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COMPETITIVE BIDDING STILL A HOT TOPIC!

There is a newly adopted Board rule pertaining to competitive bidding for engineering services, which became effective on November 14, 1983. There is also pending release from the Texas Attorney General an official opinion which will deal directly with the advanced submission by architects and engineers of their fees for state projects. See respective articles appearing elsewhere in this NEWSLETTER.

The above-mentioned rule change on competitive bidding deserves some explanation. Ever since the Board proposed to adopt a definitive rule prohibiting competitive bidding by registered engineers, the topic has remained controversial. In August, 1973, the Code of Responsibility for Professional Engineers was promulgated, containing two disciplinary rules (DR) dealing directly with competitive bidding. Of all the proposed rules, DR 5.4 and DR 5.6 in the Code received the greatest share of pro and con input from licensees and other interested parties. The resulting rules were considered adequate to express what was construed at the time to be ''public policy;'' that is, to replace price competition with regulation.

The referenced public policy was already established in both state and federal laws, namely the Professional Services Procurement Act (Art. 664-4, V.T.C.S.), and the 1972 Brooks Bill which amended Title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. §§541-544). The Board defined a competitive bid as ''the publication or communication to a prospective client of a proposal or estimate of the fee or compensation to be received for engineering services, which is published or communicated with the knowledge or reasonable expectation that similar proposals or estimates for said engineering services are being solicited from any other engineer . . .'' This applied equally in the private business sector and for public works, and the Board proceeded to apply this definition to every complaint situation submitted for inquiry.

With existing state and federal laws prohibiting competitive bidding, public work projects were approached with minimal opposition to the Board's definition of a competitive bid. However, suspected infractions of DR 5.4 involving engineers dealing with clients in private businesses presented two considerations apparently not envisioned when DR 5.4 was promulgated.

The first consideration is the fact that company records are not public records, but subject to disclosure only under proper subpoena. While the courts obviously have subpoena power, the Board's subpoena power is limited to administrative proceedings instituted against a registrant under provisions of the Administrative Procedure and Texas Register Act (Art. 6252-13a, V.T.C.S.). Unless the Board had a valid complaint and charge against a registrant for violating DR 5.4, with a hearing ordered for the proposed purpose of suspending or revoking a license, the records of any private business and other identifiable engineer suspected of being involved would be available only on a voluntary basis. This situation left the Board pursuing alleged violations on incomplete and, at best, circumstantial evidence.

The second consideration is the lack of any law which prohibits private enterprises and their consultants from entering into contracts awarded on the basis of competitive bids. This leaves them free to legally go outside Texas for competitive bids to the detriment of Texas engineers. The term ''public policy'' is apparently not universal policy applying to the general public, but rather to public entities funded by public monies. While the rules of an administrative agency generally have the effect of law, those rules must themselves be no less than implicitly founded in law. DR 5.4 became the object of concern to the Antitrust Division of the Attorney General's Office, wherein it was expressed that the Board's definition of competitive bidding may be broader than the grant of authority to the Board to restrict competitive bidding.

At this point, there was growing concern by the Board and within the profession that DR 5.4 was probably not enforceable in the private business sector. A subsequent committee study produced a modification of DR 5.4, to apply only to public works. This in turn evoked significant legal input to also change the Board's definition of competitive bidding, whereby the Board adopted a currently accepted definition from case law. With no intent to encourage bidding in the private sector, the Board has taken the position that clients and engineers are free to refrain from participating in a competitive bidding process if they individually believe that their best interests and those of the public would not be served by such procedures. Expressions of ''inequity'' have already been raised, but the Board has acted in this matter on the advice of legal counsel.

NEW RULE ON COMPETITIVE BIDDING

Under the circumstances related in the previous article, DR 5.4 pertaining to competitive bidding was changed along with other minor modifications to Canon

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V in the Code of Responsibility. The current Canon V is set forth below:

CANON V. The engineer should endeavor to build his practice and professional reputation solely on the merit of his services.

(A) Ethical considerations.

(i) EC 5.1. The Texas Legislature has decreed that professional engineers in this state shall be held accountable by high professional standards in keeping with the ethics and practices of other learned professions. In the learned professions, experience has demonstrated that the public is best served by requiring that practitioners be judged upon the merits of their services. The procurement of professional employment through false, misleading, or deceptive advertising and soliciting opens the door to the self-advancement of the least scrupulous practitioner.

(ii) EC 5.2. The selection process in a learned profession, such as engineering, should be based upon the excellence, quality, and efficacy of professional performance. The U.S. Congress has declared that the federal government will negotiate contracts for engineering services on the basis of demonstrated competence and qualifications, the selection of an engineer being subject to negotiation of fair and reasonable compensation. Reference the Federal Property and Administrative Services Act of 1949, Title IX (40 United States Code §§541-544). The Texas Legislature has recognized that competitive bidding for professional engineering services could result in the selection of the least able or qualified and the most incompetent practitioner for the performance of services vitally affecting the health, welfare and safety of the public. Therefore, it has displaced price competition with regulation for the procurement of engineering services for public entities. (Ref. the Professional Services Procurement Act, Texas Civil Statutes, Article 664-4.)

(iii) EC 5.3. Competition for engineering engagements through unfair and dishonest practices, including the displacement of one engineer by another through fraud, deception, or other devious or undermining strategems, is contrary to accepted professional conduct.

(B) Disciplinary rules.

(i) DR 5.1. The engineer shall not offer, or promise to pay or deliver, directly or indirectly, any commission, political contribution, gift, favor, gratuity, benefit or reward as an inducement to secure any specific professional engineering work or assignment; providing and excepting, however, that an engineer may pay a duly licensed employment agency its fee or commission for securing engineering employment in a salaried position.

(ii) DR 5.2. The engineer shall not solicit professional employment by advertising which is false, misleading, or deceptive.

(iii) DR 5.3. The engineer shall not make, publish or cause to be made or published, any representation or statement concerning his professional qualifications or those of his partners, associates, firm or organization which is in any way misleading, or tends to mislead the recipient thereof, or the public, concerning his engineering education, experience, specializations or other engineering qualifications.

(iv) DR 5.4. It shall be a violation of the Texas Engineering Practice Act for a registrant to submit or request a competitive bid to perform engineering services for any state agency, political subdivision, county, municipality, district, authority, or publicly owned utility of the State of Texas, or for any agency or other entity of the federal government, when the procurement of such professional services is in violation of the state's Professional Services Procurement Act or the Federal Property and Administrative Services Act of 1949, as amended, respectively.

(I) For purposes of this disciplinary rule, the board has adopted the Supreme Court of Texas' definition of competitive bidding, which in part is as follows:

> 'Competitive bidding contemplates a bidding on the same undertaking upon each of the same material items covered by the contract; upon the same thing. It requires that all bidders be placed upon the same plane of equality and that they each bid upon the same terms and conditions involved in all the items and parts of the contract, and that the proposal specify as to all bids the same, or substantially similar specifications.

(Texas Highway Commission v. Texas Association of Steel Importers, Inc. 372 S.W.2D 525, Texas 1963); however,

(II) the engineer shall not be considered in violation of the Act in cases where his engineering services may legally be offered, furnished, or performed as an integral part of research and development programs, construction projects, manufactured products, processes, or devices, which are to be offered, performed, supplied, or obtained on the basis of competitive bids.

(v) DR 5.5. The engineer shall not supplant, nor attempt to supplant, directly or indirectly, another engineer in a particular engagement, after definite steps have been taken toward such other engineer's employment.

ATTORNEY GENERAL TO RULE

The Texas Attorney General has been asked by a state agency to interpret the Professional Services Procurement Act which restricts governmental agencies from awarding contracts based on competitive bids. The Opinions Committee has designated the request as RQ-133, and a published decision is expected soon.

The ruling will be based on the following two questions:

A. Should the Professional Services Act be interpreted to prohibit the inclusion of the following question in the proposed Texas Youth Commission Architect/Engineer Questionnaire:

> Question A 2.12: There are maximum ceilings for professional service fees this agency can pay. What would you consider to be a fair and reasonable fee for providing *complete* architectural and engineering services (programming through construction observation to include one-year follow-up inspection) for this project?

B. If the answer to A above is affirmative, what means are appropriate for making such information available for consideration in selection of an architect or engineer?

Obviously, this Board and all agencies governed by Art. 664-4 will be affected and guided by the impending opinion as there is no known precedent interpretation of the state law on the

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questions asked.

Until the official opinion is rendered, this Board would recommend that registered engineers be cognizant of the ramifications posed by DR 5.4 and the lack of an existing appropriate interpretation of Art. 664-4, and respond prudently to requests for proposals (RFP). It would seem reasonable that a prospective consultant should inquire of the requesting agency if it has prepared its RFP and established its selection criteria in conformance with Art. 664-4 based on legal advice, and then proceed to participate with discretion.

FIRE SPRINKLERS

Under a recent legislative enactment, contractors are required to be registered and licensed by the State Board of Insurance if they are in the business to plan, sell, install, maintain, or service fire protection sprinkler systems. This Act adds Article 5.43-3, Fire Protection Sprinkler Systems, to Chapter 5 of the State Insurance Code. Professional engineers are exempt from registration under the Act, provided they are practicing solely in their professional capacity. Section 11 of the Act prohibits registered contractors from practicing professional engineering except in compliance with the Texas Engineering Practice Act, as amended.

The Board has reviewed the principles involved in the design of fire sprinkler systems and it concluded that these designs cannot be done without applying the engineering principles of fluid flow (hydraulics), material selection, and structural design to arrive at a system to meet the requirements of specifications and codes. The decision that a given design procedure (charts, standards, computer programs, or detailed calculations) is applicable to a specific situation is itself the practice of engineering. Therefore, the design of such systems intended for buildings which are not exempt by Section 19 or 20(f) of the Texas Engineering Practice Act must be done by registered engineers. In this regard, Section 15 of the engineering Act requires an engineer to seal his documents when filed with public authorities. This is construed to mean any and all public offices which may be clients, or represent approving or permitting authorities before the engineering designs can be constructed.

SEAL RULE REMINDER

Board Rule 131.138 pertains to the acquisition and use of the official seal by all registered engineers. This rule provides in part that when a seal is to be affixed to documents as required by Section 15 of the Act, all registrants must place their normal signatures and date of execution in close proximity to their seal impressions. The use of signature reproductions, such as rubber stamps or other facsimilies, shall not be permitted in lieu of actual signatures. The Board intends that the signature and date be applied to at least all original documents, legibly reproducible on all copies therefrom.

NEW BOARD MEMBERS

The Board is now comprised of nine members, six of whom are engineers and three appointed from the general public. New engineer members are W. Clay Roming, P.E. a consulting civil engineer from Eddy, Texas, and Robert Navarro, P.E. structural engineer owner of Robert Navarro & Associates, El Paso. They join public members James Ken Newman, Horizon Health Corp. Dallas, and Ronald M. Garrett, DC, Central Texas Clinic of Chiropractic, Waco. The third public member, attorney Jack M. Webb, Houston, continues to serve without replacement as his term of office expired in September, 1983. Remaining engineer members are Edwin H. Blaschke, P.E. Channelview; Dillard S. Hammett, P.E. Dallas; Frank B. Harrell, P.E. Dallas; and Bill W. Klotz, P.E. Houston.

"ARCHITECTURAL ENGINEER"

On December 31, 1982, the Attorney General issued Opinion MW-568 regarding the use of the title 'Architectural Engineer' by an engineer who is not a licensed architect. The question was posed by the Texas Board of Architectural Examiners based on the representation being made by a registered engineer, but no claim of the actual practice of architecture was presented. Noting the penalty provisions of Section 13 in the Architects Registration Law (Art. 249a, V.T.C.S.), the Opinion states that the use alone of the title 'architect' is not enough. To violate the provision, a non-exempt person must use the title *and* pursue the practice or profession of architecture Registered engineers are exempt from Art. 249a to the extent of performing any act, service or work within the definition of the practice of professionial engineering as defined by the Texas Engineering Practice Act [Sec. 10(b)]. The summary conclusion states: 'Without more, the use of the title 'Architectural Engineer' by one registered under the Texas Engineering Practice Act but not under the Architects Registration Law does not violate article 249a, V.T.C.S.

EXAMINATION INFORMATION

The Principles and Practice Examination (P&P) is being offered to those required to pass it for registration in *Texas*, and to those who are currently registered as professional engineers *in Texas*. The P&P will be offered during the regular examination administration dates (April 14, and October 27, 1984); however, the Board has adopted the policy of the National Council of Engineering Examiners (NCEE) to offer only Group I examinations during the spring administration and Group I and II examinations during the fall administration. Group I examinations include chemical, civil (civil/sanitary/structural), electrical, and mechanical. Group II examinations include aeronautical/aerospace, agricultural, ceramic, fire protection, industrial, manufacturing, metallurgical, mining/mineral, nuclear, and petroleum. Those who are required to apply for registration under Section 12(b) will be able to take the P&P Group I or II examination in both the spring and the fall.

Some persons applying to take an examination have provided false information to establish eligibility for the examination. As of the October 29, 1983 examinations, Board policy is as follows. When it is determined that a person has provided false information to establish eligibility to take an examination for record purposes, the Board will void the results of the examination and so notify the person. The Board will further consider this action as a basis for subsequently rejecting an application for registration as a professional

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engineer in Texas.

New test specifications for the P&P were effective with the Spring 1983 administration. The major change was combining the civil/sanitary/structural examinations. In the past, there were three separate examinations of 20 questions each. The revised examination has 24 questions and includes ample questions in the specific disciplines for an examinee wishing to test only in one discipline. The Board allows an examinee to answer any four questions from the combined examination in each of the morning and afternoon sessions. The new test specifications are available from the Board office.

The Board has endeavored to locate suitable examination facilities in the Houston and Dallas areas in which to administer the examinations on April 14, 1984, and future test dates. Interested applicants should contact the Board office for information regarding the locations established. The application deadline is always two months prior to the examination date.

PENALTIES FOR LATE RENEWALS

Registrants should be aware that the 67th Texas Legislature, *not the Board*, established the severity of penalties for those who do not renew their professional licenses on time. Section 16 of the Act provides no leeway for the Board to make exceptions. The single most contributing factor to late renewals is believed to be the failure of registrants to provide the Board with a timely notification in writing of their change of mailing addresses, whether that be a residence or a business. Too much reliance is apparently placed on the U.S. Postal Service to forward mail. While the Board mails a notice of expiration/renewal date to all licensees from four to six weeks before the expiration date (and up to eight weeks in advance for overseas addresses), the timely renewal of a license remains an individual responsibility.

To assist delinquent registrants from losing their licenses altogether upon the expiration for two years, the Board has initiated a program to trace such individuals by reasonable means within their last quarter year of delinquency by telephoning or sending a certified letter in an effort to effect renewal if such is desired by the involved registrant.

ENFORCEMENT MATTERS

The Board has pursued several legal actions based on staff-conducted inquiries, including injunctions granted against McKain Joseph Dennis in League City; Lonnie D. Strange in Austin; Les A. Bailey and Thomas C. Adams in Kaufman. Injunctive suits were dismissed against Liggins-Clark & Associates in Houston due to bankruptcy; Lester A. Meis in Victoria after belated compliance with the Act; and Roger D. Holiman in Angleton after voluntary compliance. Based on an improperly worded charge by the Travis County Attorney, the court quashed a misdemeanor suit for practicing engineering without a license against Austin architect Leon Chandler. Four injunctive suits are still pending in the courts and one misdemeanor perjury charge is pending consideration by the Harris County District Attorney.

DISCIPLINARY ACTIONS

Since publication of the October 1982 NEWSLETTER, the Board suspended a license for two years, probating 18 months, for improper control over the use of a seal. Ten reprimands were issued for various reasons, including two for practicing with an expired license; four for failure to seal documents filed with public authorities; one for conviction of a bid-rigging incident (non-engineering); one for failure to sign and date a seal affixed by an unlicensed employee; one for a conflict of interest; and one for submitting false information for inclusion in the Board records.

U.S. DOLLARS NEEDED

The Texas State Treasury Department will not accept remittances which do not represent U.S. dollars from U.S. institutions. Therefore, the Board can only accept payments in the form of U.S. cash, a personal or company or cashier's check, money order or other negotiable instrument drawn on a *U.S.* facility such as a foreign exchange bank. Unacceptable payments will be returned by the Board, thus causing a delay of the intended transaction. This has been known to cause a penalty payment for the delayed renewal of a license.

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