

# Making judgment calls

The National Society of Professional Engineers' Board of Ethical Review provides impartial help to engineers facing tough ethical questions. Following are two cases it recently reviewed.



by the National Society of Professional Engineers Board of Ethical Review

## Case #1: Conflict of interest?

Izzy A. Candid, P.E., was requested by client, Hope and Trusting (H&T), to prepare specifications for a curtain wall system. Candid immediately makes H&T aware that he is a minority shareholder in a curtain wall manufacturing company and that if H&T agrees, Candid would be pleased to prepare a set of generic specifications for a curtain wall system. H&T agrees but is silent on the point of having Candid's firm submit a proposal.

Later, Candid provides H&T with the names of three manufacturers that prepare curtain wall systems for bidding purposes. Candid includes the name of his firm among the three manufacturers, but does not include the full specifications and other supporting material about Candid's curtain wall manufacturing firm with the bidding material provided to the client. Candid's reasoning is that he could answer any questions that H&T might have about the curtain wall manufacturing system in his company.

After evaluating the proposals solicited through documentation prepared by Candid, and upon Candid's recommendation, H&T selects Candid's company.

## What do you think?

Was it ethical for Candid to prepare bidding criteria, bid, evaluate bids, and recommend his company for owner selection?

## What the board said

It was not ethical for Candid to prepare bidding criteria, bid, evaluate bids, and recommend his company for owner selection. Candid would have been better advised to avoid this conflict of interest.

Engineers are always cautioned by the NSPE Code of Ethics [and under PEO's code at Section 77(4) of Regulation 941/90, as well as Section 72(2)(i) of the definition of professional misconduct in Regulation 941] to disclose all known or potential conflicts of interest by promptly informing clients of any business association, interest, or other circumstances which could influence or appear to influence their judgment or the quality of their services.

Under the facts of this case, it is not entirely clear why and on what basis H&T selected Candid to provide the curtain wall specifications on behalf of H&T. It could be that in the rendering of consulting services, Candid performed professional services to the satisfaction of H&T and this fact may have persuaded H&T to select Candid's curtain wall company to manufacture the required equipment.

At the same time, the board believes the early and complete disclosure by Candid needs to be balanced against

Candid's later inclusion of his firm on the list of potential curtain wall manufacturers without the client's prior affirmative approval. The board believes this point is instructive because it demonstrated Candid's recognition of the potential for a conflict of interest in connection with the services provided to H&T and the actions he took in regard to that potential conflict.

While it is difficult to speculate what H&T's thinking and considerations were in connection with its selection of Candid's company, we do have a concern over H&T's selection of Candid's curtain wall manufacturing company under the facts. The board is also concerned that the decision to select Candid's firm was made without H&T affirmatively approving in the early stages that firm's participation in the bidding process.

The board's opinion is that Candid's actions could be interpreted as being calculated to result in the selection of his firm from the beginning, despite the fact that Candid provided early partial notice of the potential conflict of interest.

In addition, the board is troubled that Candid did not provide H&T with initial complete and appropriate information about the products available from Candid's firm, the manufacturing process, services provided, warranty information, operation and maintenance, and other important issues. In this connection, the board believes that once Candid made the decision to

include his firm in the bidding process, Candid should have provided H&T with the same information and under the same circumstances that Candid provided H&T with the information about the two other competing firms so that H&T would have complete information upon which to make a decision, review with other H&T representatives, and compare the information objectively with the other proposals.

## Case #2: Incomplete drawings

I. Shoulda, P.E., responds to an RFP from a small local public agency to build a new dam to be financed in part by a federal grant. Shoulda's firm's impressive brochure and personal interview results in the award of a contract for the design, drawings and specifications.

The signed and sealed drawings and specifications are ultimately approved by N. I. Woulda, P.E., of the engineering staff of the federal agency funding the project, and the project is thereafter duly advertised for bids and a contract is awarded to the low bidder, Hi-Lo Construction. The local public agency does not have the in-house technical resources to review the drawings and specifications.

At the pre-construction conference, it is pointed out by F.I. Coulda, P.E., owner of Hi-Lo Construction, that much of the design detail is lacking in the drawings and specifications, and Coulda declares that certain parts of the project are "unbuildable" without major changes.

Shoulda generally agrees with Hi-Lo's characterization, but in his defense responds that he felt pressured to deliver the drawings and specifications on a specified date, but did not inform anyone as to their incompleteness. While much of the information was missing from the drawings and specifications, Shoulda was confident that sufficient federal funds (and not local funding) would cover any potential increased costs.

## What do you think?

Was it ethical for Shoulda to submit final drawings and specifications for review and approval that he knew were incomplete? Was it ethical for Woulda to approve a set of incomplete drawings on behalf of the federal government for competitive bidding? Was it ethical for Coulda, owner of the Hi-Lo Construction firm, to submit a bid on a construction contract that he later characterized as "unbuildable" without major changes?

## What the board said

It was not ethical for Shoulda to submit drawings and specifications for review and approval that he knew were incomplete. It was not ethical for Woulda to approve a set of incomplete drawings on behalf of the federal government for competitive bidding. It was not ethical for Coulda, owner of the Hi-Lo Construction firm, to submit a bid on a construction contract that he later characterized as "unbuildable" without major changes.

While the Board certainly hopes that the facts involved in this case are very unique and do not represent more than a small fraction of public design and construction projects in the United States, it appears that the facts as presented in this case are, unfortunately, not as unique as one might hope. It is clear that Shoulda had an obligation to provide a complete set of design drawings and specifications for the project in which he was engaged. Unlike what is required on some projects (e.g. design-build or construction contracts with specific design delegation clauses or provisions) where the engineer is expected to design only a certain percentage of the project prior to the selection of the contractor, here Shoulda was fully required to provide the complete design on the project.

Shoulda's bold assertion that the work was incomplete due to time pressures and his expectation that federal funds would be awarded to complete the work is wholly unconvincing. Shoulda was selected for his expertise, which presumably included Shoulda's ability to fully perform the work based on project time parameters. Shoulda's comment about federal funds borders on fraud and misrepresentation, and it is a clear violation of the NSPE code [and of PEO's code at Section 77(1) of Regulation 941/90, as well as several sections of the definition of professional misconduct at Section 72].

Woulda's approval of Shoulda's incomplete plans is troubling, although we do not know all of the facts and circumstances relating to the decision to approve. Engineers have an obligation to perform services only within their area of competence. If Woulda was not able to perform the necessary reviews of Shoulda's work, Woulda should have provided this information to a supervisor who would have assigned an appropriate engineer to perform the review. Not possessing adequate competency to perform a task is not in and of itself a violation of the NSPE Code, but the failure to acknowledge the lack of com-

petency and take appropriate action to address the situation is a violation of the NSPE code [and of subsections 77(1)(iv) and 77(1)(iv) of PEO's code as well as Section 72(2)(h) of the definition of professional misconduct at Section 941].

Finally, the board believes that Coulda's actions in bidding on an "unbuildable" contract is also very troubling. Presumably, Coulda had an opportunity to review the bidding documents, which included appropriate engineering drawings, plans and specifications. From such a review, Coulda should have had a sense of what would be necessary to complete the project. If the engineering documents were incomplete or inadequate, then Coulda's bid should have reflected that fact and contained appropriate bid items for additional services required to complete the work for the benefit of the owner.

In addition, Coulda could have requested further clarification from the owner or Shoulda in order to better understand the engineering drawings. As an engineer and a contractor, presumably, Coulda had the necessary background and experience to carefully evaluate the engineering drawings as well as other aspects of the work in order to make an informed decision as to whether to bid on the project. Coulda had no one to fault but himself for the problems he encountered in attempting to build the project. Coulda submitted the low bid on the project, presumably knowing about the inadequacies of the documents as well as the obvious risks involved. ♦

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