

Conflict of Interest—Peer Reviewer Participating on Subsequent Joint Venture

Case No. 18-10

Facts:

Engineer A is a professional engineer and owner of ABC Engineering. ABC Engineering is retained by a state agency to participate in an independent external peer review of the design of a major state-funded transportation project. No confidentiality agreement exists on the project. Engineer A is assigned to serve as the lead engineer on the independent external review of the design of the major road transportation project prepared by the agency. The peer review is limited in scope and focused on clarifications and refinements of existing construction plans and specifications, which are ultimately incorporated into a Request for Proposal soliciting proposals for design-build services to complete the major transportation project. Approximately one-year after ABC Engineering completes the peer review, the state agency issues an RFP soliciting proposals for design-build services to complete the major road transportation project. XYZ Construction invites ABC Engineering to participate in a design-build joint venture and submit a proposal for the major road transportation project.

Question:

Would it be ethical for Engineer A and his firm, ABC Engineering, to participate in a design-build joint venture and submit a proposal for the major road transportation project?

NSPE Code of Ethics References:

- Section II.4. - Engineers shall act for each employer or client as faithful agents or trustees.*
- Section II.4.a. - 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. - 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 interested parties.*
- Section II.4.d. - 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.*
- Section III.4.a. - 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.*

NSPE BER Case References: 94-5; 96-8

Discussion:

Peer-review programs have become an important part of the professional practice of engineering. In recent years, various professions, including several groups within the engineering profession, have successfully developed project and firm peer-review programs.

These programs have been immensely successful in creating a mechanism whereby professionals in a collegial atmosphere can work together to better understand and improve professional practice. This can be accomplished by analyzing and evaluating the actions, decisions, and techniques of the professional and offering constructive and, at times, critical feedback.

Such programs are generally built on a foundation of confidentiality, whereby an individual agreeing to serve as a peer reviewer must sign a “confidentiality agreement” in which the peer reviewer agrees not to disclose information that is revealed to the peer reviewer about the firm being reviewed during the peer-review process. There are sound reasons for such an approach. Firms being peer reviewed should be encouraged to provide as much pertinent, detailed information to the peer reviewer to allow the peer reviewer the opportunity to perform a thorough evaluation of the firm, and confidentiality helps to assure that the maximum amount of disclosure will occur. In addition, confidentiality helps build trust between the parties in the peer-review process and promotes an atmosphere that will improve the likelihood that the process will be mutually productive and ultimately successful.

This principle was illustrated in BER Case 96-8. In this case, Engineer A served as a peer reviewer as part of an organized peer-review program developed to assist engineers in improving their professional practice. When originally selected as a peer reviewer, Engineer A was asked to sign a “confidentiality agreement,” whereby Engineer A agrees not to disclose confidential information involving peer-reviewed firms. As part of a peer-review visit, Engineer A visited Engineer B’s firm. Following a review of the technical documentation in connection with a series of recent design projects involving Engineer B’s firm, Engineer A discovered that Engineer B’s work may be in violation of state and local safety code requirements and could endanger the public health, safety, and welfare.

In reviewing the facts, the BER decided that if Engineer A determined that Engineer B’s work is or *may* be in violation of state and local safety requirements and endangers the public health, safety, and welfare, the appropriate action would be for Engineer A to immediately discuss these issues with Engineer B in an effort to seek clarification and early resolution of this issue. If Engineer A and Engineer B were unable to resolve the issue, Engineer A would be required to inform Engineer B that as a professional engineer, Engineer A’s only alternative is to notify and inform the proper authorities as indicated above.

The potential for a conflict of interest may also enter into situations of this type. In BER Case 94-5, a city engaged the services of a private consulting engineering firm, Firm A, to provide design review and construction inspection. In accordance with local ordinance governing land development, private developers were required to submit plans to the city for review and approval. Under the local ordinance, developers must pay the city’s expenses for having Firm A review their drawings. Additionally, during construction the developer was also required to pay for inspection services, to be provided by Firm A on the city’s behalf. The city ordinance stated specifically that

these inspection services were solely for the purpose of ensuring the infrastructure within the development, which was to be turned over to the city, is constructed in accordance with the city's design standards. Developers were also required to pay for separate inspection services to protect their interests. Firm A also provided design and inspection services for private developers within the city. In fact, Firm A used its position as the city's engineer as a marketing tool, openly telling prospective clients that they can save 50% on inspection costs by using Firm A. In determining that it was unethical for Engineer A to serve as city engineer and provide review and inspection services for private developers within the city, the BER noted that it could not see how an engineer can wear multiple hats and ethically serve multiple interests while representing the best interest of his clients. As noted by the BER, Firm A, a private consulting engineering firm regularly prepared drawings for developers and at the same time reviews those drawings at developer expense for the benefit of the city, while performing inspection services at developer expense for the benefit of the city. The BER could not see how Firm A could adequately represent the separate and sometimes differing interests of its clients under the facts presented.

Turning to the facts, the access to confidential, nonpublic information could provide Engineer A with some advantages. However, the BER does not believe Engineer A and ABC Engineering's participation with XYZ Construction in the design-build joint venture raises a conflict of interest. The Board notes that state laws may vary regarding whether this situation constitutes a conflict of interest.

Conclusion:

It would not be unethical for Engineer A and his firm ABC Engineering to participate in a design-build joint venture and submit a proposal for the major road transportation project, as long as the state agency approves and the work complies with state laws and regulations.

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