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

New York Budget Bolsters Design-Build For Public Projects – New York Governor Andrew Cuomo signed budget legislation on March 28 that reinforces the design-build delivery system for state projects, but PEs are concerned because it does not require the use of qualifications-based selection in the procurement of design services.

The 2013–14 fiscal year budget legislation (S. 2605) maintains a law requiring the State Thruway Authority; the Department of Transportation; the Office of Parks, Recreation and Historic Preservation; the Department of Environmental Conservation; and the State Bridge Authority to use design-build. State university system projects, however, will remain exempted. Governor Cuomo's initial budget proposal sought to expand the use of design-build for construction projects for most state agencies and entities. The proposal also included a provision to eliminate a \$1.2 million threshold for projects (established in 2011), with an exception given to transportation, parks and recreation, and environmental conservation projects.

Washington Continuing Education Bill Resurfaces – Legislation to require professional engineers in Washington to report their continuing education activities to the state licensing board failed last year, but another version of the bill has been introduced.

The bill (H.B. 1231), introduced in January, requires a licensed engineer to verify to the state licensing board that he or she has completed a minimum of 15 hours of professional development for the year. A licensee can earn the hours through volunteer science, technology, engineering, and math activities with students in addition to traditional course work and seminars. The bill exempts engineers who are employed by an electric utility or a gas company from mandatory reporting requirements.

The Washington Society of Professional Engineers supports continuing education for licensed engineers, but opposes legislation to implement mandatory reporting requirements. Currently, continuing education for professional engineers is considered a matter of professional conduct and practice and is left to the discretion of the individual. The state licensing board does not conduct audits or require a minimum number of professional development hours. Licensed land surveyors are required to earn 15 hours of continuing professional development for license renewal.

In January 2010, WSPE published a position paper stating that "to date, there has not been any compelling evidence presented that the current state law and implementing rules in Washington state fail to adequately provide for the continued protection of the public health, safety, and welfare.

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Florida Design Professionals Gain Liability Protection – Florida Governor Rick Scott signed a bill on April 24 that will protect design professionals from individual liability. The Florida Engineering Society pushed for the legislation because it will protect the integrity of contracts that specify remedies for economic damages.

Recent court decisions have stripped engineers of the right to enforce liability clauses in design professional contracts, according to the FES. The new law will allow contracting parties to decide how they would like to address economic damages—either by following common law precedent or through contract terms. In 2010, the Florida legislature passed a bill to address this issue, but it was vetoed by former Governor Charlie Crist.

The legislation (S.B. 286), which goes into effect on July 1, will allow a business to enter a contract stating that an individual employee of another business entity will not be held liable for negligence arising from performance of professional services under the following six conditions:

1. The business entity must execute the contract with a claimant or with another entity for the provision of professional services on behalf of the claimant;
2. The contract must contain a prominent statement that an individual employee or agent may not be held individually liable for negligence;
3. The contract does not list an individual employee or agent as a party to the contract;
4. The business entity is required to have professional liability insurance under the contract;
5. The conduct of the design professional giving rise to the damages occurs within the course and scope of the contract; and
6. The harm is exclusively economic in nature and does not extend to persons or property not subject to the contract.

When a contract does not meet these conditions, a licensed engineer employed through a business organization is not exempt from the personal liability for negligence, misconduct, or wrongful acts he or she commits. In addition, partnerships will be jointly and severally liable for the negligence, misconduct, and wrongful acts committed by their employees or partners while serving in a professional capacity.

Maryland Aims to Expand Public–Private Partnerships – As part of recent and ongoing efforts to do more with less, Maryland legislators have passed and Governor Martin O'Malley signed into law a House bill establishing new guidelines for public-private partnerships.

The new law, which was neither supported nor opposed by the Maryland Society of Professional Engineers, changes current public-private partnership guidelines in ways lawmakers and the O'Malley administration hope will expand the use of public-private partnerships in the state.

The new law authorizes a number of state agencies to enter into public-private partnerships—the Department of General Services, which oversees state building purchases and leases; the Department of Transportation; the Maryland Transportation Authority, which is responsible for the state's toll facilities; and state colleges and universities.

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"As a result of this legislation we're going to create thousands of jobs for Maryland's workers, address some of our most pressing infrastructure needs, and continue to strengthen and support our state's businesses," says Lt. Governor Anthony Brown. "Public-private partnerships are going to be an essential part of building a growing 21st century Maryland economy, and this legislation allows us to approach these partnerships in a more transparent, predictable, and efficient way."

North Carolina Design Professionals Support Certificate of Merit Bill – The [Professional Engineers of North Carolina](#) has joined with the American Council of Engineering Companies to support a bill that will provide more protections for design professionals against frivolous lawsuits.

The legislation (H.B. 739), introduced in April, will require a certificate of merit in civil actions or during arbitration proceedings that are brought against an individual or firm that provides architecture or engineering services. The plaintiff's claim against the design professional or firm must be reviewed by a licensed architect or licensed engineer who has the same type of license and specializes in the same area of practice as the design professional. The licensed professional must qualify as an expert witness and testify that the professional services provided by the defendant did not comply with the applicable standard of care.

The North Carolina Senate passed a similar bill, but the bill failed to pass the House due to opposition from organizations representing trial lawyers and general contractors, says Betsy Bailey, executive director of PENC. PENC is working with the Associated General Contractors of America to negotiate bill language that will present a compromise on proportion of liability when dealing with third-party claims while providing several benefits for professionals and firms. "This legislation will protect professionals against frivolous claims," she says. "In addition, insurance premiums tend to be lower in states that have this type of protection for design professionals."

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Engineers Endorse Two-Step Design-Build Legislation – The National Society of Professional Engineers has endorsed the Design-Build Efficiency and Jobs Act of 2013. Introduced on July 19 by House Small Business Committee Chairman Sam Graves (R-MO), this legislation (H.R. 2750) would protect the integrity of the federal procurement process and enable small and large businesses alike to compete for federal construction contracts.

Under federal law, the two design-build selection procedures are the two-step/two-phase process, which is preferred, and the single-step or "turn-key selection" process. The two-step/two-phase selection approach requires that the design team's qualifications be part of the evaluation process. This method ensures that competent and qualified design professionals are initially involved in the procurement process so that quality-based design considerations are incorporated into the drawings, plans, and specifications, consistent with the interests of the public health and safety.

The other design-build method, single-step, also known as "turn-key selection," is neither preferred nor does it provide the same quality considerations or efficiencies of the two-step process. Moreover, due to the substantial up-front costs, which can often exceed hundreds of thousands of dollars, many engineering firms and companies are deterred from submitting proposals because of the very small likelihood of being selected. Small businesses in particular cannot spend their limited resources to compete for a project when their chances of being chosen may be significantly less than 10%.

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In a letter of support to Chairman Graves, NSPE President Robert Green, P.E., F.NSPE, writes, "The Design-Build Efficiency and Jobs Act of 2013 addresses these issues by restricting the use of single-step design-build to federal projects that are less than \$750,000 and by requiring federal agencies to better justify why they short-list more than five finalists in the two-step design-build process."

Engineers Urges New Secretary of Transportation to Strongly Support Qualifications-Based Selection – The National Society of Professional Engineers sent an open letter to the new Secretary of Transportation Anthony Foxx, urging him to strongly support and encourage the use of qualifications-based selection in the federal procurement process.

As the leader of the nation's top agency for transportation and infrastructure, Secretary Foxx has an extraordinary opportunity to advance economic opportunity, increase productivity, and create a sustainable transportation infrastructure for current and future generations.

Formally codified in the 1972 Brooks Act, qualifications-based selection (QBS) provides for the selection of firms to perform architecture, engineering, and related services on the basis of the competence, qualification, background, and track record of competing firms, subject to the negotiation of a fee that is fair and reasonable to the government.

In the open letter to Secretary Foxx, NSPE President Robert Green, P.E., F.NSPE writes, "Research shows that government agencies in the United States achieve lower construction costs, more efficient use of taxpayers' money, and higher construction satisfaction when procuring design and engineering services based on qualifications rather than price. By strongly supporting and encouraging the use of qualifications-based selection in the procurement of transportation projects, you can help ensure that the nation's transportation system will be safe, sustainable, cost-effective, and an example to other countries for generations to come.

Engineers Urge the Early Taking of the PE Examination – The National Society of Professional Engineers recommends and advocates that the National Council of Examiners for Engineering and Surveying and state PE boards provide flexibility for optional early taking of the PE exam by candidates who have met the educational requirements for licensure and passed the FE exam. NSPE advocates that the number of years of progressive engineering experience indicated in the NCEES Model Law remain unchanged, such that candidates who pass the PE exam early need to accumulate the requisite number of years of documented acceptable progressive engineering experience prior to becoming licensed.

New STEM Caucus, Legislation in Senate – The Senate Science, Technology, Engineering, and Mathematics Education and Workforce Caucus gathered for the first time in May to discuss the President's Fiscal Year 2014 Budget proposal and changes to federal STEM programs.

Launched and co-chaired by Senators Dick Durbin (D-Illinois), Jeanne Shaheen (D-New Hampshire), Mark Kirk (R-Illinois), and Roger Wicker (R-Mississippi), the caucus will focus on both education and America's economic prosperity.

"We established the caucus with the goal of raising awareness and advancing the dialogue about how to improve STEM education and maintain America's competitive edge in the global economy," Kirk wrote on his blog after the caucus's inaugural briefing. "I am a strong supporter of STEM education because a STEM-trained workforce is vital to promoting economic prosperity, innovation, and national security."

COURT DECISIONS

Rolf Jensen vs. Mandalay Corporation, et al. – The Nevada Supreme Court has ruled that the Americans with Disabilities Act was enacted to remedy discrimination against disabled individuals and to prevent discrimination and that (excluding landlord-tenant relationships) the ADA contained no provisions permitting indemnity or allocation of liability the owner of a hotel and the design firm that designed the hotel. In applying the law to the facts, the Court found that allowing the hotel to maintain its indemnity claim against the design firm for ADA violations weakened the incentives of the owners to prevent violations and conflicted with the ADA’s purpose and intentions, as owners could contractually maneuver themselves to ignore their non-delegable responsibilities under the ADA. Allowance of such claims, said the court would serve to frustrate Congress’s goal of preventing discrimination and intrude on the remedial scheme set forth in the ADA, which does not expressly (or impliedly) permit rights of indemnity.

In 2005/2006, the Department of Justice (“DOJ”) investigated Mandalay Corporation and its related entities (collectively “Mandalay”) for alleged violations of the Americans with Disabilities Act (“ADA”). The investigation focused on certain properties including the Mandalay Bay Hotel and Casino (“original project”) and The hotel (“expansion project”) both located in Las Vegas, Nevada. In this same timeframe, MGM Mirage (“MGM”) acquired Mandalay’s assets and liabilities.

In 2007, MGM, on behalf of its newly acquired subsidiary, entered into a settlement agreement with the DOJ that involved paying a modest fine and agreeing to retrofit certain aspects of both projects that the DOJ deemed to be non-compliant. Shortly thereafter, Mandalay sued multiple design professionals and the general contractor seeking indemnity for payment of the fine and future payments for the retrofits. In 2008, Mandalay amended its lawsuit to name our firm’s client, Rolf Jensen & Associates, Inc. (“RJA”).

Back in 1996, during the design of the original project, the architect retained RJA to provide fire protection consulting services. During construction, a question arose whether toilet room doors in non-accessible guest rooms needed to be extra wide. Although RJA was not serving in the capacity of a retained ADA consultant, it was asked to review an RFI from the general contractor seeking clarification. In essence, RJA commented that while the issue was not clear [under the then-current guidelines], if the owner wanted to avoid a civil lawsuit, it should take the most conservative approach possible and maximize accessibility.

Mandalay did not stop work to change out the toilet room doors. In doing so, it avoided a significant time and cost impact to the project. In 2009, the project opened on time and within budget. In 2002, Mandalay hired RJA directly as an ADA consultant for the expansion project.

While Mandalay’s 2007 settlement with the DOJ encompassed multiple retrofits to the expansion project, most if not all of the allegedly non-compliant areas, involved owner-driven changes or were otherwise outside of RJA’s scope of retention. Thus, the primary focus of Mandalay’s lawsuit against RJA involved the toilet room door issue from the original project and select retrofits from the expansion project.

On August 9, 2012, the Nevada Supreme Court issued its opinion, a copy of which is attached. The Court, in a 17 page decision with no dissent, granted RJA’s Petition ordering the District Court to reverse its denial of RJA’s motion for summary judgment. The Court’s ruling was based on its conclusion that all of Mandalay’s state based claims were obstacles to the objectives of the ADA and therefore preempted by federal law.

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In its decision, the Court held that ADA was enacted to remedy discrimination against disabled individuals and to prevent discrimination. Thus, the owner of a place of public accommodation that constructs a facility not readily accessible to individuals with disabilities, regardless of intent, would be liable for unlawful discrimination. The Court further held (excluding landlord-tenant relationships) that the ADA contained no provisions permitting indemnity or allocation of liability between the various entities subject to the ADA.

In applying the law to the facts, the Court found that allowing Mandalay to maintain its indemnity claim against RJA for ADA violations weakened the incentives of the owners to prevent violations and conflicted with the ADA's purpose and intentions, as owners could contractually maneuver themselves to ignore their non-delegable responsibilities under the ADA. Allowance of such claims, would serve to frustrate Congress's goal of preventing discrimination and intrude on the remedial scheme set forth in the ADA, which does not expressly (or impliedly) permit rights of indemnity.

According to legal experts, the Nevada decision could have far reaching implications. Owners and developers across the nation routinely sue design professionals during or after settlements with the DOJ and/or other groups representing the disabled. Owners and developers uniformly have decision-making authority on compliance with the ADA and may exert pressure on all members of the design team to minimize the scope and cost of compliance, or worse, override their recommendations. This conduct is particularly concerning where owners and developers can contractually insulate themselves from the consequences of their decisions. Even if the design team has strong defenses, historically designers have been dragged into these costly and protracted cases.

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