

Significant Legal and Legislative Activities

Prepared for the Engineers Joint Contract Documents Committee (EJCDC)

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The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee collected from information provided by EJCDC member organizations 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

Missouri Society Works To Close Low-Bid Loophole – When leaders of the Missouri Society of Professional Engineers discovered that a low-bid procurement process was used to award a contract to a subconsultant on a U.S. Army Corps of Engineers project, they took immediate action. An MSPE outreach campaign to the Corps and members of Congress proved to be effective in defending the use of qualifications-based selection procurement process for federal projects.

MSPE received notice in April that a land surveyor services contract for a project in the Corps' Kansas City District project was awarded based on low-bid. The project involves environmental cleanup at the former Kirksville Air Force Station in Greentop, Missouri. Ben Ross, P.E., MSPE's immediate past president, contacted the Corps to inquire why qualifications-based selection was not used on a federal project. A Corps attorney informed Ross that qualifications-based selection procurement was not required with awarding a lower tier subcontract.

Unsatisfied with this response, MSPE executive leadership contacted U.S. Rep Blaine Luetkemeyer (R-MO) and Rep. Ike Skelton (D-MO) and U.S. Senators Kit Bond (R-MO) and Claire McCaskill (D-MO) in May to ask for assistance in closing the loophole that allows the use of low-bid procurement to award professional services contracts to subconsultants.

Following an immediate inquiry from the offices of Luetkemeyer and Skelton regarding the loophole, the Corps office conducted further investigation about the process used to award the contract. In June, Col. Roger Wilson, the Kansas City District Commander, informed Luetkemeyer that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (also known as the Superfund Law) requires the use of qualifications-based selection to award contracts to subconsultants on particular types of environmental remediation projects. As a result of this provision, the Corps voided the contract and required the contractor to use qualifications-based selection to procure services for the project.

Florida Attorney General Backs QBS – Florida's attorney general recently advised a local county that its "best value offer" procurement process doesn't comply with the state law requiring state and local government agencies to use qualifications-based selection when soliciting professional engineering services.

Attorney General Bill McCollum issued the legal opinion in June, following a request by Dwight Brock, Collier County's clerk of the circuit court. Brock wanted to determine if contracts for professional services awarded to several firms, using a "best value offer" system, violated the Consultant's Competitive Negotiation Act and the legality of payments made to vendors under these contracts.

The case relates to the awarding of continuing annual contracts for professional engineering services to eight firms in 2006. The county followed a procedure in which firms submitted requested proposals with scope of services along with proposed fees and costs. Following selection and ranking of the firms, the county requested the firms' rate schedules and then created a county rate schedule. Payments to these vendors were suspended until Brock received the attorney general's opinion.

The CCNA, adopted by the Florida legislature in 1973, requires state agencies, municipalities, or political subdivisions, school boards, and school districts to use the QBS process to select consulting firms for architecture, engineering, landscape architecture, and land surveying professional services.

According to McCollum's opinion, a process that establishes a fee for proposed professional services prior to the initiation of other steps required by state law would not comply with CCNA, which requires a project-by-project selection and negotiation process. CCNA requires a four-step process, which includes the public announcement of the work; qualifications-based selection of the firm; "arms-length" negotiations with the most qualified firm; and finally execution of a contract.

While McCollum noted that continuing contracts for a fixed term must follow CCNA, he added that the county's procurement procedures do not completely disregard CCNA and competitive negotiation.

Louisiana Licensing Board Embarks On Gulf Oil Spill Investigation – Oil from the Deepwater Horizon has finally stopped spilling into the Gulf of Mexico off the coast of Louisiana and the well has been capped. But the need to know how and why such an incident occurred on the oil platform continues. The Louisiana Professional Engineering and Land Surveying Board has launched its own review to see if any engineering laws or rules were broken in the incident that resulted in the deaths of 11 workers.

In May, the board began to discuss the incident and its role in any possible investigations. Board member Miles Williams, P.E., says the board's mission is to look for why and how the engineered component of a relatively complex facility failed and the component's relation to protecting the health, safety, and welfare of Louisiana citizens.

"Our state has been dramatically affected by what some people call the greatest environmental disaster in our history. That disaster happened because of a failure [on a] very complex engineered facility, but we have no idea if that was because of the engineering," Williams says. "However, we felt that it was our responsibility as the engineering registration board to at least investigate it."

In June, the board sent a letter to Louisiana Governor Bobby Jindal, Louisiana's congressional representatives, members of the state legislature, and U.S. Department of the Interior Secretary Ken Salazar. The board will seek to address the following concerns and questions about the incident:

- Determine who has oversight relative to the practice of engineering in the exploration and production of hydrocarbons. This includes where facilities were designed, fabricated, and operated.
- Were the appropriate engineering and industrial standards used in the design, fabrication, and operation of the facility?
- Was there proper engineering oversight of the facility?
- Were the agencies responsible for oversight properly trained in the implementation of engineering and industrial standards for exploration and production of hydrocarbons?
- Were the appropriate technical and engineering guidelines, rules, and standards in place, and are they being followed at other facilities of this type?

The Louisiana board's action involves open communication with boards in nearby states that were also affected by the oil spill: the Alabama State Board of Licensure for Professional Engineers and Surveyors, the Florida Board of Professional Engineers, the Mississippi Board of Licensure for Professional Engineers and Surveyors, and the Texas Board of Professional Engineers.

Alabama PEs Oppose Bill to Override State QBS Law – Professional engineers in Alabama have growing concerns about legislation that would allow the state to replace the qualifications-based selection of design professionals with competitive bidding.

In February, the state Senate passed a bill (S.B. 52) that would have prohibited no-bid contracts that exceed \$7,500 for all state purchases, including those for design services. The legislation would have required competitive bidding on any state contract and would have awarded contracts to the lowest responsible bidder. Any contract that did not comply with the new requirement would be voided. An exception was made for cases involving state-declared emergencies, and later the bill was amended to exempt contracts for professional services.

The Joint Engineers Council of Alabama anticipates that similar legislation could be introduced in the 2011 legislative session, which begins March 1. The council is planning to discuss the bill with members of the legislature and make the case for maintaining a qualifications-based selection procurement process for design services. Members of the organization include the American Council of Engineering Companies of Alabama, the American Society of Civil Engineers, the American Society of Mechanical Engineers, the Alabama Society of Professional Engineers, the American Society of Plumbing Engineers, the Engineering Council of Birmingham, IEEE, and the Structural Engineers Association of Alabama.

Current state law requires that the professional services of architects, landscape architects, engineers, land surveyors, geoscientists, and similar professionals on state projects must be procured through competitive QBS policies and procedures. The factors that must be considered include the following criteria:

- Specialized expertise, capabilities, and technical competence, as demonstrated by the proposed approach and methodology to meet project requirements;
- Resources available to perform the work, including any specialized services within the specified time limits for the project;
- Record of past performance, quality of work, ability to meet schedules, cost control, and contract administration;
- Availability to and familiarity with the project locale;
- Proposed project management techniques; and
- Ability and proven history in handling special contracts.

Professional engineers are prohibited by state licensing rules from participating in procurement practices that don't first determine the qualifications of the design professional prior to entering into fee negotiations for services being sought.

Puerto Rico Society Fights Against Practice Restrictions – The Puerto Rico Society of Professional Engineers recently pushed back against legislation that would have imposed practice restrictions on licensed engineers and provided licensed architects an economic advantage and greater control on construction projects.

Francisco Morales Boscio, P.E., immediate past president of the Puerto Rico SPE, expressed the organization's objections during a hearing of the Puerto Rico Senate's Urban Planning and Infrastructure Commission. Morales characterized the legislation as an attempt by the architecture community to undermine the engineering profession by proposing the subcategorization of engineers by discipline.

The bill (P.S. 1381), introduced in the Puerto Rico Senate, would have required all construction plans to be certified by both a licensed architect and a Professional Engineer in accordance with his or her specialty (civil, electrical, mechanical, structural). The bill also would have prevented project plans to be proposed entirely by PEs. This would have required project owners to contract with multiple professionals for the development of any construction project. The bill died in committee before advancing to a vote.

Morales Boscio emphasized that the division of engineering disciplines would make construction and development in Puerto Rico more expensive because owners would be required to contract with multiple design professionals.

Additionally, the legislation would have allowed architects and landscape architects to practice professions incidental to the practice of their professions, such as engineering and its specialties.

If it had passed, the bill would have had a direct impact on the practice of 8,000 professional engineers and 2,512 EITs. Of the 1,337 architects in Puerto Rico, about 700 are licensed.

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Congress, President Give Boost To Science, Engineering – President Obama signed legislation on January 4 that funds investments in science and engineering research as well as science, technology, engineering, and math education from kindergarten to the postdoctoral level.

The big question that remains: How will science and engineering funding hold up under the Republican-controlled House of Representatives?

The America COMPETES Reauthorization Act, passed by Congress in late December, authorizes funding from FY 2011–FY 2013 for the National Science Foundation and the National Institute of Standards and Technology. It also authorizes funding for existing and new STEM education programs, and covers basic research at the Energy Department and the Advanced Research Projects Agency–Energy.

NSPE supported the reauthorization as a member of the STEM Education Coalition.

Obama's signing of the legislation "means more research and expanded programs to advance science and technology in the United States," says Commerce Secretary Gary Locke. "These innovative programs and initiatives will help create jobs here at home, make our businesses more competitive abroad, and strengthen the foundation of our economy."

The America COMPETES Act set a 10-year path of doubling the budgets of NSF, NIST, and the Energy Department's Office of Science. Actual funding levels, however, will be specified by future Congressional appropriations bills.

The legislation was supported by many science and engineering organizations as well as prominent business groups. The Business Roundtable, which represents CEOs of leading U.S. companies, said the legislation will attract more young people to technical fields. It will also improve the nation's competitiveness by driving recruitment of K–12 math and science teachers, enhancing the skills of existing teachers, and increasing investments in both scientific research and math and science education.

The U.S. Chamber of Commerce also pushed for reauthorization, stating a need for qualified math and science teachers and the need to encourage high-risk, high-reward projects "that could change the entire landscape of how energy resources are produced and used."

The America COMPETES Act, first enacted in 2007, was drafted in response to Rising Above the Gathering Storm, the National Academies' report on America's lagging competitiveness in science and technology.

A/Es Make a Point as Congress Debates Earmarks – As the Republican Party leaders consider a possible moratorium on earmarks as a way to reduce federal spending, NSPE and other A/E organizations are reminding Congress that earmarks are not the same as legitimate project authorizations.

In a November letter to Congress, NSPE and the other members of the Council on Federal Procurement of Architectural & Engineering Services said that failing to distinguish between the two "could result in Congress's inability to enact infrastructure legislation that is sorely needed to advance American commerce, job creation, and quality of life."

COFPAES members include NSPE, the American Congress on Surveying and Mapping, American Institute of Architects, the American Society of Civil Engineers, and the Management Association for Private Photogrammetric Surveyors.

Congress should make a clear distinction, COFPAES argues, between earmarked appropriations that lack proper congressional authority and legitimate project authorizations that merely recommend necessary funding levels for essential programs and services.

To ensure integrity and transparency, COFPAES recommends the following:

- The general public and all members of Congress and staff should have the ability to read and analyze any bill or amendment affecting project authorizations for at least 72 hours before any subcommittee, committee, conference, or floor vote;
- A process should be implemented in which each project is reviewed, based on transparent and objective standards and criteria, prior to being included in any bill or amendment, and that such analysis be publicly available;
- Each project should contribute to national systems and be part of meeting national needs and goals, not solely local interests;
- Each project should be specified in legislation itself, not committee reports, so that opportunity for full debate and amendments to strike projects is provided; and
- Each project that receives an appropriation must first be specifically authorized by law.

West Virginia PE Elected to Congress – NSPE member David McKinley, P.E., will head to Washington next month to serve in the 112th Congress after winning a close race to represent West Virginia's 1st District. McKinley won the House seat after defeating Michael Oliverio by more than 700 votes.

To get the Republican Party's nomination, McKinley defeated five other candidates before facing Oliverio, who unseated 28-year congressional veteran Rep. Alan Mollohan in the Democratic primary. McKinley has been participating in civic affairs for years. Before his run for federal office, he was a state delegate from 1981–1994, serving on the Finance, Banking and Insurance Committee and Roads and Transportation Committee.

McKinley will be the second PE in Congress, followed by Texas Republican Joe Barton, P.E., who was elected in 1984.

Some of the areas that McKinley plans to address in Congress include education, the economy, tax reform, and energy independence. He supports tax credits and incentives for high-risk research and development and has committed to making R&D part of an economic recovery plan. He has a strong commitment to preserve the coal industry and supports using a variety of domestic energy resources to meet the nation's growing energy needs.

McKinley is the owner of McKinley and Associates, an architectural and engineering company with offices in Wheeling and Charleston, West Virginia, and Washington, Pennsylvania. He has been an NSPE member since 1972 and has served on the board of directors for the West Virginia Society of Professional Engineers. He has also been active with civic, charitable, and nonprofit organizations in the state.

Gains in International Development Depend on Gains in Engineering, Report Says – The number of engineers worldwide must increase to help address the developing world's biggest problems, say officials with the United Nations Educational, Scientific and Cultural Organization.

A report titled "Engineering: Issues, Challenges and Opportunities for Development", published by UNESCO in late October, says increased public awareness, more robust statistical monitoring, and a transformation in

education to emphasize problem-solving will gird engineering for the most pressing challenges of this century. They will also grow the number of engineers to combat a worldwide shortage of the professionals.

Poverty, sustainable development, and climate change are the issues that an improved engineering culture can best address, the report stated.

"The goal of primary education for all will require that new schools and roads be built, just as improving maternal health care will require better and more accessible facilities. Environmental sustainability will require better pollution control, clean technology, and improvements in farming practices," UNESCO Director General Irina Bokova wrote in the report's foreword. "This is why engineering deserves our attention, and why its contribution to development must be acknowledged fully."

The report is the first to look at engineering as an international solution to development and advancement problems, it states.

In it, UNESCO officials and engineers cite shortages of qualified engineers in developing areas like sub-Saharan Africa as a reason those areas lag in development and advancement.

COURT DECISIONS

Vague Law Creates Headache for Licensing Board – A Pennsylvania engineer has won a case against the state's licensing board, allowing him to take the Fundamentals of Engineering Exam although he graduated from a non-ABET accredited program.

In June, the Pennsylvania Commonwealth Court ruled for Mark Whymeyer, explaining that the state's engineering licensing law was ambiguous.

Whymeyer applied to take the FE exam in 2006, after graduating from the University of Scranton with a B.S. in electrical engineering. The Pennsylvania licensing board denied his application and appeal because the state's licensing law requires FE applicants to have graduated from "a curriculum...approved by a national accrediting association recognized by the board."

That association is ABET, according to the Pennsylvania State Registration Board for Professional Engineers, Land Surveyors, and Geologists. However, Whymeyer argued that the law was vague and the "national accrediting association" could refer to the Middle States Commission on Higher Education, which accredits the university.

In the appeal hearing, university witnesses explained the school's electrical engineering program had not achieved ABET accreditation because of its small size and the necessary cost. But the Pennsylvania licensing board declined to independently evaluate the program.

The judges agreed with Whymeyer that a high schooler choosing a university "could reasonably believe" that a four-year degree from a university accredited by the Middle States Commission on Higher Education satisfied the regulation.

If the Pennsylvania board does not rely on ABET but "exercises its independent judgment regarding an engineering program," the court's opinion stated, the Pennsylvania regulation is not void. However, in this case, the board did not.

Thus, the court found that the regulation was unconstitutionally applied and ordered the licensing board to let Whymeyer take the exam.

The National Council of Examiners for Engineering and Surveying, whose membership comprises state licensing boards, specifies in its Model Law that engineering programs be accredited by ABET.

NCEES Executive Director Jerry Carter doesn't know if any other state licensing laws are similarly vague, but he says, "you don't know you have this kind of ambiguity until you get [a] legal challenge. That's when you find out." Thomas Blackburn, counsel for the Pennsylvania licensing board, says the organization has been working on a regulation update to clarify that licensure applicants must graduate from an ABET-accredited school. "It is our intention to promulgate this regulation very quickly," he says.

Court Backs Law Removing New York City PE Requirement – A New York appeals court dismissed on November 16 a challenge made by the New York State Society of Professional Engineers to void a law that removed the licensure requirement for the commissioner of New York City's Department of Buildings.

The New York City Council, with backing from Mayor Michael Bloomberg, passed Local Law 39 to amend the New York City Charter to require that either the commissioner of buildings or the first deputy commissioner be a licensed professional engineer or a registered architect. The law, which took effect in September 2008, also allows the commissioner to delegate any engineering duties to the deputy commissioner. The law previously required that the commissioner of buildings be a licensed design professional.

NYSSPE believes that Local Law 39 conflicts with state law because the council is permitting a city official to engage in the practice of engineering without a license. In January 2009, NYSSPE filed a lawsuit against New York City in the State Supreme Court to seek the removal of Commissioner Robert LiMandri, who held an engineering degree but was not licensed. The issue of the commissioner's qualifications came into the public spotlight following several fatal construction accidents. LiMandri replaced former Commissioner Patricia Lancaster, who is a licensed architect. She resigned after coming under fire following some of the accidents.

In August 2009, the Supreme Court granted the defendants' motion to dismiss the complaint and denied NYSSPE its motion for a summary judgment. The appeals court issued a ruling stating that that the Local Law 39 is valid because it gives "the express power, by an unlicensed commissioner, to delegate any duties that involve the practice of engineering or architecture to a properly licensed deputy first commissioner." The ruling also states that the law does not permit the commissioner of buildings to regulate the practice of engineering within New York City or to practice engineering or architecture without a license in conflict of state law.

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