

Section II.4.d. - Code of Ethics
Section II.4.e. - Code of Ethics

CONFLICT OF INTEREST – FURNISHING LIMITED ADVICE

FACTS:

Engineer A serves as a principal in a consulting firm that employs other design professionals (architects, engineers, planners, surveyors). Engineer A is also retained on a part-time basis by a municipality to furnish limited advice, perform feasibility studies, and review RFPs. His agreement with the municipality states that when Engineer A's firm is employed by a client to provide professional services, other professionals in his firm and not Engineer A will be required to prepare any private client's plans that may be submitted to the municipality for review/approval. Engineer A's firm has a similar policy stating that when one of its private clients submits plans to the municipality for review/approval, Engineer A is not permitted to work on the plans at the consulting firm. Instead, those plans are prepared and sealed by Engineers B, C and D.

QUESTION:

Would it be ethical for Engineer A to provide engineering services under the conditions herein described?

REFERENCES:

- 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 professional services solicited or provided by them or their organizations in private or public engineering practice.

- Section II.4.e. -Engineers shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves as a member.

DISCUSSION:

The issue of conflict of interest and its impact on engineers acting in both a public and private capacity has been addressed by this Board on several occasions. Engineers as possessors of technical expertise are frequently called upon by both public and private parties to render advice on complex matters impacting the public health, safety and welfare. For obvious reasons, the interests of the various parties involved may not necessarily coincide. Where the engineer may have duties or obligations to one or more parties on such matters, the Code requires that the engineer must be careful to take steps which limit or avoid such conflicts.

This Board has at numerous times been asked to interpret Section II.4.d to provide specific guidance in cases which have been presented. One good example of such an interpretation is BER Case 82-4, where an engineer in full-time private practice was retained by a county as county engineer for a stipulated monthly fee. The engineer's duties included reviewing plats and construction drawings to determine whether they met county requirements, and make recommendations to local developers, county commissions, and the planning and zoning boards. In addition, the engineer was retained by a city as city engineer for a stipulated annual fee. His duties included making recommendations to the city council concerning the approval of completed engineering work. The engineer served as project administrator for the county airport authority and as such was responsible for formulating a plan for the continued development of an airport industrial park. Finally, the engineer was administrator of the city block grant program and as such oversaw engineering work on various other projects. The engineer also was retained as a consultant by several private firms to help develop city and county project proposals.

The Board of Ethical Review, reviewing earlier cases as well as the language contained in the Code, ruled that it would be (1) ethical for the engineer, who served as city engineer and county engineer for a retainer fee, to provide engineering services in a private capacity to the city or the county; (2) ethical for the engineer, who served as a member of local boards or commissions which sometimes require the services of engineers, to provide services through his private firm to those boards and commissions; and (3) unethical for the engineer, who served as city and county engineer for a retainer fee, to provide approval or render judgment on behalf of the city and/or county relative to projects on which the engineer had furnished services through a private client.

In reaching its decisions and finding the engineer's conduct to be ethical, the Board noted that under the facts presented, the engineer did not actually participate in "decisions" with respect to the services solicited or provided by him or his organization in a private or public engineering practice but rather reviewed, recommended, formulated and oversaw plans. The Board therefore concluded that one who serves as both city and county engineer for a retainer fee may provide engineering consulting services to the city or county. With regard to status as a member of a local board or commission, the Board noted that there was nothing in that case to suggest that the engineer had taken any action to influence decisions as administrator of the city block grant program or as project administrator of the county airport authority.

Finally, in reaching its decision finding the engineer's conduct to be unethical in rendering public judgments on projects upon which the engineer furnished services to private clients, the Board, citing earlier BER Case 67-12, said that for an engineer serving as a part-time county engineer to make a recommendation on plans prepared by the engineer in his private capacity is a "useless act". The Board noted it is basic to the Code that an engineer cannot wear two hats and still represent the best interests of a client. The Board cautioned at that time that, as a general matter, it would be preferable for engineers to avoid such situations.

More recently, in BER Case 85-2, an engineer, a principal in a local engineering firm, served on the board of directors of a county hospital which owned a hospital facility and which contracted with a private health care provider to manage, administer and generally operate the health care facility. Certain engineering and surveying work needed to be performed at the hospital facility and the engineer received the contract from the private health care provider to perform the work. The decision to select the engineer was made by the private health care provider's board of directors and the engineer participated in the decision.

In finding that it was unethical for the engineer to seek to contract with the private health care provider to provide engineering and surveying services, we noted that as a board member of a private health care provider, which was acting in a quasi-public capacity, the engineer, consistent with Section II.4.d., could not have ethically participated in decisions with respect to professional services provided by his firm. The engineer, a principal in an engineering firm, was serving on a body that was exercising judgment and discretion in place of a governmental body and therefore should be treated as a governmental official for purposes of a conflict of interest. By participating in the private health care provider's decision to select his firm, the engineer acted in conflict with the Code. We should also note that at the time BER Case 85-2 was decided, there was no provision in Section II.4.d. which related to engineers serving on a "quasi-governmental body". However, since that time, the Code has been amended to include specific reference to a "quasi governmental body".

Based upon a careful reading and review of BER Cases 82-4 and 85-2, it is clear the this Board has historically made an important distinction based upon the language in Sections II.4.d. and e. between those circumstances (1) where an engineer acts in some capacity as an advisor to a public agency and also provides professional services to the public agency and (2) where an engineer is part of the decision-making group within a public agency and also providing professional services to the public agency. The former will generally, in the absence of other circumstances and factors, be found acceptable under the Code while the latter, on its face will be found to be unacceptable under the Code.

Sections II.4.d and e. must be read together in light of earlier decisions by the Board. In particular, the prohibitions contained in Sections II.4.d. and e. would appear to apply only to those cases where an engineer is actually part of the final decision-making group of the governmental body or is acting as an officially designated, elected or appointed member of a governmental body, and not to circumstances where, as here, the engineer is retained merely in a consultative role to a governmental body.

The Board is troubled that there is the potential for a conflict of interest should problems arise during the course of a project. The Board recognizes there may be some communities where professionals are not locally available to provide services to the client. That fact notwithstanding, the Board would recommend a contract provision under which the parties would utilize outside consultants for dispute resolution in the event a conflict of interest arises.

CONCLUSION:

It would not be unethical for Engineer A to provide engineering services under the circumstances herein described.

Note: This opinion is based on data submitted to the Board of Ethical Review and does not necessarily represent all of the pertinent facts when applied to a specific case. This opinion is for educational purposes only and should not be construed as expressing any opinion on the ethics of specific individuals. This opinion may be reprinted without further permission, provided that this statement is included before or after the text of the case.

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