

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

New York Society Opposes Elevator Certification Bill – The New York State Society of Professional Engineers is opposing a bill in the state legislature that would require contractors—including licensed professional engineers—who design and perform maintenance on elevators to obtain specialty certifications.

The legislation (A. 08359), which the assembly passed in June, will require contractors involved in the design, construction, operation, and maintenance of elevators to apply for a special license. Contractor licensure applicants must demonstrate that they employ licensed elevator mechanics; demonstrate that he or she meets or exceeds knowledge and adherence to national standards; and complete a minimum of eight hours of continuing education addressing existing and new local, state, and national codes and standards annually. The legislation also creates a state elevator safety and standards board to regulate the licensing of elevator contractors.

NYSSPE wants a PE exemption from the elevator contractor certification requirement. "We are typically opposed to any specialty certification of professional engineers because they are trained significantly in their areas of expertise," says Kelly Norris, NYSSPE executive director. "PEs knowledgeable about the design and construction of a building are qualified to fit the elevator system to the building's specifications when it is being installed."

NYSSPE is also concerned about the creation and role of the elevator design safety and standards board. The legislation doesn't require the nine-member board to include participation by a licensed architect or engineer, says Norris. The bill only references having "an elevator architectural designer or consultant."

Though the bill failed to move out of the Senate Rules Committee at the end of the legislative session in June, NYSSPE will continue to monitor the situation.

New York Society Backs Use of QBS, PEs on Public Projects – As the New York State Senate considered legislation to modernize the delivery of public projects, the New York State Society of Professional Engineers provided recommendations including the use of qualifications-based selection and the involvement of PEs in critical roles on these projects.

The bill (S. 3035) would permit the use of alternative methods for project delivery in addition to design-bid-build for construction and repairs to state buildings. The use of alternative methods will allow for the use of technologies and best practices to increase efficiency and improve quality and sustainability.

The legislation calls for the use of QBS for selecting professional engineers and registered architects to serve in design-build and manager-at-risk positions. Licensed engineers and architects can serve as the owner's project representative independently from the principal design firm on a project. In addition, a credentialed inspector will provide direct reports to the project owner or the owner's design representative for mandatory inspections and testing.

NYSSPE supports the expansion of QBS for the procurement of design professionals as well as safeguards to protect the public health, safety, and welfare. The New York Society believes the legislation can be improved if the following changes are made:

- Removal of provisions authorizing some government entities to use alternative project delivery without sufficient detail and quality assurance safeguards.
- Inclusion of an amendment to ensure that the scope of practice and responsibility for the design of buildings is consistent with current law for both professional engineers and architects.
- Addition of a provision prohibiting improper blanket indemnification of a general contractor by a design professional. The intent is to insure that parties are held directly accountable for their respective scope of responsibilities owed to a project owner and the public.
- Addition of a quality assurance provision that applies to all design-build contracts, which allows a primary design firm unrestricted access to a project owner or owner's design representative.

The bill's quality assurance safeguards (including use of qualifications-based selection) are similar to provisions included in legislation enacted in December that authorizes state agencies to use design-build for road and bridge projects. The Society recently provided comments on the procurement process for the Tappan Zee Bridge project, which is the first project covered by the new law.

Backing Members, New Jersey Society Steps In To Advocate for Digital Signatures – Businesses and government agencies are relying more and more on technology to increase efficiencies and move away from paper-heavy projects. If you're a professional engineer in New Jersey, however, you'll have to do business the old-fashioned way because state regulations require handwritten signatures and raised seals for engineering plans and documents.

The New Jersey Society of Professional Engineers is working to help PEs who are hindered by the inability to use digital signatures. Not a week goes by when NJSPE Executive Director Joseph Simonetta doesn't get calls from Society members who are dealing with issues arising from the state's rules on seals and signatures. "Increasingly more government agencies are demanding digital filing of plans and engineering documents," he says. "Our statute prohibits anything other than a raised seal and signing every document. It doesn't even allow for scanned signatures."

Simonetta says members often have to educate governmental officials about the fact that PEs can't send documents and plans electronically. "We are in between a rock and a hard place because we have to respect the [law], but at the same time we need to make sure that our members can run their businesses," he says.

The New Jersey State Board of Professional Engineers and Land Surveyors formed a committee this year to study the use of digital signatures for documents. Simonetta and NJSPE members are working with the committee on the issue. One of the board's concerns, says Simonetta, is maintaining the security and integrity of documents because electronic documents can be manipulated by individuals other than the author.

NJSPE may consider a legislative solution next year if the board doesn't move to change the regulation by the end of the year. "We understand that the board must go through a deliberative process, but we have a responsibility to get this done," says Simonetta. "We have to act within a reasonable amount of time for our members."

California Governor Vetoes Bill Targeting Certifications – Professional engineers in California have been dealing with a growing trend: state and local government agencies requiring certifications to provide design services that licensure already qualifies them to perform. The California legislature passed legislation this summer to address the issue, but Governor Jerry Brown vetoed the bill in September.

The legislation (S.B. 975) gave the California Architects Board and the Board for Professional Engineers, Land Surveyors, and Geologists the sole and exclusive authority to license and regulate the practice of engineering. No other licensing requirements could be imposed on an individual licensed to practice engineering other than by regulation. The bill also prohibited a locality; school district; or a state, regional, or local agency from imposing a licensing requirement on a person licensed to practice engineering. The law would have taken effect on July 1, 2013.

Brown acknowledged in his veto statement that the bill attempts to address a growing trend to increase regulatory compliance and agreed that "more 8-hour courses" are not the solution to ensuring compliance. He directed the State Water Resources Control Board, the Air Resources Board, and the Energy Commission to review other methods of ensuring compliance.

The legislation was consistent with NSPE's position (Position Statement 1737) that professional engineering licensure is the only qualification for practicing engineering. The position states that licensed professional engineers may voluntarily have their expertise in a specified field of engineering recognized through an appropriate specialty certification program. The certification must not imply that other licensed professional engineers are less qualified for practice in a particular field or specialty. NSPE and its state societies oppose attempts to enact any local, state, or federal legislation or rule that would mandate certification in lieu of or beyond licensure as a legal requirement for the performance of engineering services.

Over the past few years, a growing number of state agencies and localities have started requiring certifications to submit design plans and reports, says Ken Discenza, P.E., president of the California Society of Professional Engineers. The Water Board requires individuals to obtain a certification to produce a stormwater pollution prevention plan, which every construction site in the state has to follow and post online for public access. Discenza is qualified by licensure to produce these plans, yet, he has to maintain this certification. "In order to submit reports online, I need a [certification] number," he says. "I do this because I have to keep working and I want to be able to support the needs of my client."

The AEC industry pursued legislation because they believe professional licensing boards should have the sole authority in regulating professionals. State and local agencies shouldn't be able to prevent licensed engineers from practicing engineering. "This legislation sought to tell these boards that they could offer certifications and provide training, but it can't require a professional engineer to have this certification in order to file plans," says Discenza. "The board also can't accept plans from individuals who are not correctly licensed."

For example, individuals applying for certification through the Water Board must meet specific qualifications in addition to taking a lengthy course and passing an exam. One qualification for certification is to be a licensed civil engineer, but there are other ways for nonengineers and unlicensed engineers to become certified. "They are requiring additional certification for people licensed to do this type of work and are essentially allowing people, through certification, to perform work that they are not truly qualified to do," says Discenza.

Supporters of the legislation were confident that it would become law. They were taken aback by Brown's veto of the bill. "The governor acknowledged that there is problem, but killing the legislation delays any action for at least another year," says Discenza. "He let the problem continue. It is a direct attack on the licensing of engineers."

Kansas Board Seeks Revision of Licensing Laws – The Kansas Board of Technical Professions is seeking a comprehensive revision of state licensure laws to clarify the responsibilities of the board and the scope of practice of design professionals.

The bill, which will be introduced in the Kansas Legislature's next session in January, revises the definitions of architects, engineers, geologists, land surveyors, and landscape architects to make them more consistent and to clarify the laws governing each group of licensees. These changes, in addition to corresponding updates to the rules and regulations pertaining to conduct of licensees, will help the board better identify violations and deal with enforcement.

The board crafted the legislation with assistance from the [Kansas Society of Professional Engineers](#) and the state chapters of the American Council of Engineering Companies, the American Institute of Architects, the American Society of Landscape Architects, the Geological Society of America, and the Society of Land Surveyors.

Ron Gaches, executive director of KSPE, says the organizations focused on ensuring that the legislation addresses concerns and confusion over responsible charge and scope of practice in a way that would not lead to professional turf wars. There was also an interest in providing greater clarity to the board's role in disciplining individuals who violate licensure laws.

The bill will include the following changes:

- Amends definitions to include providing expert witness testimony and teaching a profession at the college level as professional services;
- Adds definitions of "emeritus" status of a licensee, responsible charge, standard of care, and the inactive status of a licensee; and
- Adds a provision that provides immunity from civil liability for providing information to the board or assisting in the investigation or prosecution of violations of the licensure act.