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Contingent Contract - Industrial Design -- NSPE Case No. 77-12

Year

1977

Description

Payment for work on a contingency or commission basis is considered by some to undermine the professional standing of engineers, and, in some circumstances, to create a conflict of interest. Others view it as creating an incentive for an engineer to deliver the best services of which she is capable. This is a historical case reviewed by the NSPE Board of Ethical Review in 1977.

Body

Facts

Mary Smith, P.E., a consulting engineer who practices primarily in the field of industrial product design for clients, is requested by the XYZ Manufacturing Company to review an amplifier design developed by the company which has not been successful in producing an acceptable product. The company is under pressure to deliver a final model to a customer within three months. Smith spends a few days reviewing the XYZ design and makes several recommendations to improve the product. She is paid her usual per diem fee, as earlier agreed upon. However, XYZ advises Smith that it will need her further assistance for the product to make it fully acceptable and proposes to retain her for the further services on a basis that she will

be paid a fee for the additional service only if the amplifier, as a result of her assistance, will meet the company's requirements. During this period XYZ will pay Smith her out-of-pocket costs, e.g., travel, lodging, computer time, etc.

Question

- Would it be ethical for Smith to enter into a contract arrangement as described?

References

- *Code of Ethics* - Section 1(c) - "He will advise his client or employer when he believes a project will not be successful."
- Section 11(d) - "An Engineer shall not request, propose, or accept a professional commission on a contingent basis under circumstances in which his professional judgment may be compromised, or when a contingency provision is used as a device for promoting or securing a professional commission."
- (We note that Section 1(c), and other parts of the code, use the masculine pronouns "he," "his," and "him." The code applies with equal force to all engineers regardless of gender.)

Discussion

We have not heretofore been called upon to consider the application of Section 1(c) to a specific set of facts and thereby determine under what circumstances an engineer has a duty to state a belief that a project will not be successful. This case indicates the kind of situation in which the engineer must consider the application of Section 1(c). However, the facts before us do not imply that Smith had a sufficient doubt as to her ability to reach a satisfactory result to require a warning to the client.

The best known, and often discussed, ethical aspect of the case is whether Smith offends Section 11(d) by the contingent contract arrangement. Taking the latter portion of Section 11(d) first, the facts indicate that Smith did not first propose the

contingent arrangement as a device to secure work. Rather, XYZ made the contingent overture to Smith, apparently because it retained some doubt that a fully acceptable result could be achieved and hence did not want to make a further investment in Smith's technical skills if that turned out to be the case.

The remaining question is whether the contingent arrangement could induce Smith into a situation which might compromise her professional judgment. We stated in Case 77-4, quoting from Case 65-4, "The import of the restriction in Section 11(d) is that the engineer must render completely independent judgment on engineering matters without regard to the consequences of his future retention or interest in the project."

Applying that standard to these facts, it seems clear enough that Smith's judgment could not be effectively compromised because the client manufacturing company would be in a position to effectively judge if the product was acceptable based on Smith's technical contribution. Thus, both XYZ and Smith would have the same economic motivation to bring about a favorable result.

Conclusion

It would be ethical for Smith to enter into a contract arrangement as described.

Board of Ethical Review

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- Robert R. Evans, P.E.
- James G. Johnstone, P.E.
- Robert H. Perrine, P.E.
- Donald C. Peters, P.E.
- James F. Shivler, Jr., P.E.
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[NSPE Code of Ethics](#) An earlier version may have been used in this case.

Notes

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For a version of this case adapted for classroom use, see: [Contingency Payment for Industrial Design \(adapted from NSPE Case No. 77-12\)](#).

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