineer would constitute a conflict of interest. The Board also concluded that it would be ethical for Engineer A and his firm WXY to serve as city engineer for City H and perform general consulting services and design services on individual projects under circumstances where those services did not include reviewing the work of Engineer A's firm. However, the Board also cautioned that WXY would need to disclose further circumstances (e.g., private work in city, reviewing its own work) that could create the potential for a conflict of interest.

Turning to the facts in the instant case, it is this Board's view that Engineer A did have an affirmative obligation as town engineer to call to the attention of the city Engineer A's opinion that Engineer B had failed to meet the standards required to complete the local road project. As a competent advisor to the town upon whose judgment the town undoubtedly relied, it would be appropriate for Engineer A to make comments in connection with Engineer B's professional services. There is nothing under the facts to suggest that anything said by Engineer A was beyond the bounds or could be construed as anything to injure maliciously or falsely, directly or indirectly, the professional reputation or prospects, practice, or employment of Engineer B. Having done so, it is the Board's view that Engineer A acted consistently with the NSPE Code of Ethics.

Turning to the second question, it is the Board's view that there are serious ethical constraints that would preclude the selection of Engineer A by the town to perform the road design work. It is implied under the facts of this case that Engineer A is an officer or principal of his engineering firm, and thus according to NSPE Code of Ethics, section II.4.e, is not eligible to provide engineering services to Smithtown for the local road project. This conclusion is based upon the language in Section II.4.e and is irrespective of whether the town's procurement laws are scrupulously followed. Also, contrary to the situation in BER Case 01-11, the performance of such services by Engineer A potentially places him in the situation of reviewing his own work. The Board does not believe that the disclosure of any further circumstances (e.g., private work in town for a

developer, reviewing its own work) would be sufficient to avoid a conflict of interest or the appearance of a conflict of interest.

**Conclusions:**

1. It is ethical for Engineer A to contact Smithtown and advise the town that Engineer B's performance on the contract did not meet the standards as outlined in Engineer B's contract with the town.
2. It would not be ethical for Engineer A to offer and agree to perform the work for Smithtown.

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