

Now You Have It, Now You Don't **(Case 1016)**

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The Case:

The setting is Windsore County in northern California. During the El Nino winter, heavy weather triggered a large debris flow landslide in the mountain area of the county. The landslide partially buried ten summer homes situated along the bottom of a narrow canyon. During the emergency, the Windsore County Public Works Department hired Nearby Engineers, a local geotechnical engineering firm, as a sole source emergency selection to evaluate the landslide. Nearby Engineers determined that a significant additional debris flow hazard still remained. As a result, The County condemned the ten summer home properties and developed a schematic plan to protect other summer homes downstream by construction of an earth "dam" and debris collection basin, plus a large storm drain.

The Windsore County Public Works Department then issues a Request for Proposal (RFP) for engineering services to design the dam, debris flow basin and storm drain. The RFP stated that a firm would be selected on the basis of qualifications and experience (as they typically selected consultants in the past). They would then negotiate with the selected firm to arrive at an appropriate fee and contract (standard Qualifications Based Selection - QBS procedure).

Trueheart Engineers, Nearby Engineers, and two other engineering firms responded to the RFP, each submitting qualifications statements and a proposed scope of services. The County Public Works Department formed an interview and selection committee comprised of Public Works Department professional staff members, who reviewed the submittals, interviewed the four firms and ended up selecting Trueheart Engineers for the project. Trueheart was notified of their selection. They met with the Public Works staff, refined the scope of work, and negotiated an acceptable fee estimate and contract provisions. The contract was then to be approved by the Windsore County Board of Supervisors.

Shortly thereafter, Trueheart Engineers was notified by the County Public Works staff that the contract approval was delayed and that they were also requesting a formal proposal from Nearby Engineers, which was a deviation from their previously announced QBS selection process. After the Public Works Department received Nearby Engineers' proposal, the Director of Public Works overrode the staff's previous recommendations to hire Trueheart Engineers, and he recommended to the Windsore County Board of Supervisors that Nearby Engineers be hired instead. Notably, Nearby Engineers' scope of work and

contract language was the same as that negotiated by Trueheart and the fee was the same as Trueheart's. Nearby Engineers was hired for the project.

Nearby Engineers, Trueheart Engineers, members of the County Public Works interview/selection committee and the Director of Public Works are all Registered Professional Engineers and belong to various professional organizations concerned with ethics.

Question 1:

You are the President of Nearby Engineers. How do you feel about submitting an additional proposal when you know that Trueheart Engineers have already been selected for the project by the Public Works staff?

Question 2:

You are a professional engineer on the County Public Works Department staff and a member of the interview/selection team for this project. The Director of Public Works has overturned the announced QBS selection process as well as your professional evaluation of the proposed consultants. What, if anything, should you do?

Question 3:

You are the Director of Public Works, and although it is not known to your staff, you have been instructed by a member of the Board of Supervisors to hire Nearby Engineers regardless of the announced QBS selection procedure. What, if anything, do you do?

Question 4:

You are the President of Trueheart Engineers. You and your staff spent considerable professional time after you were notified that you were selected for the project, refining the scope of work and contract - time which otherwise could have been spent on billable work for other projects under contract. What, if anything, do you do?

Alternate Approaches and Survey Results for “Now You Have It Now You Don’t” (Case 1016)

Question 1 (President of Nearby Engineers):

1. Your firm did all the emergency engineering work for the project, so this job was really supposed to be yours. Therefore there is nothing wrong with submitting the additional proposal for the project assignment.

Percentage of votes agreeing: 4%

2. Some people may think that submitting a proposal for the project assignment is contrary to the Engineering Society ethics code, but the code is old and inflexible, and really doesn't address this type of situation.

Percentage of votes agreeing: 1%

3. You were hesitant to submit a proposal and deviate from the "normal" QBS process, because you are concerned about setting a precedent that might work against your firm in a future RFP with the county.
Percentage of votes agreeing: 11%
4. All is fair in business. If the county is willing to bear any additional scrutiny by requesting a proposal from your firm, who were you to turn down such an opportunity?
Percentage of votes agreeing: 7%
5. There is nothing wrong with submitting a proposal for the final engineering work as requested by the county, even though the committee had recommended Trueheart Engineering for the work. After all, the Director of Public Works does have the final say in these matters. It is not as though you went behind Trueheart's back to get the work.
Percentage of votes agreeing: 11%
6. Submitting a additional proposal for the final engineering design as requested is not unethical, because there must have been something about the Trueheart proposal the Director of Public Works didn't like. If you didn't submit this additional proposal, the Director would feel that you are not responsive to his requests, and that would be a black mark on your record the next time a project comes up for design.
Percentage of votes agreeing: 13%
7. You should have inquired if the County Public Works Department had terminated negotiations with Trueheart Engineers. If the negotiations had not been terminated, Nearby Engineers should not have submitted the additional proposal.
Percentage of votes agreeing: 31%
8. You should have notified Trueheart Engineers that your firm had been requested to submit an additional proposal. That would then have allowed you to pursue the project without any problem.
Percentage of votes agreeing: 11%
9. You were relieved that your firm continues its close relationship with the Public Works Department Director and with the Board of Supervisors. In the future, you must remember to downscale your work scopes to the level of Trueheart Engineers.
Percentage of votes agreeing: 0%
10. There is a fine line between unethical behavior and good business. In this case you have worked hard for a number of years to develop a close relationship with the Director of Public Works and the members of the Board of Supervisors. It is no surprise that they came back to you for another proposal.
Percentage of votes agreeing: 6%

11. If the shoe were on the other foot, Trueheart Engineers would have done the same thing. Additionally, you needed the work to meet your payroll commitments to your employees.
Percentage of votes agreeing: 2%
12. You are pleased that things worked out the way they did. After all, if your firm was good enough to be selected to do the preliminary engineering, why shouldn't you be good enough to do the final design work?
Percentage of votes agreeing: 3%

Question 2 (Professional Engineer on County Public Works Department staff):

13. You should quit your job in disgust.
Percentage of votes agreeing: 3%
14. You should ask the Public Works Director what the basis was for overturning the department's selection committee recommendation, which was based on the QBS (qualifications based selection) procedure, as advertised. If you are satisfied with the reasons given, you should express your objection to the way the matter was handled.
Percentage of votes agreeing: 50%
15. You should ask the Public Works Director what the basis was for overturning the department's selection committee recommendation, which was based on the QBS (qualifications based selection) procedure, as advertised. If there were reasons that would truly benefit the project, then fine. If not, you should start looking for another job.
Percentage of votes agreeing: 12%
16. Accept the decision of the Public Works Director, since it was never your decision to make any way.
Percentage of votes agreeing: 1%
17. You realize that even though you thought the QBS process was the right way to select the design firm and understood it to be one of the advertised criteria for selection, your boss overrode your recommendations. All you can do is be quiet and not jeopardize your job. After all, your job is in reality fairly political, and you'll just have to accept that.
Percentage of votes agreeing: 3%
18. You should get together with the other staff members on the selection committee and try to reach a consensus about how to deal with the situation. Then proceed according to whatever consensus is reached.
Percentage of votes agreeing: 15%
19. You should call the State Board of Registration for Professional Engineers, get the name and telephone number of the chair of the Ethics Committee, call that person, explain the dilemma as follows, "On a hypothetical basis,

what would you recommend to an engineer who finds themselves in the following situation.....?"

Percentage of votes agreeing: 12%

20. This type of thing should not go unnoticed. You should leak the Director of Public Works' refusal to accept the recommendation of the staff selection committee to the local press without divulging your name.

Percentage of votes agreeing: 1%

21. You should get together with the other staff members on the selection committee and send letters of protest to the local section of the American Society of Civil Engineers (ASCE), the state chapter of the American Public Works Association (APWA), the National Society for Professional engineers (NSPE) and as many others as come to mind, signed by each of you on the committee, and as many others in the department as are willing to do so.

Percentage of votes agreeing: 3%

Question 3 (Director of Public Works for the County):

22. You should have quit your position in disgust.

Percentage of votes agreeing: 2%

23. You should accept the decision of the Board of Supervisors, since it was never yours to make anyway.

Percentage of votes agreeing: 5%

24. You should call the members of the department's selection committee into your office and tell them that you had no choice in the issue, since you were directed by a member of the Board of Supervisors (who are your bosses) to award the contract to Nearby Engineers. You should also tell them that this information is confidential and not to be mentioned outside of the office.

Percentage of votes agreeing: 5%

25. You should have publicly declared the QBS selection process null and void because of changes in the selection process as dictated by the Board of Supervisors. In that way the contract could then be awarded to Nearby Engineers without repercussion, despite any ethical implications in the situation.

Percentage of votes agreeing: 3%

26. You should have advised the member of the Board of Supervisors that such a procedure is unethical and declined to carry out the instructions, even though it may jeopardize your continued employment as Public Works Director.

Percentage of votes agreeing: 22%

27. You should have tried to determine if the member of the Board of Supervisors who directed you to hire Nearby Engineers is speaking for the entire Board, or just herself, then made a decision whether to follow those directions or canvas the rest of the Board on a one-on-one basis.

Percentage of votes agreeing: 14%

28. You should have appealed to the full Board of Supervisors and explained to them that the procedure demanded by one of the Board members was unethical and not in keeping with accepted engineering procedures. If the Board had refused to rescind the instructions, you should have told them that you declined to participate in the revision of the design award and asked that someone else negotiate the contract arrangements with Nearby Engineers.

Percentage of votes agreeing: 38%

29. You should have terminated negotiations with Trueheart Engineers and advertised a new request for proposals (RFP) to be reviewed by a new selection committee, which should have included the member of the Board of Supervisors.

Percentage of votes agreeing: 8%

30. This is just another instance of this type of heavy-handed political maneuvering by some members of the Board of Supervisors. You should have leaked the directive from the member of the Board to the local press.

Percentage of votes agreeing: 1%

31. You should have done exactly what you did do, and keep quiet about who demanded the change in engineering firms. After all, your job is very political, and you must keep peace with the Board of Supervisors if you expect to get things done without a lot of interference. There will be other opportunities for Trueheart Engineers to submit proposals for new projects in the future.

Percentage of votes agreeing: 2%

32. This is the way things are done in the public sector most of the time. The decision was not yours, even though you stand to take the heat for it, if there is any. Trueheart Engineers are big folk and they should understand that the way the game is played is not necessarily the way it is advertised or appears in to the public. You have to go along to get along in this type of public works position.

Percentage of votes agreeing: 1%

Question 4 (President of Truehart Engineers):

33. You are outraged! You should make an objection to the way your firm was treated in an open meeting of the Board of Supervisors. It is unlikely they will override the Public Works Director's "recommendation", but you'll feel a lot better in any event.

Percentage of votes agreeing: 10%

34. You should call the President of Nearby Engineers, indicating that you are prepared to show her a draft of a formal ethics complaint and lawsuit, unless

they are willing to decline the contract (in which case you will not proceed with the complaint and lawsuit).

Percentage of votes agreeing: 6%

35. You should contact each of elected representatives in the County and expose the deviousness of the Public Works Director.

Percentage of votes agreeing: 3%

36. You should file a charge of professional misconduct against the Public Works Director with the State Board of Registration for Professional Engineers, since you understand that Nearby Engineer's scope of work, contract language and fee are identical to yours. You realize that you will be required to spend a substantial amount of time documenting the case and trying to prove that something unethical (collusion between the County and Nearby Engineers) has occurred. This may be quite difficult, since you are not going to have the cooperation of the Public Works Director, Nearby Engineers or many (if any) of the selection committee members.

Percentage of votes agreeing: 18%

37. You should file a claim with the County for the cost of the time spent in preparing the proposal and in negotiations, claiming bad faith on their part, realizing that the claim will most likely be rejected and you have spent even more lost time in on a poor situation.

Percentage of votes agreeing: 7%

38. You should contact your corporate lawyer and file a damage suit against the County and its Board of Supervisors (individually and jointly) for treble damages based on all of Trueheart's costs in responding to the County's fallacious Request For Proposals and Trueheart's legal costs, on the basis of racketeering and blatant violation of public policy and law.

Percentage of votes agreeing: 8%

39. There is nothing you can do to help your firm in such a situation, except try to figure out how bearing the brunt of this unfair and unethical treatment by the County can be turned into some sort of advantage for you in the future.

Percentage of votes agreeing: 6%

40. You should grit your teeth and do nothing! You've been had! No matter what you do, it will reflect badly on the Public Works Director, and thereby greatly decrease the likelihood of your firm obtaining work from the County in the future.

Percentage of votes agreeing: 5%

41. You have learned a valuable lesson by this experience. That is, not to begin work on a project without a signed letter of authorization to proceed or a signed contract so that if the project is cancelled or you are taken off the project you can still bill the client for the time spent to date.

Percentage of votes agreeing: 35%

42. If your firm is largely dependent on work from Windsore County in order to make a reasonable profit and provide sufficient work for your staff, you should consider converting it to an internet shopping and delivery service for housewives in the surrounding area.

Percentage of votes agreeing: 3%

Forum Comments from Respondents

1. As President of Nearby Engineers, you should find out as much as possible regarding the motivation for the County requesting a second proposal. It appears that by submitting a second proposal you might be undermining Trueheart Engineers, something that you don't agree with. Being an engineer and belonging to an engineering society, you know you would not like to be undermined by some other firm. As a result, you should decline to submit a second proposal.
2. The Director of Public Works has already lost his virginity (did what he was told by the Commissioner) and there's no getting it back. He is definitely hanging out there; the State Board won't go after the Commissioner. The time for the Director of Public Works' ethical decision has passed and he didn't make use of it (he gets along by going along). He is squarely on the hot seat.
3. If you are President of Trueheart Engineers, the next time you deal with the county (if you elect to do so again) be prepared for this type of situation and submit a written statement of clarification with your proposal, indicating that it is understood and agreed that if your firm is selected as a result of the stated and advertised QBS process, you will be awarded the contract. Provide a place for the Director of Public Works to date and sign and return a copy for your files. If he declines to sign and return the agreement, convene a meeting of all of the consulting firms in the area and convince them to send a letter to the Public Works Director and to the County Commissioners signed by all of the firms objecting to misleading practices in consultant selection, and cite the applicable law or regulations which call for the QBS selection process. Respectfully request a written reply.