

NSPE Position Statement No. 10-171—Design and Construction Contract Provisions

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NSPE Contact: Committee on Policy and Advocacy

Professional Policy Supported: 10-Professional Practice

Position Statement: It is the position of the National Society of Professional Engineers (NSPE) that contractual provisions such as “indemnification/hold harmless,” “guarantee/warranty,” “liquidated damages,” and other contractual provisions that seek to shift risks from the parties in the best position to assume those risks to the engineer are inappropriate.

Background:

Professional engineers should not assume liabilities that are not the engineer’s proper professional responsibility when providing professional services. Assuming responsibilities for which the engineer does not have legal or contractual authority, responsibility, or control is inconsistent with the ethical practice of engineering.

- NSPE opposes provisions to indemnify (hold harmless) the owner or client or other parties, as these provisions represent obligations and costs that should be borne by the owner or client.
- NSPE opposes the use of liquidated damage clauses in contracts for professional engineering services. While it is recognized that the engineer has a duty to meet the time schedules agreed upon with the owner, the concept of liquidated damages is contrary to the necessary trust and confidence that must be reposed in the engineer to provide services at the highest level of competence in the interests of the most economical and efficient facility.
- NSPE opposes the requirement of a performance bond from professional engineers in contracts for the performance of professional services. The NSPE Code of Ethics requires that engineers act for their clients as a professional and perform their services in accordance with the appropriate standard of care. The introduction of a performance bond is in conflict with professional principles by interposing a third party between the professional and his or her client.
- NSPE opposes requirements mandating that a professional engineer guaranty or warrant engineering services. Our reasons for opposing mandatory guaranty and warranty requirements are as follows:

1. Engineering (much like law, medicine, architecture, and other learned professions) is based upon professional judgment; therefore, its practitioners cannot appropriately guaranty or warrant perfection, as is explicit or implied in a guaranty or warranty.
2. There are many factors that give rise to problems with a project which are outside the control or influence of the professional engineer. Accordingly, guaranties and warranties shift an inequitable or unacceptable amount of responsibility to the professional engineer.
3. Adequate protection for owners already exists, and has worked satisfactorily for many years. If a professional engineer is shown to be negligent in the performance of his or her duties, the engineer is held responsible for damages incurred as a result of that negligence.
4. NSPE recognizes that professional engineers must accept appropriate liabilities in the performance of their professional duties. However, professional liability insurance policies exclude coverage for claims based on the guaranty or warranty when the engineer agrees to guaranty or warrant his or her work.
5. Furthermore, NSPE will use, and will urge its state societies to use, the definition given below as a resource when defining the term “certification.”
 - a) Model Definition of “Certification.” “Certification” shall mean a statement signed and/or sealed by a professional engineer representing that the engineering services addressed therein have been performed by the professional engineer, and based upon the professional engineer’s knowledge, information, and belief, that the content of the certification is true, but is not a guaranty or warranty, either express or implied.