

## **Report on a Case by the Board of Ethical Review**

### **Case No. 72-9**

#### **Conflict of Interest - Related Work for Two Parties**

##### **Facts:**

Engineer A, an out-of-state engineer, is retained by an architect to provide mechanical engineering services for a seasonal recreational facility. The owner, who is a private developer, has engaged a general contractor for the construction. Due to the requirements of the owner that the project (both design and construction) be completed in a six-month period, the owner instructs the architect that he wants the major subcontracts (mechanical and electrical) to be awarded on a design-construct basis. Engineer A is to provide design criteria and outline specifications along with schematic drawings indicating the type of systems and the location of equipment. His arrangement with the architect is that he will also review proposals from three mechanical contractors, evaluate the final design and equipment proposed, and recommend the best proposal to the owner. Three mechanical contractors were invited to submit priced proposals and to include a complete design, together with a list of proposed equipment, giving manufacturer, model number, and capacity of equipment proposed for the plumbing, heating, and ventilating systems. One of the contractors, who does not have an in-house design capability, engages XYZ Engineers, a local firm, to provide the required engineering services. Due to a breakdown in communications, Engineer A does not learn of XYZ's involvement until XYZ has finished 50 percent of its work. Engineer A then informs the architect of the involvement of XYZ Engineers and of a potential conflict of interest because he has a controlling interest in XYZ Engineers. However, he states he can give a fair evaluation of the proposals without regard to the fact that he knows that the sizing and selection of equipment for one of the bidders is being done by XYZ Engineers. Engineer A further informs the architect that if he (the architect) or the owner objects; either he will withdraw from the project or arrange that XYZ Engineers will not provide any service to any of the bidders. The owner and architect authorize Engineer A to proceed and to permit XYZ Engineers to provide services to the mechanical subcontractor. The general contractor and the mechanical subcontractors are fully informed by the owner of all the pertinent facts at the request of Engineer A.

##### **Question:**

Would Engineer A be acting unethically in continuing on the project or in allowing XYZ Engineers to provide engineering services to one of the mechanical subcontractors under the conditions stated?

##### **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 13(b)-"He will not use association with a nonengineer, a corporation, or partnership, as a 'cloak' for unethical acts but must accept personal responsibility for his professional acts."

**Discussion:**

There can be no question that once XYZ Engineers commenced work for the mechanical subcontractor a conflict of interest existed. Engineer A's dual role as owner's agent, through the architect, and bidder's agent, through the mechanical subcontractor and his controlling interest in XYZ Engineers, creates an obvious and blatant conflict of interest. To become involved in a conflict of interest is not unethical per se as the code clearly indicates. However, it may be unethical depending on the circumstances. The ethical question in the case before us pivots on the point as to whether Engineer A took adequate precautions to prevent the conflict of interest from arising-or, in the words of the code, did he "endeavor to avoid" the conflict. The avoidability of a conflict of interest is a subjective judgment. Its impact on the consideration of a case involving Section 8 will vary according to the circumstances. Yet it is a consideration which must never be overlooked or ignored. There are very valid reasons for its inclusion in the code. To demonstrate why "avoidability" is a subjective judgment, it is noted that if Engineer A had been apprised of the request made of XYZ prior to any contractual relationship between XYZ and the mechanical subcontractor, then clearly Engineer A would have had an ethical obligation to avoid the conflict by offering to withdraw or by exercising his power to cause XYZ to withdraw. On the other hand, if Engineer A had not known of XYZ's involvement until such time as he received the bids, then it is equally clear that the situation was unavoidable and Engineer A's responsibility would be to notify all concerned of the conflict prior to analyzing the bids. Between these two extremes a shift occurs-an avoidable conflict becomes unavoidable. Where the change takes place cannot be precisely defined, but it may be described as that point where the owner's interest begins to suffer damage. Obviously, this is a subjective matter that must be evaluated and determined in each case by the facts peculiar to that case. In the case before us, XYZ was 50 percent complete on a very tight schedule when the conflict was discovered. The contractor for whom they were working obviously could not have submitted a bid if XYZ were to withdraw at that stage. The owner would have been hurt by being deprived of one-third of the available bids. This is the key consideration on which this case turns. It is pertinent to note that if, upon disclosure of the conflict, the two mechanical subcontractors should decide to withdraw from the competition-a legitimate and understandable action-then Engineer A would be ethically required to resolve the conflict since the owner's interest would be damaged catastrophically. Another point worthy of mention is that Engineer A saw to it that all the concerned parties were notified. While this was not explicitly required by Section 8 of the code, it nevertheless is ethically required in a situation such as confronts us here. In sum, the ethical questions that arise out of Section 8 cannot be resolved by any hard and fast rule, rather their resolution depends on the effect of the conflict of interest on all parties concerned, except the engineer. We cannot stress too strongly that our decision in this case was based on the time element and its effect on the owner. If the timing had been different, the results could have been different.

**Conclusion\*:**

Engineer A would not be acting unethically in continuing on the project or allowing XYZ Engineers to provide engineering services to one of the mechanical subcontractors under the conditions stated.

**\*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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