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Significant Legal/Legislative Policies/Activities
Prepared for the Engineers Joint Contract Documents Committee
February 7-10, 2019
Tampa, FL

*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

Canadian Licensing Provisions Restrict US PEs – NSPE has alerted the US Trade Representative about Canadian licensing rules that restrict US licensed professional engineers from practicing in Canada.

In a September 24 letter to Ambassador Robert Lighthizer, NSPE President Michael Aitken, P.E., F.NSPE, pointed out that both the US and Canada allow individual jurisdictions to develop their own requirements to apply for and obtaining an engineering license. Unlike most of the US, Canada's 12 provinces have a minimum one-year work requirement that can be fulfilled only in Canada before applying for licensure. This requirement prohibits many US PEs from practicing there despite having proficient education and experience.

The provinces that provide an exception to this requirement are British Columbia and Saskatchewan, Aitken states in the letter. British Columbia recognizes Engineers Canada's mutual recognition agreements with Hong Kong, Ireland, and Australia. Saskatchewan maintains an agreement with Texas. Canada maintains an MRA with only Texas and Nevada.

NSPE's letter was a formal response to the US Trade Representative's request for comment for its annual National Trade Estimate Report on foreign trade barriers. According to the report, the USTR looks at standards-related measures (standards, technical regulations, and conformity assessment procedures) as serving an important function in facilitating international trade to obtain greater access to foreign markets. The measures also enable governments to pursue objectives such as protecting human health and the environment and preventing deceptive practices. However, standards-related measures that are nontransparent, discriminatory, or otherwise unwarranted can act as significant barriers to US exports.

The Society recommends that the US and Canada enter into an agreement that recognizes work experience from either nation. Aitken refers to an Arizona statute that provides model language for an agreement. The statute says that professional engineering applicants must provide evidence of work experience attained under the direct supervision of a professional who is satisfactory to the board and registered in Arizona, another state, or a foreign country in the profession in which the applicant is seeking registration. The agreement, he says, will ensure that both the US and Canada will be able to enjoy the benefits of shared technical knowledge and expertise while protecting the public health, safety, and welfare.

FAA Reauthorization Bolsters QBS Standards – The recent reauthorization of the Federal Aviation Administration includes an NSPE-backed provision that expands the use of qualifications-based selection on federally funded airport development construction projects.

On October 5, President Trump signed the legislation that extends FAA policy for the next five years, the longest reauthorization period for the FAA since 1982.

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In April, NSPE and several other engineering and construction associations sent a letter to Rep. 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) that applies QBS standards to airport projects.

The provision requires airports to comply with the Brooks Act, which established QBS as the method of procuring design services on federal projects, if any portion of a project uses Airport Improvement Program funds. This amendment was designed to prevent agencies from segmenting state or local funds for A/E services in order to avoid federal QBS rules.

NSPE supports using a QBS procedure for the procurement of all engineering services. [NSPE Position Statement No. 08-131](#) notes: “With QBS, the interests of all professional services users are best served by a selection procedure for all engineering services on the basis of qualifications, including technical competence and staff consistent with the requirement of the project. The selection procedure should address specialized knowledge and skill, experience in the type of project involved, assignment of qualified personnel, ability of the engineers to perform on a timely basis, recognition of the importance of total cost of the project within budgetary limitations, and such other areas of expertise as may be identified by the owner for prime consultant services, or the prime consultant for the subconsultant services.”

In the QBS process, professionally qualified engineers or firms are ranked on the basis of ability to provide the service. After the ranking is completed, negotiations with the best qualified engineer or firm are conducted to determine a mutually satisfactory agreement for the scope of services agreed upon.

The \$97 billion reauthorization creates discretionary grants of more than \$1 billion for small or medium-sized airports located outside of metropolitan areas, and sets new conditions for recreational drone users, among other provisions.

[House Legislation Focuses on Sexual Harassment in STEM](#) – As sexual harassment allegations continue to proliferate across industries and sectors, STEM fields have increasingly come under scrutiny. In June, the National Academies released a landmark report examining the issue in the academic sciences, engineering, and medicine. Now, some of that report’s recommendations have been codified into legislation introduced in the House of Representatives.

The Combatting Sexual Harassment in Science Act of 2018 (H.R. 7031) was introduced in October by Rep. Eddie Bernice Johnson (D-TX), with more than 30 cosponsors. As Johnson noted in a statement, 58% of women in academia have reported experiences of sexual harassment, undermining career advancement for women in critical STEM fields. Women of color are even more likely to experience sexual harassment.

“We cannot afford—morally, scientifically, or economically—to continue to lose these skilled scientists and engineers,” Johnson said, “particularly from groups that are already underrepresented in STEM.”

The legislation would establish National Science Foundation programs to fund research on the contributing factors, consequences, and interventions for sexual harassment in the STEM workforce and collect data on its prevalence.

The bill also directs the Office of Science and Technology Policy to provide federal guidelines to agencies to ensure clear policies and dedicated resources to prevent and respond to sexual harassment incidents at institutions that receive federal research funding. And H.R. 7031 would create an interagency working group to improve agency coordination and communication.

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In addition, the legislation would direct the NSF to engage the National Academies in studying the influence of sexual harassment on the career advancement of individuals in the STEM workforce.

The legislation is endorsed by the Society of Women Engineers, which notes that its proposals aimed at “better understanding the causes and consequences of sexual harassment and reducing its incidence and impact...will support the endeavors of current and future female scientists and create a richer research enterprise in the United States.”

STATE LEGISLATIVE/REGULATORY MATTERS

In Michigan, “Least Restrictive” Is Most Threatening – The [Michigan Society of Professional Engineers](#) is acting to defend professional engineering licensure as state lawmakers consider legislation aimed at reforming occupational licensure.

If enacted, the bill (H.B. 6114), introduced in June, would require the Michigan Law Revision Commission to review any bill that seeks to enact or amend an occupational regulation to determine if the legislation meets a policy of using “the least restrictive” regulation necessary to protect consumers and public safety.

In its review process, the Law Revision Commission would do the following: require the bill’s proponents to submit evidence of present, significant, and substantiated harms to consumers, and information from other individuals knowledgeable about the occupation; evaluate effects of the legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, and governmental costs; compare the way in which the occupation would be regulated by the legislation and review other states’ regulatory approaches; and provide a written report.

MSPE has contacted the legislation’s sponsors to incorporate language into the bill that would compel the Law Revision Commission to employ a presumption that a license should be maintained if the occupation is licensed by Michigan and 45 other states.

NSPE believes introduction of these type of bills underscores the profession’s need for vigilance against attacks on licensure. Since 2016, legislation and regulations that could undermine or even eliminate licensure have been introduced in 32 states, and the attacks continue to intensify.

MSPE also aims to amend a related bill (H.B. 6110), which seeks to encourage the rehabilitation of former offenders and increase their employment prospects. The bill calls for reestablishing the definition of “good moral character” as used for a requirement for an occupational or professional license or to establish or operate an organization or facility regulated by the state.

The bill outlines four conditions for when a licensing board may consider a criminal conviction as evidence in determining an applicant’s good moral character. MSPE believes that leaving it as proposed may require engineers and other licensed occupations to open up their acts and try to define any type of conviction which may be of concern and actually make this a greater barrier to employment. The society wants to modify the language so that all four conditions don’t need to be met before a felony conviction is reviewed for bearing on good moral character.

Guam PEs Respond to QBS Challenge – The [Guam Society of Professional Engineers](#) is defending the use of qualifications-based selection for design services in response to a legal opinion that the prohibition of competitive bidding by the engineering licensing board is unenforceable.

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The Office of the Attorney General issued a directive in May following a request for legal guidance from the Guam Board of Registration for Professional Engineers, Architects, and Land Surveyors on its rules of professional conduct. The licensing board's rules of professional conduct state that design professionals should seek employment based on qualifications and competence and that the design professional shouldn't solicit or submit proposals for professional services on the basis of competitive bidding contrary to the law. The request was made after the board was notified by a licensee that a client requested fees for a competitive-bidding process, and the licensee wanted to know how to address the issue with the client. Another licensee notified the board that a project request for proposal prepared by the Department of Public Works contained instructions to bidders to submit fees for engineering and architectural designs.

The Office of the Attorney General's opinion stated that the board's "blank prohibition in its Code of Ethics on competitive bidding does, indeed, violate the Sherman Act and is therefore unenforceable on its face." The attorney general justified its opinion based on a 1978 Supreme Court case ruling that rejected NSPE's ban on competitive bidding because it violates the Sherman Act and operates as an absolute ban that impedes the ordinary give and take of the marketplace.

GSPE responded to the attorney general's opinion with a letter to the board to clarify the Supreme Court decision and correct misunderstandings of the ruling and the use of qualifications-based selection over competitive bidding.

The letter outlined details of an NSPE Executive Committee statement emphasizing that the Sherman Act doesn't require competitive bidding and noted that the court decision clarified the following: (1) Engineers and firms may individually refuse to bid for engineering services; (2) Clients are not required to seek bids for engineering services; (3) Federal, state, and local laws governing procedures to procure engineering services are not affected and remain in full force and effect; (4) State societies and local chapters are free to actively and aggressively seek legislation for professional selection and negotiation procedures by public agencies; (5) State registration board rules of professional conduct, including rules prohibiting competitive bidding for engineering services, are not affected and remain in full force and effect; and (6) Nothing in the judgment prevents NSPE and its members from attempting to influence governmental action.

NSPE believes qualified professional engineers, based on design ability, experience, and integrity, should perform all engineering services. The Society supports the procurement of design professional services based on qualifications and strongly supports the Brooks A/E Act of 1972, which requires federal agencies to use qualifications-based selection procedures when obtaining design professional services. NSPE also supports the adoption of "mini-Brooks" laws at the state and local level.

According to [NSPE Position Statement No. 08-131](#) on the procurement of engineering services, the qualifications-based selection procedure should address specialized knowledge and skill, experience in the type of project involved, assignment of qualified personnel, ability of the engineers to perform on a timely basis, recognition of the importance of total cost of the project within budgetary limitations, and such other areas of expertise as may be identified by the owner for prime consultant services, or the prime consultant for the subconsultant services.

[Idaho Society Wary of 'Licensing Freedom](#) – To ensure the PE's continued role in protecting the public, the [Idaho Society of Professional Engineers](#) is keeping a watchful eye on the plans of state officials to review all state licensing requirements.

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Under the direction of the lieutenant governor, all state agencies that provide licenses were required to submit reports by July with the following information: the timeframe in which a license is granted or denied; prerequisites for a license; renewal requirements; requirements for accepting and denying licensure and renewals; qualifications for suspensions and disciplinary actions; and costs associated with licensing.

The reports were required by a May 2017 executive order from Lieutenant Governor Brad Little, who will be sworn in as governor on January 9. In a statement on the executive order, known as the “Licensing Freedom Act,” Little said, “I don’t see this as a knock on government but rather as an opportunity for government to work with citizens, to roll back unneeded regulation and make our processes more user-friendly.”

ISPE President Joe Canning, P.E., has expressed concern, however, about the executive order’s use of the term “barriers” and its description of professional licensure. In the case of professional engineering, he says, these “barriers” protect the public from dangerous and life-threatening practice by unqualified individuals. “We all must be diligent in watching this ‘licensing freedom’ process,” he says. “The Idaho Society of Professional Engineers will be keeping tabs on the process and work to be sure that the public’s protection is not compromised.”

COURT DECISIONS

NSPE Weighs in on Mississippi “Tire Engineers” Case – On December 4, 2018, the United States Court of Appeals for the 5th Circuit heard oral arguments in EXPRESS OIL CHANGE, L.L.C.; TE, L.L.C., doing business as Tire Engineers, *Plaintiffs-Appellants*, v. MISSISSIPPI BOARD OF LICENSURE FOR PROFESSIONAL ENGINEERS & SURVEYORS.

The NSPE, ASCE, and ACEC signed onto a [friend-of-the-court brief](#) in this case in support of the state engineering licensing board. The case involved a company that believed 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.

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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.

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