



NATIONAL SOCIETY OF  
PROFESSIONAL ENGINEERS

## BOARD *of* ETHICAL REVIEW



CASE REVIEW:

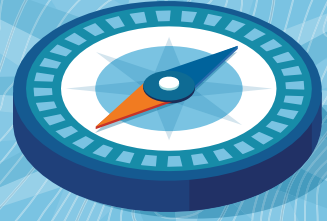
# Conflict of Interest– Design/Build Project

CASE NO. 21-05  
APPROVED OCTOBER 13, 2022

NSPE.ORG



# BOARD of ETHICAL REVIEW



## CONFLICT OF INTEREST- DESIGN/BUILD PROJECTS

CASE NO. 21-05

APPROVED 10/13/22

### FACTS:

Engineer D is the Engineer of Record (EOR) as part of a design-build team led by Contractor W. Under the terms of an Agency funding grant, the project is required to have an independent peer review of the design, the design approach, compatibility with the site, and a constructability assessment related to the design approach. Engineer D prepares the design and drawings and directly hires Engineer F to perform the peer review.

### QUESTION:

1. Was it ethical for Engineer D to hire Engineer F to perform the required peer review?

### NSPE CODE OF ETHICS

#### REFERENCES:

- Section II.1. Engineers shall hold paramount the safety, health, and welfare of the public.
- Section II.1.a. If engineer's judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.
- Section II.2.a. Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved.
- 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 III.1.b. Engineers shall advise their clients or employers when they believe a project will not be successful.

## NSPE BER CASE REFERENCES:

[91-2](#), [00-5](#)

## DISCUSSION:

The contractual relationships and roles of the many parties illustrate how a conflict of interest can go unnoticed. In this case, an independent peer review of the design was required by the Agency and the peer reviewer was in a direct contractual relationship with the EOR. Two reputable engineers can and often do disagree and they can both be right. A key question the peer reviewer needs to answer is whether the EOR did it wrong or just a different, but still acceptable, way.

In BER Case [91-2](#), the Client hired Engineer B to perform a review of Engineer A's work. The Client determined that there were errors/omissions in Engineer A's work. Engineer B's fee is dependent on the ultimate court judgement or settlement made with Engineer A in contemplation of a suit for breach of contract. The BER concluded that Engineer B is being placed in a position of identifying errors/omissions in Engineer A's work in order to pressure Engineer A into a settlement which would result in a fee for Engineer B. The nature of the services and the related contingency arrangement suggest a strong possibility that the engineer's judgement could be compromised or at the very least create the appearance of being compromised.

Peer reviews are common on complicated engineering projects. The "independent" requirement in this case must withstand the scrutiny of a conflict of interest.

What does it mean to perform an independent peer review of engineering work? NSPE Position Statement No. 10-178 (Peer Review Legislation) recommends that "...peer reviewer must not be an employee, coworker,

partner or subconsultant of the professional engineer whose design is being peer reviewed."

In order to avoid any perception of a conflict of interest, an independent peer reviewer needs to be contracted directly by and compensated by the project owner (Client) and not the EOR. In the case of Design-Build teams, the lead party could potentially hire both the EOR and the peer reviewer, as long as they are different firms. A peer review performed by another office of the EOR or a subconsultant to the EOR does not meet the requirement of being independent and squarely has a conflict of interest.

In the present case, the EOR hired the peer review firm, putting the peer review firm in a similarly conflicted position of potentially disagreeing the EOR and possibly not getting compensated if their conclusions result in significant changes to the EOR's design. The peer review engineer must be free to provide objective, unbiased professional judgements to serve the best interests of their client and not compromise integrity in pursuit of a professional fee. Contractor W should have retained Engineer F (or other engineer of Contractor W's choice) to assure the independence of Engineer F's review.

## CONCLUSIONS:

1. On its face, the peer review was not independent, as required by the agency. Therefore, it would not be ethical for Engineer D to hire and enter into a direct contractual relationship with Engineer F to perform the peer review.

## **Board of Ethical Review:**

Jeffrey H. Greenfield, Ph.D., P.E., F.NSPE

David J. Kish, Ph.D., P.E.

William D. Lawson, Ph.D., P.E., F.NSPE

Kenneth L. McGowan, P.E., F.NSPE

Craig N. Musselman, P.E., F.NSPE

Hugh Veit, P.E. (retired)

Susan K. Sprague, P.E., F.NSPE (at large)

### **Mark H. Dubbin, P.E. (Chair)**

*NOTE: The NSPE Board of Ethical Review considers ethical cases involving either real or hypothetical matters submitted to it from NSPE members, other engineers, public officials, and members of the public. The BER reviews each case in the context of the NSPE Code of Ethics and earlier BER opinions. The facts contained in each case do not necessarily represent all of the pertinent facts submitted to or reviewed by the BER.*

*Each opinion is intended as guidance to individual practicing engineers, students, and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole proprietorships, government agencies, and university engineering departments), the specific business form or type should not negate nor detract from the conformance of individuals to the Code. The NSPE Code deals with professional services, which must be performed by real persons. Real persons in turn establish and implement policies within business structures.*

*This opinion is for educational purposes only. It may be reprinted without further permission, provided that this statement is included before or after the text of the case and appropriate attribution is provided to the National Society of Professional Engineers' Board of Ethical Review.*

*To obtain additional NSPE opinions, visit [www.nspe.org](http://www.nspe.org) or call 888-285-NSPE (6773).*