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The Discipline Committee of the Association of Professional Engineers of Ontario

In the matter of a hearing under the *Professional Engineers Act*, R.S.O. 1990, Chapter P. 28

And in the matter of a complaint regarding the conduct of

## **A Member**

of the Association of Professional Engineers of Ontario and

## **Company Z**

a holder of a Certificate of Authorization

BETWEEN

The Association of Professional Engineers of Ontario and

A Member and Company Z

## **Summary of Decision and Reasons**

**T**his matter came for hearing before a panel of the Discipline Committee on February 4, 2003, at the Association of Professional Engineers of Ontario (PEO) in Toronto. Both the association and the member were represented by legal counsel.

### **The Allegations**

The allegations against the member and Company Z as stated in the Fresh Notice of Hearing dated January 31, 2003, are summarized as follows:

It is alleged that the member and Company Z are guilty of professional misconduct, the particulars of which are as follows:

1. The member was at all material times a member of the Association of Professional Engineers of Ontario and was at all material times designated by the Council of the Association of Professional Engineers of Ontario as a consulting engineer.
2. Company Z was at all material times the holder of a Certificate of Authorization to offer and provide to the public services within the practice of professional engineering and was responsible for supervising the conduct of its employees and taking all reasonable steps to ensure that its employees, including the member, carried on the practice of professional engineering in a proper and lawful manner. The member was the professional engineer responsible for the services provided by Company Z. Company Z had permission at all material times from the Council of the Association of Professional Engineers of Ontario to use the “consulting engineers” title.
3. In or about January 2000, a Condominium Corporation (CC) initiated a roofing project for approximately half of its townhouse units. The project was initiated because of various concerns that included deteriorated asphalt shingles, deteriorated brickwork below the openings in the eaves, defective stucco coating and defective flashings above the roofs, water penetration and ice damming complaints. The CC requested a quotation from Company Z for consulting engineering services related to the roofing project.
4. On January 14, 2000, the member, who is President of Company Z, submitted a quotation to the CC. The quotation was signed by the President of the CC, on May 1, 2000.
5. On March 1, 2000, Company Z issued tender documentation, including specifications and drawings to three roofing companies, Roofer 1, Roofer 2 and Roofer 3. The closing date and time for bid submission was March 9, 2000, at 2 p.m. The tender documentation required that any bid be “accompanied by the Bid Bond in the

- amount of ten thousand dollars (\$5,000).” (sic)
6. On March 8, 2000, Company Z issued Addendum No. 1 to the bid documents. This addendum reduced the scope of work by eliminating the complete replacement of the gutters and downspouts and specifying that only “damaged sections” be replaced.
  7. After Addendum No. 1 was issued, but prior to the closing date and time for bid submissions, Company Z allegedly issued a oral directive subsequently termed Addendum No. 2 to each of the contractors at the request of the CC. This addendum deleted the replacement of the metal cap flashing on the dividing walls. A written version of Addendum No. 2 was never issued.
  8. The three roofing companies each submitted a bid in response to the tender. However, the Roofer 1 and Roofer 3 bids made reference to only one addendum. The Roofer 2 bid did not include a bid bond and the Roofer 1 bid included a bid bond of only \$2,500. The Roofer 1 bid bond erroneously named another corporation as the obligee, instead of the CC.
  9. On March 17, 2000, Company Z submitted its tender analysis report to the CC. The report stated that each of the bids was reviewed thoroughly, however, no mention was made of the addenda discrepancy. Furthermore, the Roofer 2 bid was not disqualified based on the lack of a bid bond and the Roofer 1 bid was listed as having satisfactorily submitted a bond in spite of the deficient amount and incorrect obligee. The Company Z report recommended that the contract be awarded to Roofer 3, which was the lowest price bidder. The Roofer 3 bid referenced only one addendum and its price schedule included an arithmetic error that was not caught by Company Z.
- The error was in the contractor’s favour in the amount of \$1,200.
10. On March 22, 2000, Roofer 3 and the CC entered into a contract for the work. The contract was in the Standard Construction Document CCDC 2 form and indicated a contract price of \$251,022, which was the amount from Roofer 3’s bid. Article A-3 of the contract noted that the March 1, 2000, bid documents prepared by Company Z formed part of the contract documents.
  11. On May 1, 2000, Company Z issued its first inspection report. The report was based on eight separate site visits by the member and Company Z during the month of April. The report concluded that based on the site visits, the installation of the new roofing assembly was being carried out in general compliance with the repair specifications and drawings.
  12. Also on May 1, 2000, Company Z submitted to the CC the first invoice from Roofer 3, dated April 29, 2000. The invoice was in the amount of \$127,149.51 and was approved by Company Z.
  13. The CC began to have concerns regarding the completeness and quality of the work performed by Roofer 3. After receipt of the Roofer 3 invoice, the CC retained Engineer Y to review the work of Roofer 3 and Company Z in relation to the roofing project. By letter dated May 16, 2000, Engineer Y notified Company Z that he might be reviewing work performed by Company Z.
  14. On May 17, 2000, Company Z signed the Certificate of Substantial Performance for the project.
  15. On May 31, 2000, Company Z issued its second inspection report. The report was based on six separate site visits by the member and Company Z during the month of May. It was noted that by May 17, 2000, the work was complete and that Roofer 3 had demobilized off the site. The report concluded that based on the site visits, the installation of the new roofing assembly was being carried out in general compliance with the repair specifications and drawings.
  16. On June 1, 2000, Company Z issued its final inspection report, which was based on a May 26, 2000, site visit by the member and Company Z. During the site visit, the Property Manager for the CC submitted a list of problems with the repaired roofs including leakage. The Company Z final inspection report identified several deficiencies to be corrected by Roofer 3. Company Z had not previously noted these deficiencies.
  17. On June 2, 2000, the Property Manager for the CC wrote to the member and Company Z regarding Roofer 3’s invoice. The Property Manager noted that none of the metal cap flashing had been replaced on the roofs, and asked for a credit prior to any release of payment.
  18. Company Z responded by fax on June 2, 2000, noting that the metal cap flashing had been deleted from the scope of work after consultation with the CC Property Manager. Company Z advised the CC to pay the approved invoice or risk having Roofer 3 place a lien against the property.
  19. On June 5, 2000, the CC sent a fax to the member and Company Z acknowledging their response and requesting a meeting to discuss and resolve the issues of work scope and the quality and completeness of the work performed by Roofer 3. The CC requested documentation in support of the alleged changes in scope, along with other documentation and information.
  20. On June 8, 2000, the member and Company Z faxed the CC a copy of

- Addendum No. 1, which included a minor change in the specifications and a complete replacement of the price schedule table. The fax also included a copy of a March 16, 2000, letter from Roofer 3 confirming that the replacement of the metal cap flashing was not included in its price. This was supposedly to confirm the oral Addendum No. 2.
21. Representatives from Company Z, Engineer Y and the CC met on June 14, 2000, to discuss the roofing project.
  22. On June 15, 2000, Company Z faxed the CC the second invoice from Roofer 3. The invoice was in the amount of \$57,789.22 and was approved by Company Z. This amount reflected credits by Roofer 3 for the various deficiencies identified during the May 26, 2000, site visit and the June 14, 2000, meeting. The fax also included the Statutory Declaration by Roofer 3 and the Clearance Certificate from the Workplace Safety & Insurance Board.
  23. Also on June 15, 2000, Engineer Y wrote to the member and Company Z to confirm that they were not prepared to recommend to the CC that any payments be released to Roofer 3 until the deficiencies and other issues discussed during the June 14, 2000, meeting had been addressed.
  24. In a June 16, 2000, fax to the CC, reviewed by the member, Company Z provided information about the project, including details regarding the two addenda. The fax also addressed the bid bond discrepancy that wasn't reported in the tender analysis report, the arithmetic error in Roofer 3's price schedule and other issues of dispute.
  25. In a June 19, 2000, fax to the CC, the member and Company Z expressed disappointment that the CC had retained another consultant. The member and Company Z affirmed that they were the consultant of record for the roofing project and that they would not be responsible for decisions made by the CC without the advice of, or contrary to the advice of, Company Z.
  26. Between June 21, 2000, and July 11, 2000, the CC retained the services of Roofer 4 on four occasions to effect repairs to various roofs and downspouts covered by the contract with Roofer 3. The total cost of these repairs was \$1,334.29.
  27. On August 2, 2000, Engineer Y issued a report to the CC, which was based on three site visits and inspections carried out during July 2000 and included numerous photographs. The report documented a variety of deficiencies, some of which related to work done by Roofer 3 and some of which related to incomplete work. Engineer Y concluded that based on the various deficiencies identified, the roofing work done by Roofer 3 was "generally poor" and that "extensive repair work" was required. Engineer Y suggested that it might be more economical for the CC to replace the entire roofs rather than to correct the various deficiencies.
  28. On September 22, 2000, representatives of the CC, Roofer 3 and Engineer Y attended at the site to discuss the findings of the August 2, 2000, Engineer Y report and to inspect the roofs. In their site meeting report, Roofer 3 acknowledged five areas of deficiencies that were included in the scope of work and eight areas of deficiencies that were outside the scope of work. The deficiencies that were within the scope of work included several items that Company Z had reported as completed in their May 1, 2000, and May 31, 2000, inspection reports.
  29. In an October 3, 2000, letter to the legal counsel for the CC, Engineer Y commented on the Roofer 3 site meeting report. Engineer Y disputed the limited scope of deficiencies and remedies proposed by Roofer 3.
  30. On or before November 21, 2000, the CC retained Engineer Y to solicit bids to repair or replace the roofs. Engineer Y obtained four bids, each offering separate prices for repairing the roofs and for the complete replacement of the roofs. The lowest price for complete roof replacement was \$157,398. To date, however, the roof has not been replaced nor has any further repair work been undertaken.
  31. In summary, it is alleged that the member and Company Z:
    - a) failed to conduct a thorough review of the tenders and hence failed to protect the interests of the CC;
    - b) produced a tender analysis report that contained errors and omissions when they knew, or ought to have known, that the CC would rely upon the report as being accurate;
    - c) conducted site inspections that failed to recognize deficiencies and/or deviations from the scope of work and/or specifications;
    - d) issued site inspection reports claiming that the work was being carried out in general conformance with the specifications and drawings when they knew, or ought to have known, that it was not;
    - e) failed to maintain the standards that a reasonable and prudent consulting engineer would maintain in the circumstances; and
    - f) acted in an unprofessional manner.
- By reason of the facts aforesaid, it is alleged that the member and Company Z are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, Chapter P.28.

## **Plea by Member and Company Z**

The member and Company Z admitted the allegations of professional misconduct and admitted the accuracy of the factual allegations as set out in the Notice of Hearing.

## **Agreed Facts**

Counsel for the association advised the panel that agreement had been reached on the facts and allegations as set out in the Fresh Notice of Hearing and this was confirmed by counsel for the member and Company Z.

## **Decision**

The panel considered the agreed facts and finds that the facts as set out in the Fresh Notice of Hearing support a finding of professional misconduct and, in particular, finds that the member and Company Z committed acts of professional misconduct as alleged in the Notice of Hearing and that the member and Company Z are guilty of professional misconduct as defined in section 28(2)(b) of the *Professional Engineers Act*, R.S.O. 1990, c. P. 28 (the Act), and in particular guilty of negligence pursuant to section 72(2)(a) and as defined in section 72(a), and failure to make responsible provision for complying with applicable statutes, regulations, standards, codes, by-laws and rules as set out in section 72(2)(d) and unprofessional conduct as defined in section 72(2)(j) of Regulation 941 made under the Act.

The member, through his counsel, confirmed unconditionally, the accuracy of the description of his actions and the extent to which these constituted unprofessional conduct. PEO counsel supported this position completely.

## **Penalty**

Counsel for the association advised the panel that a Joint Submission as to Penalty had been agreed upon. The panel accepted the Joint Submission as to Penalty and accordingly ordered that:

- (a) The member will be admonished, with that admonishment to be recorded on the Register for a period of 12 months;
- (b) Company Z will be reprimanded, with that reprimand to be recorded on the Register for a period of 12 months;
- (c) The member will within one year write the 98-Civ-B8 examination;
- (d) If the member fails that examination, his Consulting Engineer designation and Company Z's Permission To Use the Consulting Engineer title will be suspended forthwith until the member passes the examination;
- (e) If the member does not write and pass the examination within one year, his licence to practise engineering will be suspended for a period of three months and his Con-

**sulting Engineer designation and Company Z's Permission To Use the Consulting Engineer title will be suspended forthwith until the member passes the examination;**

- (f) **Company Z will submit to PEO a written explanation of protocols and procedures to the satisfaction of the Registrar within 60 days relating to Company Z's construction management practice in order to avoid a recurrence of similar situations;**
- (g) **The Decision and Reasons of the Discipline Committee will be published without names.**

The panel is satisfied that the penalty agreed to by the defendant and by the PEO is of a severity that is consistent with the agreed upon actions by the defendant and extent of professional misconduct occasioned by these actions. The panel, upon reviewing the agreed facts, supported by assertions from PEO counsel and the member's counsel as well as comments from the member, is satisfied that the described professional misconduct is a consequence of inattention to professional duty, rather than deliberate disregard of acceptable standards of professional practice.

The written Decision and Reasons in this matter was dated June 19, 2003, and was signed by the Chair of the Panel Lawrence McCall, P.Eng., on behalf of the members of the Discipline Panel: Santosh Gupta, P.Eng., John Reid, P.Eng., Michael Wesa, P.Eng., and Derek Wilson, P.Eng.

## **Note from the Regulatory Compliance Department**

The member and Company Z waived their right of appeal in this matter and the Discipline Panel administered the admonishment and reprimand at the conclusion of the hearing. The fact of the admonishment and reprimand were recorded on the Register of the association. Company Z submitted the required protocols and procedures on April 1, 2003, and these were satisfactory to the Registrar. The member wrote and passed the 98-Civ-B8 (Management of Construction) examination in May 2003