

Report on a Case by the Board of Ethical Review

Case No. 78-6

Naming of Staff Engineer in Firm as Inducement for Contract

Facts:

Engineers A and B on behalf of their respective firms, both of which were engaged in a specialized field of engineering, were contenders for a contract with an out-of-state client. Following submission of their respective statements of qualification, the client selected B's firm for negotiations and subsequently executed a contract. Engineer A alleged in a complaint to the state society ethics committee that B had obtained the contract through improper means, charging that B's submission to the client stated that the firm had on its staff Engineer X who had outstanding technical qualifications for an important aspect of the work, and that X would be assigned the major responsibility to carry out that part of the assignment. Engineer A alleged that, in fact, X was not on the staff of B's firm, and that the false claim in that regard was a material or controlling factor in the client's selection of B's firm.

The state society ethics committee conducted a preliminary inquiry and determined that at the time B submitted his statement of qualifications he had made an offer of employment to X, who had orally accepted it. Prior to the award and signing of the contract, however, X changed his mind and declined B's offer, but B did not communicate this information to the client at the time or at any time prior to signing the agreement.

Question:

Was B unethical in failing to promptly advise the client of the change in staffing set forth in his proposal to the client?

References:

Code of Ethics - Section 3(a) - "The Engineer shall not make exaggerated, misleading, deceptive, or false statements or claims about his professional qualifications, experience, or performance in his brochures, correspondence, listings, advertisements, or other public communications."

Section 11 - "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by taking advantage of a salaried position, by criticizing other engineers, or by other improper or questionable methods."

Discussion:

We take it as a "given" that the identification of X on the staff of B's firm was a material factor in the client's decision to retain his firm, noting the specialized nature of the services and X's special qualifications in that field of expertise.

While B was in technical violation of 3(a) in listing X as a member of the engineering staff of the firm prior to the time that X had actually entered upon such employment, we can understand the circumstances under which the "false" claim was made. At the time he listed X as a member of the staff, B could naturally have concluded that there had been an offer and acceptance of employment, and that it was only a matter of timing for his statement to the client to be true. And we can assume that B in good faith expected that X would be actively employed and play a major role in carrying out the assignment for the client.

With these favorable assumptions, however, the fact remains that when B learned that X would not be joining the staff of the firm he failed to promptly notify the client of the change and proceeded to the signing of the agreement. By this omission B converted an excusable error into a deliberate misrepresentation of a material fact pertinent to his firm's qualifications. When 3 refers to false statements by an engineer it necessarily embraces false statements about the firm he represents in circumstances where the statement relates to the qualifications of the firm for a particular project.

Section 11 represents a somewhat broader aspect of the ethical standards required between and among engineers who are in competition for client selection. The failure of B to advise the client of the change, whether deliberate or by negligent oversight of an ethical duty, amounted to an "improper" or at best a "questionable" method of securing the assignment.

We are not privileged to know under the submitted facts whether a prompt advice to the client would have resulted in the award being made to A's firm, or whether the client would have been content to allow B's firm to retain the contract with the assignment of other presently qualified staff personnel for the specialized work X would have performed. It is entirely possible that if B had disclosed the change in circumstances, the client would have been willing to allow B to search out and employ another engineer with comparable specialized expertise as required.

Whatever these speculative possibilities may be, it was the right of the client to be advised of the material change of qualifications prior to execution of the agreement, and to be allowed to make an informed judgment on whether the client wished to proceed with B's firm under a different staffing arrangement or exercise his right to terminate the selection under changed conditions and select another firm. Even if X were a bona fide full-time employee and had left the firm during the period of negotiation, B would be required to inform the client of this change before signing the contract.

Conclusion: *

Engineer B was unethical in failing to promptly advise the client of the change in staffing set forth in his proposal to the client.

*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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