

Conflict of Interest—Serving on a Public Utility Board Selection Committee

Case No. 19-5

Facts:

Engineer A, a professional engineer in private practice, is appointed to a public utility board selection committee for the purpose of hiring an engineer for a sewer project. Engineer B, a professional engineer in private practice, subsequently submits a statement of qualifications for the sewer project. Engineers A and B have their own engineering firms and compete in the same geographic area where the sewer project is being proposed. Engineer A is not competing for this project. During the utility board selection process, Engineer A evaluates and assigns Engineer B a low score. Engineer B was not selected for the sewer project. Instead, Engineer C, the engineer with the highest-ranked score, is retained by the public utility to perform the engineering services.

Question:

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

NSPE Code of Ethics References:

- Section II.4.a. - Engineers shall disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.*
- Section II.4.d. - Engineers in public service as members, advisors, or employees of a governmental or quasi-governmental body or department shall not participate in decisions with respect to services solicited or provided by them or their organizations in private or public engineering practice.*
- Section III.5. - Engineers shall not be influenced in their professional duties by conflicting interests.*
- Section III.6. - Engineers shall not attempt to obtain employment or advancement or professional engagements by untruthfully criticizing other engineers, or by other improper or questionable methods.*

NSPE BER Case Reference: [08-8](#)

Discussion:

As the NSPE Board of Ethical Review has noted on previous occasions, the manner in which engineers and engineering firms are selected and compensated has, in the past, been the subject of various provisions of the NSPE Code of Ethics as well as NSPE Board of Ethical Review opinions. However, over the past 40 years, as a result of a series of actions undertaken by the US Department of Justice, federal and state antitrust laws, and First Amendment rulings by the US Supreme Court, NSPE and other engineering organizations (as well as medical, legal, dental, and accounting professional societies) have been required to remove or modify code of ethics provisions that restrict or prohibit certain activities. These provisions relate to professional selection, compensation, restrictions on competitive bidding, free engineering, supplanting, advertising, and other practices. Therefore, these professional groups,

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including NSPE, are prohibited from issuing ethical or other policy guidance in these and other areas. At the same time, among one of the most fundamental outcomes of these antitrust actions and rules was the basic principle that federal, state, and local laws governing procedures to procure engineering services are not affected and remain in full force and effect.

A relatively recent case that examined some of these issues was [BER Case 08-8](#). In that case, Engineer A was a principal in a medium-sized engineering firm with expertise in mechanical and electrical engineering. Engineer A's firm was retained on a speculative basis by Engineer B, a local civil engineer, to assist City X in applying for a federal grant for certain wastewater treatment equipment upgrades for the city's wastewater treatment facility. The application was successful—City X obtained the grant and Engineer B was retained to design the wastewater equipment upgrades. In recognition of Engineer A's work in securing the grant, Engineer C, the chief city engineer, verbally promised to select Engineer A's firm on a future engineering project for City X.

In deciding that it was not ethical for Engineer C to promise to select Engineer A's firm on a future engineering project for City X, the Board assumed that public procurement laws and regulations were in place that outlined the policies and procedures for selecting an engineering firm. Based on that assumption, it was the Board's view that Engineer C's action in verbally agreeing to select Engineer A's firm on a future engineering project for City X would constitute a subversion or a misuse of the existing procurement policies and procedures in place in City X. In its opinion, the Board noted that regardless of the method of professional selection utilized in City X, one must assume that the method would, at a minimum, involve public announcement along with free, open, and transparent opportunity for all qualified and eligible engineers and engineering firms to be considered for the contract. Promising in advance that Engineer A would be selected for a future contract without considering the qualifications, experience, and other factors of other competing firms was inconsistent with both the spirit and the intent of the NSPE Code of Ethics.

Turning to the facts in the present case, this Board reiterates the point made in [BER Case 08-8](#) regarding the crucial importance of public procurement laws and regulations that outline the policies and procedures for selecting an engineering firm. While it is not clear from the facts, one must assume that there were public procurement conflict-of-interest and disclosure requirements that applied regarding service as an appointed member on the public utility board selection committee. It would appear that in most instances, at a minimum, it would be appropriate for an engineer serving on such a committee to fully disclose any interest that might influence the engineer's judgment in performing the services on the public utility board selection committee. While we cannot make a judgment regarding the ethics of Engineer A's decision to assign Engineer B a score making Engineer B ineligible to be selected for the sewer project, we can say without hesitation that Engineer A had an obligation to fulfill all required conflict-of-interest disclosure requirements that might apply under the applicable public utility laws and regulations. At that point, it would be up to the public utility selection board to determine whether Engineer A would be required to be recused from this selection.

Conclusion:

Engineer A had an obligation to fulfill all required conflict-of-interest disclosure requirements that might apply under the applicable public utility laws and regulations. At that point, it would be up to the public utility selection board to determine whether Engineer A would be required to be recused from the selection.

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