

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).
For more information about NSPE membership, products, and services, please visit www.nspe.org*

Significant Legal/Legislative Policies/Activities
Prepared for the Engineers Joint Contract Documents Committee
October 6, 2018
Reston, VA

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

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Award Winners Make Qualifications Top Priority – A small town in northwest Massachusetts and a large agency that designs and constructs federal buildings overseas have been recognized by NSPE for their emphasis on qualifications in the procurement of design professional services.

The 2018 QBS Award winners—the Town of Buckland, Massachusetts and the State Department’s Bureau of Overseas Buildings Operations—were recognized during the [2018 NSPE Professional Engineers Conference](#) in July.

Through the [QBS Awards program](#), NSPE recognizes both public and private entities that make exemplary use of the qualifications-based selection process. The Town of Buckland, Massachusetts was selected as the winner in the state government category. The town’s Board of Selectmen has followed a QBS process for the selection of designers since 2005.

The board’s selection committee evaluates clients based on experience, past performance, financial stability, and qualifications of the consultants who will work on the project. The committee then ranks the firms and provides the ranking to the board. For projects in which the fee is to be negotiated, the board shall request a fee proposal from the first ranked designer remaining on the list and begin contract negotiations. If the board is unable to negotiate a satisfactory fee with the first-ranked designer, negotiations shall be terminated and undertaken with the remaining designers in the order in which they were ranked by the selection committee until agreement is reached.

The town recently used the process for a road reconstruction and widening project that’s slated to begin in late 2020.

In the federal sector, the State Department’s Bureau of Overseas Buildings Operations was selected based on its execution of the worldwide design services contracts over several procurement cycles. The bureau procures A/E services for new embassy and consulate compounds as well as upgrades to existing facilities.

Prior to the procurements, OBO holds open industry days and invites teams to provide qualifications briefs to the agency. The request for qualifications includes a two-phase approach. First, teams provide portfolios of no more than six projects, which are scored by the selection panel based on the stated selection criteria. OBO then shortlists teams after they provide a technical submission and a team presentation. The agency issues task orders in the contracts based on team qualifications, and fair and reasonable fees are negotiated.

NSPE Champions Federal Legislation to Strengthen QBS Requirements – NSPE successfully advocated for the inclusion of an important provision in the Federal Aviation Administration Reauthorization Act of 2018 (H.R. 4) to strengthen qualifications-based selection requirements for airports. NSPE and other engineering and construction associations sent a letter to Bill Shuster (R-PA), chairman of the House Committee on Transportation and Infrastructure, urging the incorporation of a bipartisan amendment offered by Rep. Bruce Westerman, P.E. (R-AR) and Rep. Daniel Lipinski (D-IL).

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).
For more information about NSPE membership, products, and services, please visit www.nspe.org*

NSPE believes professional engineers, qualified based on education, experience, and examination, should perform all engineering services that potentially impact the health, safety, and welfare of the public. NSPE supports the procurement of design professional services based on qualifications and strongly supports the Brooks A/E Act of 1972 (PL 92-582), which requires federal agencies to use QBS procedures when obtaining design professional services. NSPE also supports the adoption of “mini-Brooks” laws at the state and local level.

Highly skilled services that impact public safety, such as engineering services, are simply too critical to leave to the lowest bid. The selection process should be based on expertise, qualifications, and the ability to perform the work to protect the interests and well-being of our citizens.

The Westerman-Lipinski amendment clarifies existing rules to ensure that airports follow a uniform QBS process for airport projects that use Airport Improvement Program funds. The amendment states, “[E]ngineering and design are highly skilled, multi-disciplined professions whose services directly affect public safety and welfare. Firms provide technical expertise, innovation, and the latest technologies—skills that are the most important factors in enhancing project performance and cost savings. QBS ensures that these attributes are emphasized in the procurement process.”

As a result of this initiative, the amendment was incorporated into the legislation. The House of Representatives approved the FAA reauthorization on April 27 by a vote of 393–13. The focus is now on the Senate where companion legislation is being drafted.

STATE LEGISLATIVE/REGULATORY MATTERS

Michigan Society Opposes Bill Treading on PE Judgment – It was only last year that the [Michigan Society of Professional Engineers](#), with backing from NSPE, worked to stop the progress of a bill in the state Senate that would have infringed on the PE’s judgment in recommending pipe and piping materials on certain public projects. Now, MSPE is speaking out against a similar bill in the House.

The legislation (H.B. 5723), which applies to publicly financed water supply and wastewater projects, may sound reasonable to some. It would prohibit a public entity from adopting or enforcing an ordinance that prohibits, restricts, or limits the evaluation, comparison, or usage of certain pipe and piping materials, specifically those that meet the standards of the American Society for Testing and Materials, the American Water Works Association, the Great Lakes-Upper Mississippi River Board, the American National Standards Institute, and NSF International. The prohibition would also apply to the performance specifications determined by a professional engineer.

The legislation also states that the provision would not limit the professional judgment of a project’s engineer to specify or select any acceptable pipe or piping materials based on the project’s performance requirements.

While the bill’s language is different from the language originally proposed in last year’s Senate version, MSPE believes that it still attempts to solve a problem that doesn’t exist. MSPE leaders reached out to the Michigan Competitiveness Committee to explain that operators of the state’s public water and wastewater systems design these systems for sustained, long-term operation and with the public health, safety, and welfare as primary design factors.

“It’s imperative that the industry allow the design engineers and system operators, the experts in operations and maintenance, to choose the materials that can provide consistent and safe service,” wrote MSPE President-Elect Scott Conners, P.E., in a memo to the committee.

MSPE also asked the committee to consider that licensed professional engineers are already working to include new pipe materials as needed and that it is dangerous to tie pipe supply to a handful of specifications that might not give the end user the performance or maintenance options that they prefer.

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).
For more information about NSPE membership, products, and services, please visit www.nspe.org*

In about the last two years, states including Indiana, Ohio, and South Carolina have introduced similar versions of this legislation. NSPE believes that the professional engineer's foremost responsibility is to protect the public health, safety, and welfare. Professional engineers are already obligated to choose the right piping material, based on experience, expertise, qualifications, and the applied knowledge of engineering principles.

Society Calls for PE Role Following Deadly Missouri Boat Accident – What began as an evening excursion of fun and family time on a “Ride the Ducks” boat ride turned into a nightmare in Branson, Missouri on July 19. Seventeen lives were lost when the boat capsized and sank during a storm on Table Rock Lake. According to a *Los Angeles Times* report, court documents indicate that the amphibious vehicle (also known as a stretch boat) was designed by an entrepreneur, not an engineer.

While the National Transportation Safety Board's investigation into this accident continues, NSPE offers condolences to those who lost loved ones and is calling for a critical review into how similar tragedies can be prevented and the potential role for licensed professional engineers to increase safety.

In a letter to US Senator Claire McCaskill on August 6, NSPE President Michael Aitken, P.E., F.NSPE, called attention to court records showing that the boat was designed by an individual with no engineering training, and no structural engineers were consulted when the boat was redesigned to extend its length. He also noted that an attorney representing plaintiffs in a 2015 crash involving a similar vessel assumed that structural engineers were required to design amphibious vehicles.

Aitken wrote: “It is NSPE's belief that licensed professional engineers with expertise in naval architecture and marine engineering would have a positive impact on the safety of marine vessels and within the marine industry. However, specific qualifications for licensure as a naval architect and marine engineer vary by state. It's NSPE's hope that state and federal agencies will seriously consider the importance of the professional engineering license for the design of boats and take appropriate action to implement the necessary changes in the law to mitigate future accidents.”

There is precedent for a PE role in the maritime industry. In 1992, the US Coast Guard issued its Navigation and Inspection Circular, NVIC 10-92, which stated that plans and design calculations submitted to the Coast Guard's Marine Safety Center must be reviewed by a PE or a full-time employee of the American Bureau of Shipping.

In 1995, the National Council of Examiners for Engineering and Surveying developed and approved a PE exam for professional engineering licensure in naval architecture and marine engineering.

Nevada Licensing Board Off the Chopping Block – In a victory for professional engineers, a Nevada legislative subcommittee has recommended no changes to the Nevada State Board of Professional Engineers and Land Surveyors. The subcommittee's decision to maintain the status quo may not seem like a victory to some. It comes at a time, however, when state legislators are looking critically at occupational licensing and, in many cases, recommending that the free market is the best form of regulation.

Over the last two years, NSPE has taken a strong stand to ensure that legislators, during their regulatory reform discussions, do not categorize PEs with occupations that have no direct impact on the public health, safety, and welfare.

In Nevada, NSPE proactively responded to the regulatory review threat by joining forces with the [Nevada Society of Professional Engineers](#). Beginning in January, the organizations worked to ensure that the licensing board would not be compromised by the review.

The Sunset Subcommittee of the Legislative Commission was tasked with reviewing state boards and determining whether they should be terminated, modified, consolidated with another board, or continued. The commission reviewed 23 professional and occupational licensing boards but recommended to abolish only the homeopathic board.

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).
For more information about NSPE membership, products, and services, please visit www.nspe.org*

In a letter to the chair of the Sunset Subcommittee, NSPE President Tom Roberts, P.E., F.NSPE, and Nevada Society President Craig Sisco, P.E., explained how engineering licensure and the licensing board are critical to protecting the public as well as the state's economic competitiveness. Professional engineers and engineering firms bring many millions of dollars to the state. Moreover, as all states and territories require the licensing of professional engineers, Nevada's licensing system is necessary to ensure the state can continue to attract qualified professional engineers and engineering firms.

Roberts and Sisco also pointed out that the licensing board had partnered with the Wyoming licensing board in 2017 to forge a first-of-its-kind pact to increase the ease of mobility for professional engineers. The agreement allows for a Model Law engineer, as designated by the National Council of Examiners for Engineering and Surveying, who applies for licensure in either state to be licensed in the other state. North Dakota is in line to join the pact and the Nevada board is encouraging other states to participate.

NSPE and the Nevada Society will continue to actively support the Nevada Board of Professional Engineers and Land Surveyors in protecting the public health, safety, and welfare. This past year, the Society has worked to help protect the integrity of the PE license and respond effectively to threats to occupational licensure in other states, including Louisiana and Ohio.

Idaho Approves Early Taking of PE Exam – In July, Idaho became the latest state to permit engineers to take the PE exam prior to obtaining the minimum of four years of experience and submitting a license application to the state licensing board.

Traditionally, licensure candidates have been allowed to take the PE exam only after passing the FE exam and gaining four years of approved experience. Beginning in 2005, however, states began to consider allowing candidates to take the PE exam before meeting the experience requirement. The four years of experience would still be required, but they would not be a prerequisite for taking the exam.

In addition to Idaho, 14 other states allow the early taking of the PE exam: Arizona, California, Illinois, Kentucky, Louisiana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Texas, Utah, and Wyoming.

The move is part of the Idaho Board of Professional Engineers and Professional Land Surveyors' effort to eliminate barriers to entering the profession. Since 2015, the board has aligned engineering education minimum requirements with the National Council of Examiners for Engineering and Surveying's model to improve licensure mobility. The board has also allowed engineers to take the FE exam without prior board approval; allowed engineering faculty with PhDs to obtain a restricted license without examination; stopped disqualification of applicants who failed a "professional exam" multiple times; and simplified the licensing process by accepting the use of an NCEES record for initial licensure.

NSPE is in favor of state licensing boards allowing candidates to take the PE exam early, as long as 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 NCEES Model Law should remain unchanged, and licensure candidates who pass the PE exam early needed to obtain the requisite number of years of engineering experience before becoming licensed.

To provide guidance to engineering professionals on the path to licensure, NSPE has published [When Can I Take the PE Exam? States Allowing Examination Before Experience](#), which covers the state-by-state details. The report can be found at www.nspe.org; click on "Advocacy," then "[Reports on State PE Laws and Rules](#)."

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).
For more information about NSPE membership, products, and services, please visit www.nspe.org*

COURT DECISIONS

NSPE Weighs in on Mississippi ‘Tire Engineers’ Case – NSPE recently signed onto a [friend-of-the-court brief](#) in a case involving a company that believes its rights were violated by a Mississippi law prohibiting the use of the title “engineer” by individuals and businesses that aren’t licensed to practice engineering.

When Express Oil Change LLC changed the name of its tire sale and service center to Tire Engineers in 2015, the Mississippi Board of Licensure for Professional Engineers and Surveyors notified the company of the violation of state law. A person or business is prohibited from using the term “engineer” in a commercial identification, title, or name, unless the individual or company is licensed to perform engineering services by the state licensing board.

Express Oil Change filed a lawsuit claiming that the licensing board misinterpreted its governing statutes and infringed upon the company’s First Amendment rights by prohibiting its use of “Tire Engineers.” The Alabama-based company maintains nine service centers in Mississippi.

In February, a federal district court upheld the state actions against EOC, rejecting the free speech and trademark rights claims in the case. Although the company’s website states, “Tire Engineers have tire engineers who are qualified to service customers’ tires,” the district court concluded that the business name Tire Engineers is likely to deceive and mislead consumers to believe that services are provided by a recognized group of qualified engineers working to design tires in the transportation industry.

Upon EOC filing an appeal in May to the US Court of Appeals for the Fifth Circuit, the Mississippi attorney general requested that NSPE submit an amicus brief along with the American Council of Engineering Companies and the American Society of Civil Engineers.

The brief argues that the use of the term “tire engineer” to describe auto service mechanics is inherently misleading to the public and that “tire engineer” has a well-established meaning: a professional engineer with specialized knowledge and experience working with tires. For example, the brief says, “Tire Engineers states the reason is ‘to distinguish its automotive services from those offered by competitors.’ But the only distinguishing characteristic that Tire Engineers’ name suggests is that, unlike its competitors, Tire Engineers employs actual professional tire engineers. This suggestion is false.”

NSPE believes that state licensing laws for design professionals are predicated upon and justified to protect the public health, safety, and welfare. The public is best served by the licensure of all qualified individuals within the engineering profession.

* * *