

## **Professional Selection—Receipt of Submission Beyond the Published Deadline**

Case No. 16-3

### **Facts:**

Engineer A works for a public agency in City X. The city is seeking the services of a qualified engineering firm and is using QBS for the design of the new public building. Engineer A is the point of contact on the City X QBS review team for this project.

The city conducted a mandatory pre-submittal meeting and received initial interest from 14 different firms. Thereafter, City X published the date, time, and location of the submittal for the Statements of Qualifications (SOQs) indicating all submittals must be received by the city in the city clerk's office no later than 10:00 am on January 30. The date, time, and location were also listed in the city's RFQ webpage and appeared on the hard copy agenda that was distributed at the pre-submittal meeting. Engineer A returned to his office in the afternoon on January 30 and was intercepted by the city manager's administrative assistant, who had a large envelope bearing Engineer A's name and the letterhead of Firm B, one of the firms that had participated in the pre-submittal meeting. Firm B had also performed well on several other engineering design projects for the city. The envelope was date- and time-stamped to indicate that the submittal was received on January 30 at 2:05 pm in the city manager's office.

### **Question:**

What are Engineer A's ethical responsibilities under the circumstances?

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

*Section II.3. - Engineers shall issue public statements only in an objective and truthful manner.*

*Section II.3.a. - Engineers shall be objective and truthful in professional reports, statements, or testimony. They shall include all relevant and pertinent information in such reports, statements, or testimony, which should bear the date indicating when it was current.*

*Section III.1. - Engineers shall be guided in all their relations by the highest standards of honesty and integrity.*

### **NSPE BER Case Reference: 10-8**

### **Discussion:**

The integrity of the professional engineering selection process is critically important in assuring that the public receives high-quality engineering services at a fair and reasonable cost. The public QBS system seeks to advance this goal, establishing procedures and policies that provide appropriate protections for the public while at the same time recognizing the rights and responsibilities of the professional engineers and engineering firms that participate in the procurement processes.

The NSPE Board of Ethical Review has previously examined ethical issues relating to the selection of engineering services in the public arena. For example, in BER Case 10-8, in response to a public request for qualifications (RFQ), Engineer A submitted his firm's engineering qualifications for a public project to a state agency using the state's public procurement procedures. Prior to the interview process, Engineer B, a competitor of Engineer A, whose firm also intended to respond to the same RFQ, submitted a state Freedom of Information Act (FOIA) request in order to obtain a copy of the qualifications information Engineer A submitted to the state. The state then provided the information to Engineer B. Thereafter, Engineer B submitted his firm's engineering qualifications to the state agency for the same public project.

The NSPE Board of Ethical Review determined that it was ethical for Engineer B to make the FOIA request in connection with the state's procurement of engineering services, pursuant to the State's RFQ procedures, but that in order to avoid any appearance of impropriety, Engineer B should have made the FOIA request subsequent to and not before Engineer B's firm submitted its RFQ. The Board noted that the referenced public procurement system was designed to advance the public interest in obtaining the most qualified engineering services and that the laws and regulations pertaining to that system were put into place to achieve that result. In this situation, overlooking the timing of Engineer B's request, which was of concern to the Board, Engineer B appeared to have been acting in a manner consistent with those laws and regulations, and the Board concluded that it was not in a position to second-guess or otherwise determine the appropriateness of those rules and regulations. Moreover, in view of the fact that the public procurement process was intended to be free and open in order to, among other considerations, avoid misrepresentations by parties including consultants, a review of a party's representations provides the public with some degree of assurance that misleading or deceptive representations that could undermine the public interest are not made. The Board would caution engineers that, in situations such as the one represented by the facts of this case, an engineer may wish to avoid including any confidential or proprietary information in this type of submission to a public agency since such information could be subject to public disclosure under applicable laws and regulations.

Turning to the facts of the present case, it is the Board's view, consistent with BER Case 10-8, that a balance needs to be struck between the objective of selecting the most qualified engineering firm and strict adherence to the relevant public procurement rules and policies. While Engineer A may have been mindful of the past performance of Firm B and may have viewed Firm B's failure to deliver the submittal to the correct city office by the required hour a harmless error, any effort on the part of Engineer A to fail to follow the strict rules and policies of the public procurement process could call the integrity of the process into question. In addition, while in this case there does not appear to be a nefarious cause for Firm B's failure to deliver the submittal to the correct city office by the required hour, the Board is concerned that allowing Firm B's submittal to be considered would open the procurement to challenge or at the very least create a climate in which non-adherence to public procurement rules and policies are tolerated. Such a situation would not reflect well on that process, the city, or the engineering profession.

**Conclusion:**

Engineer A should return the submittal to Firm B unopened with the explanation that the bid was received late.

**Board of Ethical Review:**

John C. Branch, P.E.

Vincent P. Drnevich, Ph.D., P.E., F.NSPE

Neil A. Norman, P.E., F.NSPE, D.E.E.

Luke Patterson, P.E.

Susan H. Richard, P.E., F.NSPE

Susan K. Sprague, P.E., F.NSPE

Francis “Frank” J. Stanton Jr., P.E., F.NSPE (**Chair**)

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