

## **Design-Build Dilemma: “Rubber-Stamping” Request**

### **Case No. 11-6**

#### **Facts:**

A small engineering and construction firm, Great Engineering Inc. (GEI), has been awarded a multimillion dollar design-build contract. GEI will design the project and has enlisted two skilled contractors with whom GEI has worked successfully in the past to perform the construction work on the design-build project. GEI will provide the engineering design, construction management, and quality control services on the design-build project.

After the contract is awarded but prior to the bond being issued, the bonding company, Bondco, informs GEI that Bondco will not allow GEI to sign and seal the design documents, but rather will require that all design documents be signed and sealed by an independent, licensed design professional. GEI informs the bonding company that Bondco’s request violates engineering licensing laws and practices and would constitute unethical conduct. Bondco tells GEI that Bondco wants an independent engineer, with errors and omissions insurance, to review the design-build documents and to seal the work. GEI is concerned that a post-design review and sealing of the work by an independent engineer could be in violation of engineering licensing laws and ethics and could constitute plan-stamping. GEI has the proper licensed design professionals, errors and omissions insurance, and the experience to perform a competent design and construction of the project; GEI could also retain an independent engineer as a subcontractor in responsible charge from the beginning of the project to satisfy this demand legally and ethically. If GEI does not satisfy Bondco’s demands, GEI could be forced to forfeit the project.

#### **Question:**

What is the ethical course of action for GEI?

#### **References:**

- Section II.1.b. - NSPE Code of Ethics: *Engineers shall approve only those engineering documents that are in conformity with applicable standards.*
- Section II.1.d. - NSPE Code of Ethics: *Engineers shall not permit the use of their name or associate in business ventures with any person or firm that they believe is engaged in fraudulent or dishonest enterprise.*
- Section II.1.e. - NSPE Code of Ethics: *Engineers shall not aid or abet the unlawful practice of engineering by a person or firm.*

- Section III.7.a. - NSPE Code of Ethics: *Engineers in private practice shall not review the work of another engineer for the same client, except with the knowledge of such engineer, or unless the connection of such engineer with the work has been terminated.*
- Section III.8.a. - NSPE Code of Ethics: *Engineers shall conform with state registration laws in the practice of engineering.*

**Discussion:**

Design-build project delivery is a well-established method for designing and constructing projects in both the public and private sectors. At the same time, depending upon the roles of the design professional in the process, design-build can sometimes raise ethical issues for engineers.

The NSPE Board of Ethical Review has explored some of these issues in the past. For example, in BER Case No. 95-1, a large utility company in a large state was looking for a design-build or turnkey approach for its new project. In order for Engineer A to compete on this project, he was required to establish partnerships with manufacturing and construction contracting firms. Each partner was responsible for its own expenses in preparing the proposal. Engineer A was requested to make a proposal to the utility on behalf of the partnership. The agency required that preliminary engineering be done at the proposal stage. Engineer A was required to prepare a series of simple layouts so that the contractor could estimate its part of the project. Each of the partners had a significant investment in time which each partner covered with the understanding that if the partnership received the project each partner will recover its costs. Engineer A was concerned that this type of partnering arrangement may involve contingencies under which the engineer's professional judgment might be compromised. In finding that engineers may ethically participate in a design-build project as stated in the facts of BER Case No. 95-1, in as much as the utility has solicited proposals for a design-build process, Engineer A has avoided deceptive acts as required in NSPE Code of Ethics Section I.5. The Board assumed that since Engineer A participated in the selection of the partners to submit a response to the request for a proposal, all the participants were of good reputation and that Engineer A met the ethical requirements of Code Section II.1.d. The facts of the case also noted that Engineer A would be associated with a manufacturer and a contractor, implying that each will limit their activities to their respective fields of expertise. Therefore, Engineer A had complied with the commitment of Section II.2.a. Finally, Engineer A was accepting compensation solely from the utility and none from the contractor or manufacturer. Each of the participants is preparing the proposal at its own expense. This, in the Board's opinion, complied with the intent of Section II.4.d. The Board also noted that, although the procedures outlined in the facts of the case met the ethical tests, an engineer should not participate in an endeavor where the engineer has a personal concern that the "arrangements may involve contingencies under which his professional judgment may be compromised."

Turning to the facts in the present case, the Board understands and appreciates GEI's concerns relating to the requirements of the bonding company. For this reason, the Board suggests GEI pursue alternative options to satisfy the bonding company's concerns and

remain in compliance with engineering licensing laws and ethical practice. GEI is advised to inform Bondco that their requirement for the seal of an independent engineer who was not in responsible charge of the project is in violation of engineering licensing laws and the Code of Ethics. With a mutual understanding of these principles, GEI and Bondco could develop written procedures for the signing and sealing of the design documents to clarify the responsible charge of the project and the role of the independent engineer. However, Bondco may yet insist upon its original requirement that an independent engineer simply “rubber-stamp” GEI’s design documents. If so, GEI could, at an additional cost to the project developer, employ another engineering firm or private engineer early in the design phase to be in responsible charge of the project and ultimately serve as the engineer of record, thereby satisfying Bondco’s requirement. If feasible, GEI could also approach other bonding companies that have a better understanding of design-build engineering and contracting and of engineering licensure laws.

**Conclusion:**

It would be unethical for GEI to aid and abet the demand by Bondco for plan-stamping (“rubber-stamping”) of the plans by an independent engineer. GEI should pursue alternate courses of action, including: informing the bonding company about engineering licensure laws and the Code of Ethics; developing a written procedure with Bondco that meets their requirements and engineering licensure laws and ethics; or possibly teaming with an independent engineer or firm that would be in responsible charge of the work from the beginning of the project. If feasible, GEI might wish to consider approaching another bonding company.

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