

NON-CIRCULATING

TEXAS STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS

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**ATTORNEY GENERAL
CONFIRMS COMPETITIVE
BIDDING PROHIBITED**

On May 9, 1984, the Texas Attorney General issued Opinion No. JM-155 as an interpretation of the Professional Services Procurement Act (Art. 664-4, Vernon's Texas Civil Statutes). The opinion reconfirms that no state agency, political subdivision, county, municipality, district, authority or publicly-owned utility of the State of Texas shall make any contract for, or engage the professional services of, any architect or registered engineer, or any group or association thereof, selected on the basis of competitive bids submitted for such contracts or for such services to be performed, but shall select and award such contracts and engage such services on the basis of demonstrated competence and qualifications for the type of professional services to be performed and at fair and reasonable prices.

Opinion No. JM-155 was issued in response to questions posed by the Texas Youth Commission which apparently was in need of guidance as to how to obtain information about fair and reasonable fees for consideration in selecting an architect or engineer. The Commission has developed a questionnaire which it intends to submit to architects and engineers being considered for employment, wherein it solicits information regarding professional fees which engineers or architects would consider appropriate for the particular project. Regarding the questionnaire, the opinion states that Art. 664-4 does not prohibit the inclusion of a question designed to elicit information regarding fair and reasonable fees or cost estimates. *Looking Beyond Opinion No. JM-155.*

The Texas Engineering Practice Act (Art. 3271a, V.T.C.S.) authorizes the Board in Section 8(b) to make rules restricting competitive bidding, and it has

done this in Canon V of the Code of Responsibility for Professional Engineers, specifically in Disciplinary Rule (DR) 5.4. Agreeing with Art. 664-4, the Board believes that competitive bidding for engineering services is not in the best interests of the public.

With the issuance of Opinion No. JM-155, notice should be taken of the fact that: (1) Art. 664-4 prohibits competitive bidding as a public policy; (2) it neither requires the use of a questionnaire nor prohibits one; (3) contracts must be awarded at fair and reasonable prices, but a 'price in hand' is not required before an agency selects an engineer for contract negotiations; and (4) while cost must be one factor considered by an agency before awarding a contract, the law does not require an engineer to submit a binding fee before he is selected and contract negotiations begin.

Disciplinary Rule 5.4 to be Reevaluated

In view of the preceding commentary, consideration is being given to the need of restructuring DR 5.4 under the Board's express authority to adopt rules to restrict competitive bidding by engineers. Until some revision is adopted which might change the current provisions of DR 5.4, and using Opinion No. JM-155 as guidance, engineers who wish to respond to requests for proposals which ask for estimates of the cost for professional services should either not supply the cost data requested, or fully qualify whatever cost information they choose to submit. In this regard, the Board suggests that engineers determine that specific information about competency and qualifications is also being requested and will be a part of the selection criteria. The engineer should stipulate that any price submitted is not a firm price but only an estimate or range proposed for negotiation of a contract after his selection and the final scope of services has been agreed upon.

BOARD RULES CHANGE

Registrants should be aware of the following changes to the Board's rules:

Rule 131.36 which pertained to invalid portions of Board rules was expanded to include a savings provision. The original rule was codified as subpart 'a' and the new provisions were made subpart 'b' as follows:

b. Since individual Board rules are adopted, changed or deleted periodically, each rule herein will apply only to acts occurring on or after the effective date of the rule. An offense committed before the effective date of one or more rules will be governed by the rules existing before the effective date, which rules are continued in effect for this purpose as if these rules were not in force. Any proceeding pending before the Board on the effective date of one or more of these rules is governed by the rules existing before the effective date of these rules, which rules are continued in effect for this purpose as if these rules were not in force.

Rule 131.134 pertaining to the expiration and renewal of certificates of registration was changed for two reasons. The first was to delete the phrase 'as established by the Board, which left the impression that the Board actually set the relatively high penalty fees for late renewals. The Board, of course, does not set the penalty fees but rather the application fee for a license, currently \$50. Section 16 of the Act uses the application fee as a basis for the formula of late penalty fees. As an example, if a registrant's license has lapsed for one day but not longer than 90 days (not three months), not only is the renewal fee owed but one-half of the application fee, or an additional \$25. The Board has no discretion in this assessment

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which has proven to be a surprise to many individuals.

This rule was also amended to incorporate the following provisions to assist in getting annual renewal notices into the hands of each licensee to effect a timely renewal without penalty:

Each registrant shall notify the Board in writing of each change of mailing address as it occurs. The Board will mail a renewal notice to the last recorded address of each registrant in compliance with Section 16(a) of the Act. However, it is the sole responsibility of the registrant to pay the required renewal fee together with any applicable penalty at the time of payment, regardless of whether the renewal notice is received late.

The timely renewal of an engineer's license and practicing with an expired license are personal responsibilities.

Rule 131.166 regarding the staffing of multiple offices was modified in several places to clarify the restrictions on soliciting and performing engineering services at exempted project or field offices. The revised rule now reads:

Multiple Offices. If an engineer or engineering firm maintains offices in more than one locality, each principal and branch office must be staffed with a licensed professional engineer in responsible charge if either the practice of engineering or the solicitation of engineering services is to be allowed as intended by sections 1.2, 8, and 18 of the Act. Exceptions to this rule are project offices established for on-site investigations, inspection or construction or installation for individual projects, and field locations established solely as a base for technicians to gather data and information for subsequent engineering testing, evaluation, and reporting at the principal office where the responsible engineer is assigned; providing, however, that such exempted facilities are appropriately identified and represented as 'project' or 'field' offices, and no offer to perform engineering is made or misleadingly implied through any signs, listings, or claims in connection with such facilities.

Rule 131.105 is new and will deal with examinations. The rule reads as follows:

Examination Analysis. In accor-

dance with Section 14(c) of the Act, a written analysis will be provided to anyone failing an examination provided a written request is received in the Board office during the period the actual examination is retained in the Board files. Further, privileges of viewing examination results, regrading, etc. as permitted by the uniform examination procedures set out by the National Council of Engineering Examiners (NCEE), may also be available provided that any costs associated with regrading by NCEE will be paid by the examinee.

COURT ACTIONS

Since publication of the February 1984 NEWSLETTER, the Board has settled several civil suits. Injunctions were granted against James D. Herbert of Austin and Ronald E. Grubbs of Houston, and a restraining order was issued against John Marvin Martin of Huffman. Injunctive suits against Viro Industrial Sales of Deer Park and Allen Bese of Irving were dismissed due to voluntary compliance and lack of evidence, respectively. Three injunctive suits are still pending in the courts. Two misdemeanor suits have been initiated based on charges filed by the Board for the illegal use of an engineer's seal, and both are pending prosecution by county attorneys. A perjury charge filed by the Board was not accepted by a local district attorney because the applicant for registration left the state.

DISCIPLINARY ACTIONS

On January 18, 1984, the Board suspended, for two years, the Texas license of Florida resident and registrant Ralph R. Clark, P.E. for lending his name and licensure status to a Houston, Texas, corporation held out as an engineering business in violation of the state law and Board rules. Also, reprimands were issued to four registrants, one of which is under appeal.

INFORMATIVE LETTERS SENT TO PUBLIC OFFICIALS

In August of this year, the Board directed letters to various public officials with information about the engineering

practice Act as a reminder of the legal requirements in Sections 19 and 20(f) of the statute for the involvement of registered engineers in public works and private construction, respectively. These informative letters are mailed periodically in an effort to alert new officials to matters which they may not be aware. Each of the 254 county judges received an enclosure with excerpts from the statute. Letters to 1,136 city mayors included a diagrammatic interpretation of the engineering Act relative to when engineers are required in the design and construction of public works and other commercial construction. The superintendents of 1,098 school districts were reminded of their responsibilities under Section 19 of the Act, and of the interpretation of the Act by the Attorney General in Opinion C-791 (1966) regarding school facilities in particular.

Registrants who are employed by or engaged as consultants to cities, counties, school districts and other governmental agencies should be mindful of those provisions in the Act requiring licensed engineers, and the stipulations of Section 15 in the Act and Board Rule 131.138 regarding the sealing of engineering documents.

REFERENCE STATEMENT FORMS FOR APPLICATIONS, REVISED

In an effort to receive enhanced reference statements in support of applications for registration, the reference form has been revised. Noteworthy additions include (1) a letter to the potential reference emphasizing the utmost importance of providing an accurate, detailed and complete response concerning an applicant's engineering experience, and (2) a place for P.E. references to affix their seal. The new form will supersede all previous forms and will be put in use immediately.

WOODY MIZE TO RETIRE AS EXECUTIVE DIRECTOR; KEN BARTOSH IS PROMOTED

Mr. Woodrow W. 'Woody' Mize, P.E. has tendered his resignation as Executive Director of the Board for the purpose of retiring on January 31, 1985. Woody has been an employee of the Board since August, 1973, when he was hired as the Assistant Executive Director, and was

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promoted to the Executive Director's position in November, 1980. The Board accepted Woody's letter of resignation, then nominated and approved the promotion of Mr. Kenneth J. Bartosh, P.E. to be the new Executive Director. Mr. Bartosh has been serving the Board as Director of Special Programs since March, 1982.

NEW BOARD PERSONNEL

Mr. H. Edwin Crow, P.E. was employed by the Board as Director of Special Programs on November 1, 1984, and will assume the former responsibilities of Ken Bartosh who will become the Executive Director on February 1, 1985. Ed is a retiree from Monsanto Company after nearly 28 years, having served as Vice President of their subsidiary, Leonard Construction Company. He is a native of Hamlin, Texas, a civil engineering graduate of Kansas State University, and holds professional engineering registrations in the states of Texas, Illinois, Missouri and Pennsylvania. His wide range of engineering construction experience will be quite beneficial to the staff in its administrative and enforcement responsibilities.

Earlier this year Mr. Kenneth R. Wood was hired as the Board's third investigator after his retirement from the United States Air Force on January 31, 1984. Ken was a Special Agent with the Office of Special Investigations (OSI), and specialized in procurement-fraud investigations.

FOREIGN CHECKS

It is the Board's policy *not to accept* any checks which are drawn on foreign banks. Remittances must be in the form of U.S. cash or a personal, company, or cashier's check or money order drawn on a United States bank. Foreign tender will be returned to the remitter which could result in a license becoming delinquent and thus a penalty fee would be due in addition to the renewal fee.

LANDSCAPE ARCHITECTS NOT EXEMPTED BY TEXAS ENGINEERING PRACTICE ACT

In Opinion No. JM-217, issued by the Attorney General of Texas on October 24, 1984, it was ruled that a landscape architect may not develop detailed plans and

specifications for retaining walls, park shelters, decks, viewing platforms, elevated boardwalks, etc. when their preparation for such structures requires skills which fall within the definitions of the practice of engineering, architecture, or public surveying. Article 249c, V.T.C.S. defines the practice of landscape architecture, which in part states that 'such services concern the arrangement of natural forms, features, and plantings, including the ground and water forms, vegetation, circulation; walks, and other landscape features to fulfill aesthetic and functional requirements but shall not include any services or functions within the definition of the practice of engineering, public surveying, or architecture as defined by the laws of this state.

The opinion pointed out that Art. 249c exempts professional engineers, land surveyors and architects from the provisions of the Act. Landscape architects, on the other hand, are not exempted from compliance with the statutes governing the other three professions. Therefore, as concluded on two prior occasions, landscape architects are not excused, by agreement or otherwise, from the licensing requirements of statutes from which they are not specifically excepted.

Opinion No. JM-217 further noted that the landscape architect in question was employed by a municipality and the provisions of Section 19 (public work) of the Texas Engineering Practice Act requires engineering plans and specifications for work where cost exceeds \$3,000 must be prepared by and the engineering construction supervised by a registered professional engineer.

1985 EXAMINATION INFORMATION

The Fundamental Examination is being offered to seniors and graduate students enrolled in ABET approved engineering curricula; also, graduates with ABET approved engineering degrees; and those required to pass the Fundamentals for registration in Texas.

The Principles and Practice (P&P) Examination is being offered to those currently registered as professional engineers in Texas and those required to pass it for registration in Texas. Group I and II examinations are offered during the fall administration. Group I examinations include chemical, civil (civil/sanitary/struc-

tural), electrical, and mechanical. Group II examinations include aeronautical/aerospace, agricultural, ceramic, fire protection, industrial, manufacturing, nuclear and petroleum. Those who do not have an approved degree and are applying for registration under Section 12(b) will be able to take the P&P examination in Groups I or II in both the spring and fall. Registered engineers should take note, however, that the P&P examination is offered in Group I *only* during the spring administration.

Students are required to test at the schools where they are enrolled and all other examinees may take the examinations at one of the Board's testing sites in Austin, Dallas or Houston. The examinations are scheduled for April 20, and October 26, 1985. The examination application deadline is always two months prior to the examination date.

THE RULES ON SEALS

The use of the seal is only addressed twice in the Act. Section 15 provides that registrants will obtain a seal of the design authorized by the Board, and that 'plans, specifications, plats and reports issued by a registrant shall be stamped with the said seal when filed with public authorities, during the life of the registrant's certificate, but it shall be unlawful for anyone to stamp or seal any documents with said seal after the certificate of the registrant named thereon has expired or has been revoked, unless said certificate shall have been reissued. Section 23 of the Act provides that it shall be a misdemeanor for any person presenting or attempting to use as his own the seal of another.

Based on the limited language above, the Board has had to expound on the matter of the seal in Board Rule 131.138. Several of its eight subsections are occasionally misunderstood, and the following comments are offered as clarification of the respective subsections:

(1) Seals will be of a design and size depicted in Rule 131.138. The seal must bear the preprinted name of the engineer and the certificate of registration number issued to the registrant. With regard to the registrant's name, some confusion exists with the phrase 'or the usual written signature. This is meant to permit the preprinted name to reflect, i.e. 'Jack Armstrong' (a usual written signature) in lieu of John Roy Armstrong (a legal name as might appear on the certificate of reg-

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istration). It does not mean that an actual signature can be written in the space in lieu of the preprinted name of the registrant.

(2) Sealing of work without performing a reasonable, acceptable and necessary consulting service to an architect or other designer or client to be professionally responsible to the client and the public for engineering represented on any given document is the essence of plan stamping; that is, the after-the-fact approval of engineering already done (sizing, calculations, etc.) by unlicensed individuals not in the employ of or subordinate to the sealing engineer [Section 20(c) of the Act].

(3) To prohibit the signing or sealing of engineering work which may endanger the public is clear.

(4) Failure to renew an annual license before its expiration date results in an expired certificate of registration. Though the registrant may have the right of renewal, the license has expired and sealing is illegal under this rule and Section 15 of the Act.

(5) Due primarily to the need to reproduce approved original tracings, sepias, etc. the rubber stamp seal is authorized in lieu of the impression (crimp) seal which is not visible for reproduction purposes.

(6) The use of preprinted seals on blank documents does not meet the intended requirement of sealing an engineer's work product. Decal or 'stick-on' seals are discouraged because they are not easily

controlled by the licensee and they can be peeled off one document and fraudulently placed on another.

(7) If an engineer's seal is lost or stolen, he may choose to replace it with a seal bearing a different configuration of his name as permitted in subsection (1) of this rule, to assist in detecting fraudulent use after it has been discovered missing and reported to the Board. A sample of the replacement seal should be sent to the Board for inclusion in the registrant's permanent file.

(8) Signing and dating of his seal by the engineer is not only an effort to curb the unauthorized use of the seal, but it tends to add significance to the act of sealing (personally certifying, authenticating). Placing the signature and date 'in close proximity to their seal impressions' is meant to preclude a signature across the center of the seal which might obscure the preprinted name and serial number of the engineer, as signatures are not always legible. It is, however, suggested that a portion of the written signature actually cross a part of the seal to discourage illegal copying and transferring of the seal replica to an unauthorized document. Only an actual signature is permitted with an actual sealing on original documents, from which blueprints or other copies may be made. Rubber stamp signatures are prohibited and so are rubber stamp and decal seals with built-in signatures.

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The names of those registrants who

failed to renew their licenses for 1985 before the December 31 deadline will not appear in the January 1, 1985 Roster of Engineers. Late renewals automatically result in the assessment of a penalty fee; practicing and sealing without a current license is violative of the Act and Board rules; and disciplinary actions have ensued in such instances.

Air Conditioning Contractors licensed under Art. 8861, V.T.C.S. (1983), administered by the Texas Department of Labor and Standards can design, install, construct, maintain, service, repair, alter or modify any heating, ventilating or air conditioning product, system or equipment, but they may not perform or offer or attempt to perform any act, service or function that is defined as the practice of engineering by the Texas Engineering Practice Act (Art. 3271a, V.T.C.S.).

After dissemination of the 1982 'Joint Policy Statement' by this Board and the Board of Architectural Examiners to building officials and design professionals, it appears that plans filed for building permits are more frequently being required to bear the seals of architects and engineers on their respective documents.

In January, 1983, John Howerton of Dallas was sentenced to life in prison as a habitual criminal for violation of the State Securities Act. A board investigator testified that Mr. Howerton was not a Registered Engineer as he had reportedly misrepresented himself to investors in fraudulent oil schemes.

FROM
TEXAS STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS
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