

**Significant Legal/Legislative Policies/Activities**  
Prepared for the Engineers Joint Contract Documents Committee  
October 17-18, 2014  
Washington, DC

*The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee compiled from information provided from associations and other source material. For background material on each issue, please contact Art Schwartz, NSPE Deputy Executive Director & General Counsel (aschwartz@nspe.org).*

## **STATE LEGISLATIVE/REGULATORY MATTERS**

**New York Society Backs QBS Expansion for Design-Build Projects** – The New York State Society of Professional Engineers issued a position statement in March calling on Governor Andrew Cuomo to expand the use of qualifications-based selection for public projects in his 2014 capital projects budget proposal. The governor's budget proposal (S. 6357-B/A.8557-B), which seeks to address the state's aging infrastructure and expedite project delivery, authorizes the use of design-build for specific public agencies: the State Thruway Authority; the Department of Transportation; the Office of Parks, Recreation, and Historic Preservation; the Department of Environmental Conservation; and the State Bridge Authority. The current proposal is similar to the 2011 budget proposal, but includes a requirement for project labor agreements on specific projects that exceed \$10 million and a three-year sunset provision. NYSSPE originally objected to the 2011 proposal because it failed to require use of qualifications-based selection to procure all professional design services. NSPE supports the procurement of design professional services on the basis of qualifications and strongly supports the Brooks Act of 1972, which requires federal agencies to use QBS when obtaining the services of a design professional. The Society also supports the adoption of "mini-Brooks" laws at the state and local level. NYSSPE believes that a mandatory indemnification agreement that provides a fair and balanced contractual indemnification between the project owner and the design-build participants is essential to improving the legislation. Currently, government contracts largely place an undue burden on design consulting firms and contractors for both damages and costs, the statement says. The legislation should also require project owners to hire a licensed architect or PE to serve as the owner's expert, says NYSSPE. The requirement seeks to alleviate concerns about the ability of the contractor to exert undue influence on a principal design firm or team of design firms. A quality-assurance provision would also provide the principal design firm unrestricted access to the project owner and the owner's design professional.

**Tennessee Bill Targets Additional Certifications for PEs** – The Tennessee Society of Professional Engineers wants state law to protect licensed design professionals from being required to have additional licenses and certifications to practice in their field. Legislation (H.B. 1517) introduced in January clarifies licensure requirements to ensure that a licensed engineer or architect who is providing design services within the scope of practice and area of competence will not have to obtain an additional license, certification, or registration to perform these services. TSPE and the American Council of Engineering Companies of Tennessee have explained to the bill's sponsors that state law requires PEs to practice only in those areas in which they are competent. PEs' competence to practice in specific areas is based on education, examination, and experience, and their code of ethics and professional conduct prohibits them from practicing outside of their area of expertise. NSPE believes that professional engineers may voluntarily have their expertise in a specified field of engineering recognized through an appropriate specialty certification program (NSPE Position Statement No. 1737, "Licensure and Qualifications for Practice"). The certifications, however, shouldn't imply that other licensed engineers are less qualified to practice engineering. NSPE and state societies actively oppose attempts to enact any local, state, or federal legislation or rule that mandates certification in lieu of or beyond licensure as a legal requirement for the performance of engineering services.

**West Virginia Law Requires PEs for Storage Tank Inspections** – West Virginia Governor Earl Ray Tomblin approved legislation in March that seeks to protect the state’s water resources and the public by establishing a regulatory program for aboveground storage tanks that will require inspections by a professional engineer. The bill (S.B. 373) was introduced in January after a chemical leak from an industrial storage tank contaminated a local water supply and water treatment plant near Charleston. More than 300,000 West Virginians lost access to safe drinking water when about 10,000 gallons of a chemical used to clean coal spilled into the Elk River. The law will take effect on June 6. To protect the state’s water supply, the law requires the commissioner of the Bureau for Public Health to oversee and administer updated regulations for protecting public water systems. A critical component of the legislation requires certification and annual inspection of aboveground storage tanks, leak detection systems, and secondary containment by a qualified PE licensed in by the State Board of Registration for Professional Engineers. The West Virginia Society of Professional Engineers and the state chapter of the American Council of Engineering Companies supported the legislation. The legislation also requires that the secretary of the Department of Environmental Protection establish a regulatory program for new and existing aboveground storage tanks that contain fluids other than water without additives. The secretary must establish a permitting and regulatory program that includes the following requirements and guidelines: Performance standards for design, construction, installation, maintenance, corrosion detection and maintenance, release detection and prevention, and secondary containment; Requirements for maintaining a leak detection system and inventory control systems combined with testing designed to identify releases from aboveground storage tanks in a manner that protects human health and safety, water resources, and the environment; Requirements for early detection of releases and immediate reporting of releases along with creating a correction action plan; Guidelines for the closure of aboveground storage tanks and remediation to prevent future releases of fluids or materials to the state’s water resources; and A requirement that any aboveground storage tank maintenance work shall start within six months from the date a permit was issued with a completion deadline of one year from the start of the work. The permit expires if the work has not started or is not completed within the prescribed time frame.

**Increase in Continuing Education for Florida PEs Appears Likely** – Professional engineers licensed in Florida may soon see an increase in the number of continuing education hours required for license renewal. The legislation (S.B. 692/H.B. 713), passed by both the state senate and house, is en route to Governor Rick Scott. The measure will increase the continuing education requirement to 18 hours every two years, from eight hours, while significantly broadening the options engineers have for obtaining their credits. The Florida Engineering Society believes that the continuing education changes are essential to bringing the state closer to standards set by the National Council of Examiners for Engineering and Surveying. The new continuing education requirements call for the following: four hours must be related to the state PE law and professional ethics, four hours must be devoted to the licensee’s area of practice, and the remaining hours can cover various topics related to the practice of engineering. A maximum of four hours can be earned by presenting or attending seminars, in-house courses, workshops, and professional or technical presentations at meetings and conferences. A maximum of four hours may be earned by serving as an officer or actively participating on an FES committee. The bill also changes the qualifications and procedures for appointing members of the Board of Professional Engineers, creating more flexibility in appointments. Nine members of the 11-member board must be licensed engineers. They will be selected based on their qualifications and experience to provide expertise to the board in civil engineering, structural engineering, electrical engineering, mechanical engineering, plumbing engineering, fire protection engineering, or engineering education. A professional or technical society may recommend potential members of the board. Additionally, licensure applicants serving in the US armed forces who are delayed in taking the FE or PE exam will be allowed two extra chances to pass either exam before being required to take additional college courses or an exam review course.

**Ohio PE Act Changes Take Effect** – A new Ohio law changes educational, examination, and reporting requirements for professional engineers and surveyors and the authority of the State Board of Registration for Professional Engineers and Surveyors. A major change to the state law will allow licensure candidates to take the FE and FS exams anytime throughout the year at testing centers around the state rather than just twice a year in April and October. The new law, which took effect June 3, also allows computer-based testing and eliminates references to oral and written examinations. The Ohio Society of Professional Engineers believes the changes will encourage more engineers to pursue licensure. “We believe that it will streamline the registration process, making it less burdensome for engineering graduates, who in the past have had to travel great distances to sit for the exams,” says Joseph Warino, P.E., F.NSPE, OSPE’s vice president of legislative and government affairs. The legislation (H.B. 202), introduced and sponsored by OSPE member Rep. Louis Blessing III, P.E., also includes the following changes:

Licensed engineers and surveyors are required to complete 30 hours of continuing education every two years to renew their licenses. The new law eliminates the requirement that even if there is a dispute with the board about the content of any credit hours or coursework, the board has to accept any credit hours or coursework submitted by a licensee if accompanied by a statement affirming that the coursework is relevant to the licensee's practice. Requires that if an applicant for engineering licensure has graduated from a school with an unaccredited college curriculum, it must be evaluated and approved by the board and deemed as equivalent to accredited curricula. Requires that an individual seeking a PE license must first be certified by the board as an engineer intern and apply for registration and pay the required fee to become a licensed engineer. Currently, a firm, partnership, association, limited liability company, or corporation that provides professional engineering and surveying services and uses titles associated with these services must obtain a certificate of authorization from the board. A change to the act will extend the renewal of the certificate from one to two years. Requires the board to submit (at the end of each fiscal year) a report to the governor of its activities of the preceding year and a statement of the board's receipts and expenditures along with affidavits from the board's chairperson and executive director.

**NSPE Urges Repeal of Industrial Exemption** – On September 29<sup>th</sup>, NSPE President Harve Hnatiuk, P.E., F.NSPE, sent a letter to the Pennsylvania House Committee on Professional Licensure to comment on a bill (HB 1447) set to be heard by the committee on October 8th, which could repeal Pennsylvania's industrial exemption. In the letter, President Hnatiuk stated that "This hearing presents an opportunity to address the need to amend P.L. 913, No. 367 to remove exemptions from licensure and regulation that allow unlicensed individuals to engage in the practice of engineering that could impact the public health, safety and welfare...NSPE recommends the phasing out of existing industrial exemptions in state licensing laws."

## **NATIONAL/FEDERAL LEGISLATIVE/REGULATORY/ASSOCIATION MATTERS**

**OSHA Regulations Should Follow Industry Practice, NSPE Says** – On September 2, NSPE submitted comments to the Occupational Safety and Health Administration regarding the design of cave-in protection systems. NSPE commended OSHA for recognizing the important role PEs play in protecting the public health, safety, and welfare, but urged the agency to ensure that the roles and responsibilities of PEs follow the well-established practices used in the design and construction industry. NSPE wrote: "[W]e believe that it is extremely important to distinguish between the roles and responsibilities of the professional engineer serving as a design consultant to the project owner and the professional engineer who may be separately employed or retained by the construction contractor to assume responsibility for the design of cave-in protection systems. Under well-established practices within the design and construction industry and under well-settled law, the design professional retained by the owner is not responsible for the means, methods, techniques, procedures, and safety precautions relating to the construction process. That responsibility rests with the construction contractor who possesses authority over the construction site and over those performing work on the site. This well-established principle is incorporated in all standard contract documents published by engineering, architectural, and construction industry groups.

**Major General, PE Killed in Afghanistan** – Maj. Gen. Harold Greene, P.E., deputy commander of the Combined Security Transition Command in Kabul, Afghanistan, became the highest-ranking American service member to be killed in the wars in Iraq and Afghanistan. He was shot and killed on August 5 when an individual wearing a uniform of the Afghan National Security Forces fired into a group of coalition and Afghan service members on a routine visit to the Marshal Fahim National Defense University. He was the highest ranking officer killed in combat since 1970. A professional engineer licensed in Virginia, Greene held a bachelor's degree in materials engineering and a master's degree in management engineering from Rensselaer Polytechnic Institute. He received his commission as an engineer, and he also earned a Ph.D. in materials science and a master's in mechanical engineering from the University of Southern California.

**Levee Certification Program Puts PEs at Risk, Society Says** – In July, NSPE urged to the Federal Emergency Management Agency and US Army Corps of Engineers to consider changes to FEMA’s levee certification program. “NSPE commends FEMA for recognizing the crucially significant role of the professional engineer in evaluating a levee for certification,” NSPE President Harve Hnatiuk, P.E., F.NSPE writes in a letter to FEMA Administrator W. Craig Fugate and Army Corps of Engineers Chief Engineer Lt. General Thomas Bostick, P.E. “It is, however, our belief that the FEMA levee certification program places an unreasonable burden on PEs, exposing them to great risk.” Recent natural disasters like Hurricane Katrina prompted FEMA to require PE certification of all levees to be eligible for FEMA accreditation. The program currently requires professional engineers to assume much of the legal risk associated with that accreditation. “Under the FEMA program, a PE is in many instances being asked to certify levees without the protection of professional liability insurance or other liability protections,” Hnatiuk writes. “Many qualified PEs have been advised by their professional liability insurance carriers that they will lose professional liability insurance coverage or have their premiums substantially increased if their practice includes levee certification under the current FEMA program. As a result, many qualified PEs no longer offer services under the FEMA program because it would leave them and their firms vulnerable to potential lawsuits and related costs.” As NSPE’s position statement on FEMA levee certification, approved in April, points out, the program could actually endanger the public instead of protect it. Because of the elimination of many qualified PEs from the pool of engineers available for selection because of liability concerns, those willing to perform the services under the FEMA program may not be the most qualified to do the work. Citing the position statement, Hnatiuk asks in his letter that FEMA revise the certification requirements to shift responsibility and liability to parties in a better position to assume responsibility and liability—levee boards, owners, and operators.

**NCEES Takes a New Look at Education Requirement for PEs — Council Also Amends Qualifications for PE Exam** – The member licensing boards of the National Council of Examiners for Engineering and Surveying have decided to change their approach to requiring education beyond a bachelor’s degree for licensure as a PE. In August, the council voted to remove from the Model Law and Rules a requirement calling for licensure candidates to earn a master’s degree or its equivalent prior to being awarded a PE license. The language was added to the Model Law and Rules in 2006 and intended to take effect in 2020.

The council voted to remove the requirement to end confusion and to avoid barriers to comity licensure but plans to work on the specifics of the requirement, said NCEES Chief Executive Officer Jerry Carter. “The language about requiring additional education beyond the bachelor’s degree was inserted in the NCEES model governance documents to reflect the belief of the council that significant revisions are needed in the education of engineers to ensure that they are prepared to enter the professional practice of engineering,” he said in a statement. “Because the language had been incorporated into the Model Law and Model Rules, but had not yet been adopted by an individual licensing board, it was causing confusion among students, educators, and professional engineers.”

Another key issue was the effect on the NCEES Records program, which is used by PEs to facilitate comity licensure. “For those who meet the Model Law Engineer or Model Law Structural Engineer standard, many states expedite a comity licensure application. In 2020, the MLE and MLSE standards would have required a master’s degree or the equivalent,” said Carter. “If no state requires a master’s, most licensees would no longer meet the MLE and MLSE standards, which would have slowed comity licensure. NCEES is dedicated to facilitating licensure among states, so it wants to avoid this impediment.”

NCEES will continue to support improving education standards, said Carter, to better prepare individuals to enter the profession. A committee will develop a position statement to establish support of additional education for initial engineering licensure and the council will consider adopting the statement during next year’s annual meeting.

NSPE supports the establishment of additional academic requirements beyond the bachelor’s degree, such as a master’s degree or equivalent, as a prerequisite for licensure and practice of engineering at the professional level as outlined in NSPE Professional Policy No. 168, adopted in 2002.

**Early PE Exam** – In August, NCEES also removed from the Model Law a requirement that licensure candidates must earn four years of experience before taking the PE exam. The change paves the way for states to allow candidates to take the PE exam any time after they pass the FE exam. The Model Law still requires licensure candidates to gain at least four years of experience in addition to passing the PE exam before receiving a license.

NSPE has urged NCEES and state licensing boards to allow licensure candidates to take the PE exam if they have met the educational requirements for licensure and passed the FE exam. The Society also believes that the four years of progressive engineering experience indicated in the Model Law should remain unchanged, and candidates who pass the PE exam early need to gain four years of documented acceptable progressive engineering experience before becoming licensed.

**Prevailing Wage Issue in Illinois** – On October 1, 2013, IDOL posted a statewide prevailing wage determination for survey workers. In addition, IDOL posted a Prevailing Wage (PW) determination for material testers and added an “inspector” classification for the 25 northern Illinois counties. This action created mass confusion among designers and triggered a series of additional legal requirements that can best be summed up as an erosion of QBS, lack of control of designers over their work and onerous new requirements for design firms. Most importantly, this appears to signify a planned effort by organized labor to claim work that has been the exclusive purview of licensed design professionals.

ISPE joined with ACEC-Illinois, the Illinois Professional Land Surveyors Association (IPLSA), Associated General Contractors of Illinois (AGCI) and Southern Illinois Builders Association to work in opposition to the ruling. The group hired labor attorney Andy Martone of Hesse Martone, PC of St. Louis, Missouri to oppose the rulings.

On October 10, 2013, Martone filed a timely written notice of objection of IDOL’s PW determinations and asked for a hearing on the objection. On November 4, 2013, IDOL issued a letter refusing to grant a hearing, ignoring the law which entitled the coalition to seek administrative relief.

The coalition and 24 Illinois design firms filed a lawsuit in Cook County Circuit Court, Chancery Division on December 4, 2013. The basis of the lawsuit was the denial of due process and the lack of any administrative remedy due to the unfair PW determination issued by IDOL.

The Illinois Road and Transportation Builders Association (IRTBA) also joined the coalition as plaintiffs. The American Society of Civil Engineers – Illinois Chapter (ASCE), Hispanic American Contractors of Illinois Association (HACIA) and both the Illinois Hispanic and Black Chambers of Commerce joined the coalition, but declined to participate as plaintiffs.

In February 2014, the coalition filed a Motion to Stay the PW to pre-October 1st levels until the matter could ultimately be resolved. On April 4, 2014, Cook County Judge Dave Atkins ordered an immediate Stay within hours of the hearing. The ruling indicated the Stay would remain in effect until IDOL provides a hearing to the plaintiffs.

On April 11, 2014, IDOL (represented by the Illinois Attorney General) offered a settlement requesting an administrative hearing be set regarding both surveyors and material testers/inspectors as previously requested by the coalition. That agreement is being finalized. If IDOL does reinstate the PW, the coalition anticipates that additional legal action will be required.

## **COURT DECISIONS**

**NCEES Weighs In on Supreme Court Case** – The National Council of Examiners for Engineering and Surveying recently filed a “friend of the court” brief with the Supreme Court in a case that could have significant implications for state licensing boards. The case began with a complaint filed against the North Carolina Board of Dental Examiners by the Federal Trade Commission for sending cease-and-desist letters to nonlicensed teeth whitening providers. The board claims to be acting as a state regulatory body, ensuring patient safety; the FTC claims the board, comprised mostly of dental professionals competing against nonlicensed teeth whitening providers, is exceeding its authority and violating antitrust law. Following the FTC complaint, the board claimed as a defense the “state action doctrine,” which provides exemption from federal antitrust law for certain state-mandated activities. As a result, the implications of the case have expanded beyond the question of whether it is legal for the board to shut down nonlicensed teeth whitening providers when six of its eight members are dentists, especially after the Fourth US Circuit Court of Appeals agreed with the FTC.

The North Carolina Board of Dental Examiners appealed the court’s decision to the US Supreme Court. “NCEES is concerned that the position adopted by the FTC and the Fourth Circuit in this case, if affirmed, will subject its member licensing boards to second-guessing by federal antitrust regulators, impeding the boards’ ability to effectively carry out their state-appointed task of regulating the engineering and surveying professions and protecting the general public,” the NCEES brief to the Supreme Court reads. “To lose immunity to federal antitrust law is to lose a basic protection that enables state licensing boards to fully function as delegated state agencies.” If affirmed, the position adopted by the FTC and the Fourth Circuit would leave states with only three options, the brief explains. All would harm states’ and licensing boards’ ability to regulate professions that impact public health, safety, and welfare. By retaining the status quo—i.e., keeping market participants on their boards—states will expose the boards to the risk of antitrust liability for just doing their jobs. This would harm the ability of states to recruit and maintain well qualified members of the professions to serve part-time on licensing boards and would chill the boards’ ability to make tough calls. Thus, states would lose many of the benefits they sought when they delegated legislative authority to licensing boards, and included on those boards the very people who were most qualified to understand the needs and concerns of the professions they are charged with regulating.” “To the extent States can only preserve their boards’ immunity by instituting ‘active supervision’ that the FTC or federal courts may deem sufficient (but which the states had not deemed necessary), states would be forced to engage in expensive, wasteful institutional experiments, with little assurance that the supervision would reflect adequate subject-matter knowledge or satisfy any particular tribunal. Adding a layer of bureaucracy would complicate and alter the state-designed decision-making process while still subjecting boards and their members to a continued risk of liability.” “States may feel it necessary to legislatively eliminate market participants from their licensing boards altogether in order to avoid antitrust liability. But when a decision has such coercive effect, it creates serious federalism concerns. The decision...substitutes the FTC or the courts’ determination that action of a state agency is ‘private’ over the State’s own demonstrated intent to delegate regulation of professions as a sovereign state activity. This contravenes this Court’s pronouncements that antitrust law should not nullify the States’ democratic processes for regulating their economies and protecting the public welfare.” Oral arguments before the Supreme Court are expected to begin on October 14.

\* \* \*