

Report on a Case by the Board of Ethical Review

Case No. 79-1

Conflict of Interest—Payment From Related Party

Facts:

A government agency retained an architectural-engineering firm as the prime professional for the design of a major hospital. The A/E firm, in turn, retained Engineer A as a structural engineer consultant and Engineer B as a concrete consultant. The agreement with the A/E firm required, among other things, that the A/E firm review and approve shop drawings furnished either by the government or the contractors for conformity with the design concept and the contract documents. This duty was contracted by the A/E to Engineers A and B for their respective portions of the work. The steel supplier then retained Engineer A to prepare the shop drawings for its portion of the work. The concrete subcontractor retained Engineer B to prepare the shop drawings for that part of the work. Engineer B also agreed to serve as an expert witness on behalf of the concrete subcontractor in the event of any dispute for that part of the work. The responsible engineer of the A/E firm was advised of these arrangements and made no objection. The government agency learned of the facts before construction started and has questioned the ethical propriety of these arrangements.

Questions:

1. Was it ethically permissible for Engineers A and B to enter into the above arrangements with the construction subcontractors?
2. Was it ethically permissible for the responsible engineer of the A/E firm to permit these arrangements?

References:

Code of Ethics-Section 8-"The Engineer will endeavor to avoid a conflict of interest with his employer or client, but when unavoidable, the Engineer shall fully disclose the circumstances to his employer or client.

Section 8(a)-"The Engineer will inform his client or employer of any business connections, interests, or circumstances which may be deemed as influencing his judgment or the quality of his services to his client or employer."

Section 8(b)-"When in public service as a member, advisor, or employee of a governmental body or department, an Engineer shall not participate in considerations or actions with respect to services provided by him or his organization in private engineering practice."

Section 10-"The Engineer will not accept compensation, financial or otherwise, from more than one interested party for the same service, or for services pertaining to the same work, unless there is full disclosure to and consent of all interested parties."

Section 10(b)-"He will not accept commissions or allowances, directly or indirectly, from contractors or other parties dealing with his clients or employer in connection with work for which he is responsible."

Discussion:

In a related case, 72-9, we noted that an engineer's dual role as the owner's agent, through an architect, and a bidder's agent, through a subcontractor, created an obvious conflict of interest. We added that it is not unethical per se to become involved in a conflict of interest under §8 of the Code, but that it may be unethical depending on the circumstances. "The avoidability of a conflict of interest is a subjective judgment. Its impact on the consideration of a case involving §8 will vary according to the circumstances." In that case, arising under quite different facts, we concluded that the engineer had not acted unethically because of the time elements involved which, in effect, made the conflict unavoidable. There is no similar time element in the case before us, as indicated by the question raised by the governmental agency representative before construction work started, hence the conflict was avoidable.

The purpose of the shop drawing clause, which is commonly used in engineering documents, is to protect the interests of the owner by assuring independent review of the shop drawings as part of the duty of the design professional to determine on a timely basis that the project will be built to comport with the design concept. Obviously Engineers A and B could not "independently" review the shop drawings they had prepared. It should also be noted that the duty to review the shop drawings was imposed on the A/E prime professional, and while this function could be delegated to associate engineers serving as consultants that delegation did not change either the legal or ethical duty of the prime professional.

It is clear that Engineers A and B are in conflict with §10(b) under their respective arrangements to receive compensation from both the owner (through the A/E) and the steel supplier and concrete subcontractor for services pertaining to the same work. As we are advised, the A/E prime professional has been made aware of the arrangements by Engineers A and B, and has consented by not objecting. But that is not a sufficient answer to the requirement of §10 that there be both full disclosure and consent of all "interested parties." The owner is clearly an "interested party" and by raising the ethical issue has clearly not consented. It was incumbent upon Engineers A and B to assure themselves that their arrangements were approved by the owner as an "interested party." Aside from the disclosure requirements of §8, §8(a) imposes the further obligation on the engineer to inform his client of any business relationships which may be considered as possibly influencing his professional judgment. This has been done by Engineers A and B, although it is not clear that they would agree that their respective relationships might influence their judgment or the quality of their services. We have also cited §8(b) of the

code, which applies only in principle, because Engineers A and B are not in public service in the intent of that provision. It is pertinent, however, as being consistent with the philosophy of the other portions of §8 to indicate the importance of engineers not being in a position of trying to serve opposing interests.

The agreement of Engineer B to also serve as an expert witness on behalf of the concrete subcontractor in the event of a dispute on that part of the work is so patently in conflict with ethical precepts that it does not warrant extended discussion. It should have been apparent to Engineer B that he cannot appear on behalf of the subcontractor while performing his primary ethical duty to represent the interests of his client, whether that "client" be interpreted only as the A/E prime professional or as the ultimate client, i.e., the government agency.

Under these circumstances and considerations, we believe that Engineers A and B will compromise, or appear to compromise, their independent position and professional judgment by attempting to serve the primary interests of the owner and the steel supplier and concrete subcontractor at the same time of the same project.

Conclusions:

1. It was not ethically permissible for Engineers A and B to enter into the above described arrangements.
2. It was not ethically permissible for the responsible engineer of the A/E firm to permit these arrangements.

**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.

Board of Ethical Review

Louis A Bacon, P.E.
Robert R. Evans, P.E.
James G. Johnstone, P.E.
Robert H. Perrine, P.E.
James F. Shivler, Jr., P.E.
Donald C. Peters, P.E., chairman