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

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).

FEDERAL LEGISLATIVE/REGULATORY MATTERS

NSPE Letter to U.S. Office of Personnel Management on Professional Engineering – In a May 9, 2017, letter, NSPE urged the department to revise its individual occupational requirements for all “Professional Engineering Positions, 0800.” OPM’s use of the term “professional engineering” to define positions that are not professional engineering positions creates substantial confusion about job scope and responsibilities. NSPE, therefore, urges OPM to stop using the term “Professional Engineering Positions” and to retitle the classification as “Engineering Positions.”

In the letter, NSPE President Kodi Verhalen, P.E., Esq., F.NSPE, states, “NSPE advocates that federal employees who are in responsible charge of engineering activities should be required by federal agency policy to be licensed professional engineers in at least one jurisdiction. NSPE urges OPM to revise the engineering licensure standard to require compliance with state licensure laws.”

NSPE Calls for Full Funding of the U.S. Chemical Safety Board – NSPE submitted public comment to the House Appropriations Subcommittee on Interior, Environment, and Related Agencies asking them to fully fund the U.S. Chemical Safety Board in the Fiscal Year 2018 budget.

In April 25, 2017 public comments, NSPE President Kodi Verhalen, P.E., Esq., F.NSPE stated, “NSPE and the professional engineers we represent rely on the agency’s independent chemical incident reports, recommendations, and safety bulletins to protect the health, safety, and welfare of the public. Professional engineers, as a requirement of their state-issued license, must hold these three considerations paramount above all other considerations in our designs, reports, and all other areas of the practice of engineering.”

The Chemical Safety Board was created by Congress “to investigate accidents to determine the conditions and circumstances which led up to the event and to identify the cause or causes so that similar events might be prevented.” The CSB was instrumental in investigating the BP Deepwater Horizon oil spill in the Gulf of Mexico, as well as investigating over 130 other chemical incidents and providing nearly 800 safety recommendations, 78% of which have been closed. It is vital that this independent, nonregulatory agency exist to provide feedback on why chemical disasters arise and how to prevent these disasters from occurring again. Products that the CSB provides, including safety reports, recommendations, bulletins, and videos, are frequently used and cited by the industrial community, academia, and professional associations.

NSPE Implores ABET to Emphasize Licensure’s Role in Engineering Curriculum – As engineering education accreditors work out the details of how best to prepare students for a changing profession, NSPE is strongly advocating for a place in the curriculum for teaching the value of engineering licensure. Accreditation organization ABET is revising its criteria for student outcomes and the engineering curriculum, and in January, NSPE urged ABET’s Criteria Committee to explicitly reference the value of engineering licensure in its new standards. In a January 10, 2017 letter to Patricia Brackin, chair of the Criteria Committee, NSPE President Kodi Jean Verhalen, P.E., Esq., F.NSPE, pointed out, “Every state requires licensure for certain aspects of the practice of engineering. A critical component of the engineering curriculum should be ensuring that engineering students are aware of the potential that their practice may require a license.” NSPE’s position is that all engineering graduates should, at the very least, be required to know of and understand the role licensure plays in the practice of engineering and that each state sets forth the requirements and exemptions for licensure.

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STATE LEGISLATIVE/REGULATORY MATTERS

NSPE and Nevada Society Resist Inflammatory Occupational Licensure Bill – NSPE and the Nevada Society of Professional Engineers beat back legislation (A.B. 353) that would erode occupational licensure in the state.

In an April 11, 2017 letter to the Nevada Assembly Committee on Commerce and Labor, NSPE President Kodi Jean Verhalen, P.E., Esq., F.NSPE, and NSPE-NV President Craig Sisco, P.E., emphasized the importance of occupational licensure for professional engineers. “The professional engineer’s foremost responsibility is to practice in a manner that protects the public health, safety, and welfare. Nevada’s professional engineers design and administer the construction of bridges, tunnels, buildings, waste-water treatment facilities, plants, factories, processing centers, and many other public and private development projects. The professional engineer (PE) license demonstrates an engineer’s commitment to the highest standards of engineering practice and ethical conduct and shows that the individual has the proper education, experience and qualifications to provide these engineering services to the public.”

At the last minute, the bill was scheduled for an April 12 hearing by the Nevada Assembly Committee on Commerce and Labor. NSPE and the Nevada Society were notified late on April 11 that a comment needed to be submitted immediately. Working together, NSPE and the Nevada Society put together a joint response in three hours. As a result of the opposition to the bill, the bill was dropped from the committee’s agenda the next day. This is a fantastic example of what the national-state partnership can achieve to protect the integrity of the PE license. “NSPE stands ready to assist our state partners in legislative and advocacy efforts to ensure the protection of the PE license and the public health, safety, and welfare,” Verhalen says.

NSPE, Maine Society Oppose Legislation Repealing Continuing Education Requirements – NSPE and the Maine Society of Professional Engineers are opposing legislation that would eliminate continuing education requirements in the state. Currently, professional engineers licensed in Maine must complete 30 professional development hours every two years.

In an April 5, 2017 letter to the Maine Joint Committee on Labor, Commerce, Research and Economic Development, NSPE President Kodi Jean Verhalen, P.E., Esq., F.NSPE, and MeSPE President Colin Hewett, P.E., LEED AP, emphasized the importance of continuing education requirements for professional engineers. “The universe of engineering knowledge continues to expand with time. Just as evolving technical precepts are integrated into classroom instruction, so too the practicing engineer must grow in knowledge to remain effective and competent,” the letter states. “Mandatory continuing education requirements, overseen and enforced by the licensure board, ensure that PEs continue to learn, grow, and benefit the profession and their own development, as well as protect the public health, safety, and welfare.”

Over 40 state licensing boards require that professional engineers maintain and improve their skills through continuing education courses. The number of states requiring continuing education requirements continues to grow. If the bill (L.D. 1165) is enacted, Maine would put its professional engineers at a significant disadvantage with almost all other states requiring continuing education; endanger the public health, safety, and welfare; and possibly create comity issues with other states.

The Joint Committee on Labor, Commerce, Research and Economic Development will consider the bill at a hearing on April 13.

NSPE Fights Attempts to Eliminate QBS in Florida – NSPE sent a public comment on March 27, 2017 to the Florida House Oversight, Transparency & Administration Subcommittee in opposition to a bill that would eliminate QBS and replace it with a “best value selection process.”

If enacted, H.B. 789 would allow price to influence as much as 50% of the selection process. This would create a procurement system in which price is given priority over the competence and qualifications of the provider in making procurement commitments. In the letter, NSPE President Kodi Jean Verhalen, P.E., Esq., F.NSPE, cited a Florida Department of Transportation analysis of the bill. She stated, “imposition of price would outweigh innovation as a selection factor, and encourage selection based on the cheapest proposal or design. This may result in higher transportation project life cycle costs, since the cheapest design is not always the most efficient or sustainable design.”

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NSPE has been collaborating with the Florida Engineering Society to defeat this legislation. The legislation passed out of committee on March 28. An amendment was added to exempt transportation projects to ensure continued federal funding. However, it still impacts non-transportation projects. NSPE continues to work with FES on next steps to defeat the bill.

COURT DECISION

Balfour Beatty Infrastructure, Inc. v. Rummel, Klepper & Kahl, LLP – In Balfour Beatty Infrastructure, Inc. v. Rummel Klepper & Kahl, LLP, the Maryland Court of Appeals confirmed that the Economic Loss Rule is alive and well in Maryland. NSPE and other design professional organizations filed a “friend of the court” brief in support of the rule.

Generally, the Economic Loss Rule prevents parties from asserting tort claims (e.g., negligence and negligent misrepresentation) against parties with whom they do not hold a contract in order to extricate themselves from the terms of their contracts. In Balfour Beatty, a contractor on a design-bid-build project asserted claims against the owner’s engineer based on alleged deficiencies in the design documents. The engineer moved to dismiss the contractor’s claims, arguing that—as there was no contract between the contractor and the engineer—the contractor’s claims were barred by the Economic Loss Rule and should be dismissed. The trial court and the Maryland Court of Special Appeals (an intermediate appellate court) agreed with the engineer.

When the contractor appealed the case to the Maryland Court of Appeals, several organizations representing the interests of design professionals came together to file an amicus brief, sharing their perspective with the Maryland Court of Appeals on the importance of contracts in the construction industry for the fair and equitable management of risk and responsibility between parties involved in a construction project.

On February 22, 2017, the Maryland Court of Appeals affirmed the lower courts’ decisions and adopted the logic and reasoning advanced in the amicus brief, finding that the intricate web of contracts on complex construction projects justified continued application of the general rule requiring parties to assert claims along lines of contractual privity. The Court’s decision cites several cases highlighted for the Court only in the amicus brief (and not the briefs of the contractor and engineer), evidencing the significant impact the amicus brief had on the outcome in this case. This decision benefits design professionals in Maryland, and elsewhere, who manage risk through contracts and rely on courts to enforce their bargained-for expectations.

Jarlstrom v. Oregon Board of Examiners for Engineering and Land Surveying Board – An Oregon man who was investigated and fined by a state board for unlicensed practice of engineering has filed a lawsuit in federal court alleging the state’s definition of an engineer violates the First Amendment. Mats Jarlstrom, 56, was fined \$500 after identifying himself as an engineer in emails he sent to Beaverton officials challenging Oregon’s timing of yellow traffic lights as too short. The Jarlstrom, who has a bachelor of science degree in engineering, has joined the Institute for Justice to file a federal civil rights lawsuit against members of the Oregon Board of Examiners for Engineering and Land Surveying.

The board’s attempt to keep people from calling themselves engineers if they’re not an Oregon-licensed professional engineer is a violation of their right to free speech, alleges Jarlstrom’s attorneys. “It’s important in my mind we can share ideas freely in Oregon to promote innovation,” Jarlstrom said. “I feel violated at this point in time.”

The state board has a history of investigations on others for using the word “engineer” including Portland City Council Commissioner Dan Saltzman, according to the lawsuit. A spokesman for the board declined to comment.

This is not Jarlstrom’s first lawsuit. In 2014, Jarlstrom’s filed a lawsuit against Beaverton that claimed the city’s yellow lights were too short at intersections. Even though the judge tossed out his lawsuit, Jarlstrom continued presenting his findings from his studies to local media, CBS News show “60 Minutes” and the annual Institute of Transportation Engineers last summer. His current lawsuit does not seek monetary damages.

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