

## **Engineer's Recommendation of Contractor—Outstanding Accounts Receivable**

### **Case No. 13-5**

#### **Facts:**

Engineer A is retained by City to evaluate Contractors X, Y, and Z and recommend one of the contractors for selection on a major project for the city. As part of the proposal process, each contractor is required to list the subcontractors they plan to use on the project. Following Engineer A's evaluation, Engineer A recommends Contractor Z. One of the subcontractors used by Contractor Z is Subcontractor L. In the months prior to being retained by the City, Engineer A performed services for Subcontractor L and Subcontractor L has an outstanding invoice from Engineer A for \$25,000 in fees for those engineering services. Prior to and following the recommendation of Contractor Z, Engineer A did not disclose that Subcontractor L owed Engineer A \$25,000 in professional fees.

#### **Question:**

Was it ethical for Engineer A to fail to disclose to all parties involved that Subcontractor L owed Engineer A \$25,000 in professional fees?

#### **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.4.  | - | NSPE Code of Ethics: | <i>Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.</i> |
| Section III.5.  | - | NSPE Code of Ethics: | <i>Engineers shall not be influenced in their professional duties by conflicting interests.</i>  |

#### **Discussion:**

As the Board has recognized in earlier decisions, the question of what constitutes an improper inducement that might influence or appear to influence an engineer in making a decision is often not an easy question to answer. The answer will be based upon a variety of factors—some objective with others being more subjective. It is often very difficult to get into the mind of an individual to determine what motivates the individual to make or not make certain decisions in connection with their engineering practice. It is essential that an engineer maintain an arm's-length relationship with contractors, vendors, etc., having or potentially having contractual arrangements with the engineer's employer or client. It is often difficult to discern whether a gift or other inducement is an expression of gratitude or an attempt to buy a favor, and it is just as difficult to ascertain the influence a particular gift may have on the recipient's disposition to return and/or perpetuate the favor

by compromising standards or rendering preferential treatment to the giver. The engineer though must be mindful of how others may construe the effect a gift would have on the firmness of an arm's-length relationship.

The NSPE Board of Ethical Review has had occasion to consider the issue of gifts or inducements that might influence or appear to influence an engineer in making a decision on several occasions. In BER Case No. 81-4, three principals or employees of a consulting firm provided a list of recommended contractors to their developer clients. From time to time, at holidays or on birthdays, these contractors and vendors with whom the engineers dealt would give the engineers personal gifts of substantial value.

Citing previous cases and language of the NSPE Code (Sections II.4.c, II.5.b, and III.5.b), the Board concluded there was a reasonable suspicion to others, and particularly to other contractors and suppliers, that acceptance of gifts by the engineers would imply favoritism. The Board determined that acceptances of gifts under the circumstances were unethical. The discussion in Case 81-4 refers the reader to the discussion of BER Case No. 60-9 for guidance on the nature of generally acceptable gifts. Case 60-9 noted that the "question of when a gift is intended to or becomes an inducement to influence one's impartial decision, as distinguished from an expression of friendship or a social custom, has remained a perplexing one over the years. No blanket rule covering all situations has been discovered." It was also noted by the Board that the size of the gift is usually a material factor, but must be related to the circumstances of the gift. It would hardly be felt a token gift, such as a desk calendar, etc., would be prohibited. It has been customary in the business world for friends and business associates to tender such tokens of recognition or appreciation, and "picking up the tab" at a business luncheon or dinner is commonplace and well accepted in the mores of our society. The Board also acknowledged that while engineers may neither offer nor receive a gift which is intended to or will influence his independent professional judgment, the full application of this principle requires the impossible—that we read the state of mind of the donor or donee.

In BER Case No. 95-3, a contractor offered the following incentive in exchange for referrals by a professional engineer: "As an incentive to include my company on such list or as a referral to your clients, I am prepared to offer you a flat \$500 plus 3% of the total contract price, as a finder's fee/commission for every contract I sign as a result of your referral." In finding that it would not be ethical for the engineer to associate with the contractor under the circumstances being proposed, the Board noted that it is essential that an engineer maintain an arm's-length relationship with contractors, vendors, etc., having or potentially having contractual arrangements with the engineer's employer or client.

More recently, in BER Case No. 02-4, Engineer A was a consulting engineer that performed both design and installation observation services. Following client review and approval of Engineer A's designs, Engineer A was requested to recommend a contractor

to perform installation services. Engineer A frequently recommended that his clients hire Contractor B to perform installation services because Contractor B performed high quality construction. Recently, Engineer A mentioned to Contractor B that Engineer A planned to expand his consulting engineering practice and, thereafter, Contractor B offered to lend Engineer A \$20,000 at an interest rate significantly below the market rate.

In ruling that it was not ethical for Engineer A to accept Contractor B's offer to lend Engineer A \$20,000 at an interest rate significantly below the market rate, the Board determined the below-market interest loan to be a gift of substantial value and Engineer A was in a position to influence the award of a contract to a contractor by virtue of Engineer A's opinion of the quality of Contractor B's services. The Board expressed concern that the injection of the loan offer could influence, or at the very least appear to influence, Engineer A's judgment regarding Contractor B. The Board noted potential situations where Engineer A's judgment could be compromised by his financial relationship with Contractor B. For example, should the quality of Contractor B's services decline or should Engineer A's financial situation change (e.g., requiring the negotiation of additional loans from Contractor B or being unable to meet existing obligations), the Board could foresee circumstances where Engineer A could be severely conflicted and compromised in seeking to serve the interests of Engineer A's clients. In addition, since Engineer A also performed construction inspection services for clients, there was also the possibility that Engineer A's judgment in evaluating Contractor B's construction work could be compromised as well.

Turning to the facts in the present case, based upon the language in the NSPE Code of Ethics and earlier Board of Ethical Review Opinions, it is the Board's view that Engineer A had an obligation to disclose that Subcontractor L owed Engineer A \$25,000 in professional fees. For many of the same reasons described in BER Case 02-4, Engineer A's decision to select Contractor Z and thereby Subcontractor L raises at least the appearance of a conflict of interest. While the facts in the instant case are somewhat more ambiguous and Engineer A's relationship to Subcontractor L is somewhat less direct and more remote than the facts described in BER Case 02-4, conflict of interest issues can often be subtle, which makes them prone to the appearance of impropriety. Engineer A should have discussed the issue with Subcontractor L, since Subcontractor L was Engineer A's client. Engineer A should have disclosed the outstanding invoice with Subcontractor L to the City prior to the selection of Contractor Z. The City would then be on notice and therefore could take appropriate actions to mitigate the likelihood of any appearance of a conflict of interest.

**Conclusion:**

It was not ethical for Engineer A to fail to disclose to all parties involved that Subcontractor L owed Engineer A \$25,000 in professional fees.

**Board of Ethical Review:**

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