

## **Significant Legal and Legislative Activities**

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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**

**Governor Signs Bills Backed by Maryland Society** – Maryland PEs gained an additional voice on the state licensing board after Governor Martin O'Malley signed legislation in May that increases engineer representation on the board from five to six. The law specifically states that the governor's selection for the new board spot must come from a list of three nominees recommended by the Maryland Society of Professional Engineers. MSPE leadership believes that adding another board member will allow the agency to better work on behalf of a diverse and complex profession. The licensing board identifies and represents only four engineering disciplines—chemical, civil, electrical, and mechanical—while the U.S. Department of Labor identifies at least 14 engineering disciplines

Additionally, since 1990, the number of engineers in Maryland has increased by 300%, to more than 27,500 engineers in the state, according to the society. So, too, has the diversity. "We felt that it was important to broaden the diversity in the types of engineers who serve on the board beyond the four disciplines traditionally represented," says David Thaler, P.E., past president of MSPE.

Thaler believes that MSPE's role in selecting a new board member is critical because it represents engineers of all disciplines in the state. However, he says, the MSPE will consult with other engineering organizations before providing a list of potential board members in September.

**Proposed Changes at Nevada Board Draw Objections from PEs** – Following opposition from the Nevada Society of Professional Engineers, state legislators have decided not to act on a bill that would have reduced the number of qualified professionals sitting on state licensing boards and granted the governor authority to appoint board chairs.

The Nevada Society opposed the legislation (S.B. 354) because it would have changed the structure of the boards by removing a professional member in order to accommodate the appointment of an additional public member. It also would have resulted in board chairs who were political appointees rather than peer selected. The bill, which unanimously passed in the Senate, targeted 36 licensing and regulatory boards, including the Nevada Board of Engineers and Architects.

In a May letter to Representative Kelvin Atkinson, chair of the Assembly Commerce and Labor Committee, Society President David James, P.E., pointed out that the bill would reduce the number and diversity of qualified professionals to provide impartial judgment of a candidate's qualifications for licensure and carry out disciplinary actions against licensed professionals. He added that the political appointment of board chairs could increase the risk of favoritism in board operations, which could be avoided by maintaining the current chair election process.

The Nevada Society has not stood alone in the fight against efforts to reduce the participation of licensed engineers on critical regulatory boards. The Tennessee Society of Professional Engineers recently waged a successful campaign against a similar bill that sought to require that only "public members" serve on the state's Solid Waste Disposal Control Board, the Water Quality Control Board, and the Air Pollution Control Board. TSPE, along with the American Council of Engineering Companies, said the legislation would exclude licensed design professionals and put the health, safety, and welfare of the public at risk.

**Bill Aims to Make New York Design Firms More Competitive** – New York design firms might get a little more competitive in the near future, according to the New York State Society of Professional Engineers.

Both houses of the state legislature passed a bill allowing the formation of "design professional service corporations" where nonlicensees may have up to 25% ownership in the corporation. New York Governor Andrew Cuomo is expected to sign the bill this summer.

The legislation, if signed, would eventually put New York design firms on a more even business keel with competing firms in nearby states, says NYSSPE Executive Director Kelly Norris. Under the bill, design firms would have the option of offering ownership incentives to attract and retain top-quality but unlicensed management and design talent.

Current law requires professional service corporations—engineering, architecture, landscape architecture, and land surveying firms—to be owned entirely by professional licensees. That means firms in other states can offer more incentives to top-flight talent that does not hold a license, Norris says.

"If someone can go across the border and take a job where they can get ownership benefits in a company, that's a lot more attractive to more people," Norris says. "We just never thought it was fair that some of these other firms couldn't offer that."

Safeguards in the bill would prevent nonlicensees from exerting too much influence at the firms. Licensees would be required to hold the president, chief executive officer, and board chairman positions and at least 75% of director and officer positions.

For all the positives design firms could reap from the legislation, NYSSPE's lobbying effort has been a long time in the making. Similar bills were introduced in 1999 and passed the state senate in 2006, 2007, and 2008. The cause got lumped together with corporate ownership concerns in the medical and accounting industries, however, stalling movement on the design professions, Norris says.

Once PEs worked closer with state regulators and advocates for the medical and accounting interests, a clear distinction for the design sector was drawn and the effort moved forward, Norris says.

It was an encouraging victory, she says, adding, "It's always a pretty big accomplishment when you get something passed through the New York legislature."

**Massachusetts Design Professionals Get Lien Power** – It just got easier for PEs and other design professionals to pursue developers in Massachusetts who fail to pay for services.

In January, Governor Deval Patrick signed a bill that allows PEs, architects, and land surveyors to place liens on property when its owner doesn't pay for work. The law takes effect July 1.

The American Council of Engineering Companies of Massachusetts and the American Institute of Architects of Massachusetts led the charge to change the law. The ability to place liens on property is a right that others have had and a protection that design professionals deserve, says Abbie Goodman, ACEC/MA executive director.

"Builders have long had this right and filing a lien—or the threat of a filing—has been shown to be an effective way to prevent this abusive business practice," says Goodman. "Additionally, this long history demonstrates that the right to file liens has not harmed anyone unjustly; the only individuals or companies who would bear any costs under this new law are those who would abuse the firms they engage," she says.

While statistics don't exist on unpaid design fees in the state, many cases of such have made their way to ACEC, Goodman says.

Previously, a design professional's only recourse to be paid was to sue, a costly option, says Kenneth Skinger, P.E., president of the Massachusetts Society of Professional Engineers. Arbitration was another option, but legal fees in both cases would quickly outpace the amount in fees for service being pursued.

This way, a relatively small fee can protect a design professional, he says. "At least in this circumstance, you're going to get paid," Skinger adds.

**Oregon Design Professionals Call for QBS Expansion** – A coalition of Oregon design professionals is pushing for the expansion of qualifications-based selection as the procurement method for design services on public projects.

The Professional Engineers of Oregon and several other organizations are supporting H.B. 3316, which would extend the use of QBS to all projects carried out by all public agencies. It would cover the procurement of services from architects, engineers, photogrammetrists, and land surveyors.

In January 2006, a law was enacted that required the use of QBS on all local government projects that cost greater than \$900,000 and receive state funding that accounts for at least 10% the project's overall cost. These government agencies have been allowed to use any procurement process if the projects fell below these requirements.

The Oregon Design Professionals (ODP) coalition was established after several members joined forces last year to oppose efforts to consolidate the Oregon State Board of Examiners for Engineering and Land Surveying, says PEO Legislative Chair Dennis Hickman, P.E. The group shared its legislative agenda with members of the Oregon legislature during a "Day at the Capitol" event on February 28.

"There will be times when members of our coalition will have differing views on future legislation, but there is uniform support for this bill," says Hickman. The bill states that the act is necessary for the preservation of the public welfare, health, and safety and will take effect immediately upon passage.

ODP members include the American Institute of Architects Oregon, the Professional Engineers of Oregon, the American Council of Engineering Companies of Oregon, the Structural Engineers Association of Oregon, IEEE, the American Society of Civil Engineers, the Oregon chapter of the American Society of Landscape Architects, and the Professional Land Surveyors of Oregon. The state licensing boards for engineers, land surveyors, architects, and landscape architects are also coalition members.

## **FEDERAL LEGISLATIVE/REGULATORY MATTERS**

**Coalition Calls for Innovative Transportation Policies** – A bipartisan coalition is calling on political leaders in Washington to stop the bickering and set policies to rebuild and invest in the nation's infrastructure in order to restore economic strength and spur job creation.

A new report points out how the U.S. has lost its competitive edge and is one of the only leading nations that don't have a plan for public-private partnerships for infrastructure projects or a national infrastructure bank. Significant changes must be made to restore the nation's economic strength. The report makes the following recommendations for the federal government to craft innovative transportation policies:

- **Develop a national infrastructure strategy for the next decade that makes choices based on economics, not politics.** The U.S. should adopt a 10-year national plan for strategic investments that focuses primarily on transportation with attention to other infrastructure challenges such as water and the electrical grid. The investment should be at least \$200 billion per year, and the strategy will create nearly 5 million jobs for the next decade.
- **Pass a six-year transportation bill updated to compete in the 21st century global economy.** A new bill would provide a plan that sets clear priorities and makes hard choices based on increasing economic return and mobility while reducing congestion and pollution. The investment strategy should focus on projects that will yield results—aviation systems, high-speed rail in key corridors, freight rail, public transit, and maintenance of the U.S. transportation network.
- **Be both innovative and realistic about how to pay.** A national infrastructure bank must leverage private dollars and invest in the best big projects, including those spanning state boundaries or encompassing multiple modes of transportation. All long-term revenue generating options should be considered which includes an increased federal gas tax, congestion pricing, carbon auctions, fees based on miles traveled, or reserves built into capital budgets.

- **Promote accountability and innovation.** The federal government should establish clear criteria for all funding, encourage state and local innovation through competitive grants, streamline the project delivery process to ensure projects are started quickly, and carefully audit the results to ensure projects are completed on time, on budget, and yielding promised results.

**Building Institute Says New Data Needed for High-Performance Buildings** – The National Institute of Building Sciences is starting its own high-performance building information initiative to fill the void left after budget cuts and statistical errors have apparently stalled efforts to update data at the federal level.

It's a move that could help the high-performance building market avoid negative effects of increasingly obsolete data used for commissioning and rating said buildings, NIBS officials say.

Officials with the Energy Information Administration said in April they would not be releasing results of their 2007 Commercial Buildings Energy Consumption Survey because statistical issues have made the data unusable. Additionally, work on a similar 2011 survey is being suspended due to budget cuts from the federal budget compromise for fiscal year 2011. That means the most recent energy information for commercial buildings is from 2003 and is quickly becoming outdated, say NIBS officials.

That data is important because federal officials use it to set Energy Star benchmarks, which are then used both as direct thresholds for building inspections in places like Washington, D.C., and as pieces of overall building ratings systems like the U.S. Green Building Council's LEED and LEED-EB ratings.

NIBS officials say surveys of high-performance buildings need to continue as the market for energy efficient structures grows. If the information becomes older, the market for high-performance buildings could diminish as it becomes harder to accurately determine how efficient or inefficient a building is.

"The nation is in the midst of a fundamental shift toward high-performance buildings. The significant gap of reliable data from [the Energy Information Administration] is extremely troubling at a time when the building community is thirsting for quantifiable statistics to show their actions to save energy are working," says NIBS President Henry Green.

NIBS is in the process of seeing what information the high-performance building community wants and can collect, says Ryan Colker, presidential advisor at NIBS. Officials also want to devise the best way to collect and disseminate that information. A forum on the topic is in the works for this summer, Colker says.

**Role for PEs in Pipeline Safety Upgrades?** – Natural gas explosions in Allentown, Pennsylvania, earlier this year and in San Bruno, California, late last year have renewed a call from Washington for safer pipeline management.

Where PEs fit into that discussion is yet to be determined. There are currently no requirements for PEs to oversee pipeline inspections at the federal level, according to Department of Transportation spokeswoman Julia Valentine. DOT officials, who oversee pipeline operations in the U.S., are asking industry players and the public for ways to improve pipeline oversight and safety and have not yet determined if PEs will be a part of that solution, Valentine says.

Transportation Secretary Ray LaHood called for increased pipeline safety after a natural gas explosion in Allentown killed five people on February 9. Deaths from pipeline accidents have climbed for the past three years to 22 in 2010 despite a decline in the overall number of pipeline incidents, according to DOT figures.

In response to LaHood's call for greater safety, industry leaders focused on two issues during an April 18 forum at DOT headquarters in Washington: better support and enforcement for state "call before you dig" programs and support for the DOT's Pipeline Informed Planning Alliance.

## COURT DECISIONS

### Engineer That Did Work Without Written Change Order Not Entitled to Be Paid for Additional Services –

Oral authorization for engineer to perform additional design services on a municipal golf course was not binding on city because the contract mandated that written change orders be executed to authorize such services (*P&D Consultants, Inc. v. City of Carlsbad*, 190 Cal.App.4th 1332 (California 2010)).

On the engineer's breach of contract action against the City of Carlsbad, California, a jury awarded the engineer \$109,000 for its extra work. This was reversed on appeal based on the contract's requirement for a written change order, with the court stating that unlike private contracts, public contracts that require written change orders cannot be modified orally or through the parties' conduct. Consequently, even if the engineer had sufficient proof of oral authorizations of a city employee for extra work, the matter should not have been submitted to a jury but summary judgment should have been granted instead.

The city retained the engineering firm of P&D Consultants, Inc. to redesign the city's municipal golf course. Scope of work and contract price were well defined in the contract that provided that no amendments, modifications, or waivers of contract terms would be allowed absent a written agreement signed by both parties. An integration clause in the contract further provided that the contract and any written amendments thereto embody the parties' entire agreement.

### Design Professional Had No Liability for Worker's Injuries Because Intervening Acts of Contractor Prevented Designer's Alleged Acts from Being the Proximate Cause –

Design Professional's alleged errors were not the proximate cause of the death of a construction worker, and summary judgment was correctly granted because intervening negligent acts of the general contractor broke any causal connection between the alleged negligence of the engineer and the death of the worker. *Edwards v. Anderson Engineering, Inc.*, 251 P.3d 660 (Kansas 2011).

The engineer designed a storm sewer for a municipality utilizing a large, elliptical-shaped concrete pipe. After project completion, the pipe failed and had to be replaced. Having completed the replacement, the contractor then retained a consultant to test the reason for the failure. This testing was done at an off-site facility, and was done without the knowledge of the site designer or pipe manufacturer. During the testing, a worker stood on top of the pipe with a concrete saw and made a long cut along its top. This resulted in the pipe splitting in half and the worker falling and being crushed under the weight of the pipe as it rolled over on him. In the law suit against the site design engineer and pipe manufacturer, the worker's family argued that "but for" alleged negligent decisions of the engineer and manufacturer in the use of the pipe for the project, the sequence of events that culminated with testing the defective pipe would not have occurred. The appellate court affirmed the trial court summary judgment, finding the acts or omissions were "too attenuated" to be a usual, likely or legally cognizable cause" of the fatal injuries.

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