

## **Confidentiality—Access to Competitor’s Proposal**

Case No. 16-12

### **Facts:**

Engineer A, principal owner of Firm X, is preparing an engineering proposal on a private project for Client M. The project includes preliminary design information and subproposals from other team members, including subconsultant Firm Y. One day before Firm X meets with Client M to make an oral presentation and provide a preliminary proposal on the project for Client M, Firm Y informs Engineer A that Firm Y has gained access, through a third party, to a copy of the engineering proposal prepared and presented by Firm Z to Client M for the same project the prior day. Engineer A and Firm X will be making the oral presentation and proposal to Client M on the following day.

### **Question:**

What are Engineer A’s ethical obligations under the circumstances?

### **NSPE Code of Ethics References:**

- Section I.4. - Engineers, in the fulfillment of their professional duties, shall act for each employer or client as faithful agents or trustees.*
- Section II.1.d. - 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.f. - Engineers having knowledge of any alleged violation of this Code shall report thereon to appropriate professional bodies and, when relevant, also to public authorities, and cooperate with the proper authorities in furnishing such information or assistance as may be required.*
- Section II.4. - Engineers shall act for each employer or client as faithful agents or trustees.*
- Section III.1. - Engineers shall be guided in all their relations by the highest standards of honesty and integrity.*

**NSPE BER Case References:** 99-13; 00-4; 03-1; 05-12

### **Discussion:**

The NSPE Code of Ethics is based on a series of fundamental ethical obligations—the obligation to the public, to the employer and client, and to other parties, including other professional engineers and third parties. These obligations are reciprocal and must be considered concurrently at all times. These ethical obligations help to establish ethical integrity on the part of practicing professional engineers.

Ethical cases involving professional impropriety that may affect existing relations with employers or clients have been examined by the Board of Ethical Review in the past. For example, in BER Case 99-13, Engineer A was employed by SPQ Engineering, an engineering firm in private practice involved in the design of bridges and other structures. As part of its services, SPQ Engineering used a CAD software product under a licensing agreement with a vendor. Under

the terms of the licensing agreement, SPQ Engineering was not permitted to use the software at more than one workstation without paying a higher licensing fee. SPQ Engineering ignored this restriction and used the software on multiple employee workstations. Engineer A became aware of this practice and called a hotline publicized in a technical publication and reported his employer's activities. In deciding that it was not ethical for Engineer A to report his employer's apparent violation of the licensing agreement on the hotline without first discussing his concerns with his employer, the Board noted that an engineer, as a professional, should always exercise judgment and discretion when confronting a situation such as the one presented under the facts. Depending on all of the facts and circumstances, an engineer should take reasonable steps to exhaust all appropriate alternatives before taking an extreme action, such as reporting an employer or a client for their actions, particularly where such actions do not appear to result in physical harm or danger to the public health or safety.

In another opinion, BER Case 00-4, Engineer A was a small-business owner. Engineer B, a licensed engineer formerly employed by Engineer A's firm, made telephone calls to Engineer A's employees (at home and at work) requesting that they provide Engineer B with copies of their company's proprietary schematics. Engineer B's request specifically instructed these individuals to not mention these conversations to Engineer A. Thereafter, Engineer A's employees alerted Engineer A to the situation. However, Engineer A was concerned about Engineer B's activities and the potential threat these requests could have on the health of Engineer A's company (if their proprietary information were to fall into a competitor's hands). In deciding that it was not ethical for Engineer B to contact Engineer A's employees, the Board of Ethical Review suggested that the appropriate actions to be taken by Engineer A in response to Engineer B's activities would include a direct conversation with Engineer B about Engineer B's actions and, if necessary, a letter from Engineer A (or Engineer A's attorney) demanding that Engineer B cease and desist from continuing his improper actions, or else face legal consequences.

In BER Case 03-1, Engineer X was a professional engineer in private practice who served as a forensic engineer and expert witness. Engineer X was engaged as an expert for the defense by an insurance company in a lawsuit involving the design of a sports complex. Engineer X received correspondence in an envelope addressed to him in his office from the attorney representing the plaintiff in the lawsuit. Engineer X noticed the source of the correspondence, unsealed the correspondence, read some of the contents, and realized that it was not intended for him. The correspondence was intended to be sent to the plaintiff's expert and not the defense expert. He then resealed the information and sent it back to the plaintiff's attorney with a note indicating that the correspondence was inadvertently sent to him, but that Engineer X did not review the contents of the correspondence. The Board of Ethical Review found that (1) it was not unethical for Engineer X to have opened the correspondence but that (2) it was unethical for Engineer X not to reveal that he had reviewed some of the contents of the correspondence. In addition, the Board found that Engineer X should have advised his client of the events that had transpired. Said the Board, "the NSPE Code compelled Engineer X to reveal that he had reviewed some of the content of the correspondence. That is, the ethical course of action by Engineer X obliged

him to be honest and truthful by disclosing to the plaintiff's attorney that he had reviewed a small portion of the material. While the NSPE Code placed on the engineer the obligation to serve the employer or client as faithful trustee, the Board believed that obligation could be fulfilled if Engineer X also informed his client (the defense attorney) that he had inadvertently reviewed some of the contents of the correspondence. By reviewing the material in the manner described, Engineer X had not done anything that was unethical. Under the facts, it was clear that once Engineer X identified the material and understood the circumstances, he immediately ceased reviewing the contents of the correspondence. Whatever interest Engineer X may have thought he was protecting by misstating his actions to plaintiff's attorney was potentially outweighed by the apparent conclusion that plaintiff's attorney would draw that Engineer X did, in fact, review the material based on the probable condition of the correspondence, and quite possibly discredit Engineer X's subsequent actions and testimony in connection with the case. Such appearances would not reflect well on Engineer X, Engineer X's client, nor on the engineering profession in general. For those reasons, the Board believed Engineer X would have been better served and would have better served his client if Engineer X had accurately and fully reported that he had reviewed some of the content of the correspondence. Furthermore, Engineer X should have advised his client of the events that had transpired."

Turning to the facts in the present case, in light of the earlier Board of Ethical Review opinions and the language in the NSPE Code of Ethics, this Board believes that Engineer A has an obligation to immediately advise Firm Y that its access to Firm Z's proposal was improper, and that under no circumstances should Firm Z's proposal be reviewed or considered by Firm Y. In addition, in light of this development, Engineer A should take immediate steps to remove Firm Y as a subconsultant on Engineer A's design team. Since it appears from the facts that Firm Y did not review Firm Z's proposal, it does not appear that Engineer A had an obligation to report the impropriety to Client M prior to making the proposal to Client M the following day. However, if Engineer A had a reasonable suspicion to believe that Firm Y may have had access to or reviewed Firm Z's proposal, Engineer A has an obligation to report his concerns to Client M.

**Conclusion:**

Engineer A has an obligation to immediately advise Firm Y that its access to Firm Z's proposal was improper, and that under no circumstances should Firm Z's proposal be reviewed or considered by Firm Y. In addition, in light of this development, Engineer A should take immediate steps to remove Firm Y as a subconsultant on Engineer A's design team. Since it appears from the facts that Firm Y did not review Firm Z's proposal, it does not appear that Engineer A had an obligation to report the impropriety to Client M prior to making the proposal to Client M on the following day. However, if Engineer A has a reasonable suspicion to believe that Firm Y may have had access to or reviewed Firm Z's proposal, Engineer A has an obligation to report his concerns to Client M.

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*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 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.*

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