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OFFICIAL NEWSLETTER

April 1990

**PROFESSIONAL
DEVELOPMENT PROGRAM
PROGRESSES**

A project initiated by the Board to develop a professionalism and ethics program for engineers has progressed to the point of signing a contract between the Board and the Murdough Center for Engineering Professionalism at Texas Tech University. Development of the program is under the direction of Dr. Jimmy H. Smith, P.E. Director of the Murdough Center. Three objectives of the contract are to develop a program for all universities teaching engineering courses, for self and continuing education by registered engineers, and to possibly be imposed in the disposition of disciplinary actions against registrants by the Board. An advisory committee to the Board has been formed consisting of the Deans of Engineering from seventeen universities, and representatives from engineering organizations and industry, to assist with this program. It is reported that NCEES has a standing committee on professionalism and ethics, which has also contributed to the Murdough Center to assist with the creation of a program. It is opined that this movement will be a national effort before too long.

**COMPETITIVE BIDDING
ISSUES ABOUND**

In 1971 it became illegal for public entities to seek competitive bids for certain professional services, and such competitive bidding is still illegal. Last year the legislature added Section 3A to the Professional Services Procurement Act (Art. 664-4, V.T.C.S.) to provide for a two-step process of awarding contracts to architects and engineers, resembling the federal Brooks Act. The initial selection of the most highly qualified engineer shall be based on the demonstrated competence and qualifications of the

person or firm who is to provide the services, and then, after the public entity makes its selection according to these requirements, it shall proceed to negotiate a contract at a fair and reasonable price.

The staff has been inundated with inquiries about whether certain request for proposals (RFP) are in compliance with the new Section 3A provisions. It would appear that many public entities have not been informed of the enactment or are attempting in various ways to circumvent the intent of separating the cost aspects of the award from the initial selection and ranking phase. Some RFP's make outright request for costs and related data from which cost can be derived; some make no provision for selection and negotiation as a two-step procedure; and some claim that the cost information up front won't be used as a selection factor. While this latter claim may be well intended, cost information could certainly influence an otherwise objective selection and ranking process using the more traditional criteria relative to competence and qualifications.

The Board interprets the new Section 3A to reserve the introduction of fair and reasonable prices until the second, or negotiating, step. As noted elsewhere in this publication, Board Rule 131.155(d) has been amended to reflect this interpretation. The Board contends that under an accepted rule of construction the intent of an amendment to an act can be learned from the language prior to the amendment. In Opinion No. JM-155, the Attorney General interpreted Art. 664-4, before the inclusion of Section 3A, to provide for a one-step selection/award procedure with price as one statutory requirement. There should be little argument that cost is a factor in 'awarding' a contract, but Section 3A intends for that factor to be a part of negotiating a fair and reasonable price with the best firm 'selected' previously by other criteria.

Another issue yet to be resolved involves professional subcontractors. The Board's legal counsel advises that Art. 664-4 only addresses the contract made between the public

entity and the professional designer (architect or engineer) who is awarded the contract. The primary designer signs a contract agreeing to "provide" the desired services. Subcontractors are not a party to the contract regulated by Art. 664-4. They "perform" services which the prime contractor agrees and arranges to "provide. If the prime and subcontractors wish to establish their relationship on competitive bids, such transactions appear to be beyond the purview of Art. 664-4. This interpretation is not shared by all practitioners. At press time the Board will be considering a petition from several engineering organizations to further modify Rule 131.155(d) by encompassing all engineering services associated with a public work project.

**POST-TENSIONED
FOUNDATIONS**

Recent inquiries have been made of the Board regarding the performance of foundations on ground, particularly those reinforced with post-tensioning. The Board has no intention at this time of making further requirements or specific recommendations in the Board Rules for this specialized practice area, since ample portions of the Practice Act already cover these activities.

There have been recent problems of registrants not being conversant with the guide specifications invoked in project documents. Of particular concern are the FHA Data Sheet 79G: "Land Development with Controlled Earthwork, and the PTI manual 'Design and Construction of Post-tensioned Slabs on Ground. If these are included or referred to in the documents, it is imperative that the professional invoking them be conversant and in compliance with their requirements. Both FHA 79G and PTI manual make specific references to the need for site specific detailed geotechnical studies and that the work in the field must be finally certified as in substantial compliance with design intent.

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Thus, the engineer of record (EOR) or his designate must either visit the site at the proper times, or make sure that a qualified professional performs these services. Another possible scenario would be for the owner to retain these services directly via a professional acceptable to the EOR. This requirement is similar to the UBC Special Inspection requirements. At the very least, the owner or client must be made aware that these are not optional items but are required and that it is the EOR's RESPONSIBILITY to see that they occur.

It is recommended that the EOR specify that the contractor furnish him and the owner a certified copy of the Elongation Report of the stressing of the slab tendons. Many of the projects coming to Board attention were designed without soil test, site visits by the EOR or familiarity with the site. It seems imprudent for the EOR to invoke these requirements and then fail to comply themselves. Another issue involves standardized General Notes which are not project specific. It is imperative that the EOR be familiar enough with the project to make detailed, site specific recommendations. To do otherwise is at worst in violation of Board Rules and at least obviates the need for professional services since it infers that the practice of engineering is a "cook book" process, rather than the learned art that it is.

NOTE: While the design of a private residence is exempt under Sec. 20(f) of the Engineering Practice Act, local ordinances and other authorities often require the engineering of residential foundations by a P.E. The registrants are then professionally obligated by the Act and rules to design and document such foundations properly.

RULE CHANGES

The following Board Rules have been amended since the publication of Newsletter No. 15 in July, 1989: 131.54, 131.55, 131.71, 131.73, 131.81, 131.92, 131.114, 131.120, 131.137, 131.138, 131.155, and 131.166. Rule 131.133 has been proposed for amendment as published in the Texas Register on February 13, 1990, and is expected to be adopted at the April Board meeting.

RULE 131.54: This rule pertains to general application information and was amended by adding the following two subsections: '(c) Applicants must be able to speak and write the English language. An applicant who is a native of a country in which the primary language is other than English, shall be re-

quired to include with his application evidence that the applicant has passed a TOEFL (Test of English as a Foreign Language) with a score of 550 or above, and a TSE (Test of Spoken English) with a score of 200 or above. These tests shall have been taken within two years of the time the application is submitted if the applicant has lived in a non-English speaking country for more than two consecutive years after initially taking the test. (d) If in the review of an application or in other communications with an applicant, other than an applicant specified in subsection (c) of this section, the board or the executive director finds there is sufficient reason to doubt the English speaking or writing ability of the applicant, the applicant may be required to take the same tests as specified in subsection (c) of this section.

RULE 131.55: This rule pertains to applications for registration from nonresidents, and paragraph (2) therein was amended by replacing the term "reciprocity" with the term "nonresident" to be consistent with Section 21 of the Act.

RULE 131.71: This rule pertains to applications for registration. It was amended by making the existing rule subsection (a), and adding the following two subsections: '(b) The Act, §22, authorizes the board to take a disciplinary action or deny an application for registration for any documented instance of retaliation by an applicant against an individual who has served as a reference for that applicant. (c) The Act, §22, effective September 1, 1989, provides for the confidentiality of statements made by a reference for an applicant whereby it is privileged only to the board or employees or agents involved in the registration process, and not subject to discovery, subpoena, or other disclosure.

RULE 131.73: This rule pertains to communications with references and was amended in subsection (c) simply to refer to Reference Statements rather than to the Reference Statement Form.

RULE 131.81: This rule pertains to the evaluation of engineering experience claimed in an application for registration, and it was amended in paragraph (16) to delete the term "reciprocity" and to reflect as follows: '(16) Non-resident applicants applying under the Act, §21, must have met the experience requirements of either §12(a) or (b) at the time their out-of-state registration being used as a basis for application was granted.

RULE 131.92: This rule pertains to foreign degrees and subsection (a) (3) was amended to refer to registration by nonresidents rather than to reciprocity.

RULE 131.114: This rule pertains to rejected (denied) applications and it was amended to enumerate the five causes for such action by the Board: '(1) any fraud or deceit in attempting to obtain a certificate of registration; (2) any documented instance of retaliation by the applicant against an individual who has served as a reference for that applicant; (3) a violation of the Act or a board rule; (4) unfavorable conduct bearing directly on the applicant's character and reputation; or (5) criminal activity as set out in §131.120 of this title (relating to Criminal Convictions).

RULE 131.120: This rule pertains to criminal convictions, and subsection (a) therein was modified to make reference to Texas Civil Statutes, Articles 6252-13c and 13d. Subsection (e) was also modified to read as follows: "The application of any applicant deemed ineligible for registration because of a prior criminal conviction will be proposed for rejection and the applicant will be provided the following information in writing: (1) the reason for rejecting the application; (2) notice of the administrative appeal available under §131.118 of this title (relating to Personal Appearances for Rejected Applicants); and (3) notice that upon exhaustion of the administrative appeal, an action may be filed in a district court of Travis County for review of the evidence presented to the board and its decision. The person must begin the judicial review by filing a petition with the court within 30 days after the board's decision is final and appealable.

RULE 131.133: This rule pertains to certificates of registration, and subsection (b) enumerates the branches of engineering for which there is an available principles and practice examination through the National Council of Examiners for Engineering and Surveying (NCEES). Subsection (b) is being amended to include as paragraph (17) the designation of '(X) control systems. Both subsections (b) and (c) are being changed to reflect the recent name change for the Council as reflected above.

RULE 131.137: This rule pertains to disciplinary actions against registrants and was amended to establish the manner in which a consent order may be offered to a registrant as an expedient informal disposition of alleged infractions; to substitute the term "censurable" for 'guilty' to add two paragraphs to provide for reinstatement of a revoked registration, and for appeal of a suspension or revocation action in the courts; and to clarify in subsection (a) (5) that an informal reprimand will not be publicly disseminated but "will only be noted in the registrant's file and board minutes.

As an additional means of disposing a disciplinary matter, a new paragraph (2) of subsection (f) was added to accommodate evident and undisputed violations: 'if facts and circumstances of a particular case appear to warrant disposition by offering the registrant a consent order, the executive director on advice of the staff or counsel and agreement of one board member may approve of such offer in lieu of an informal conference. Any such consent order may be accepted or rejected by the board. If the registrant declines such an offer, or if the board rejects it, the procedures in paragraph (1) of this subsection will be followed.' The previous paragraphs (2) and (3) were renumbered (3) and (4).

Subsection (g) pertains to the handling of criminal convictions, and two paragraphs were added as follows: '(3) Any registrant whose certificate of registration has been revoked under the provisions of this subsection will be advised in writing of the right to apply for reinstatement of registration (not as a first-time applicant under the Act, §12, or as a reregistrant under the Act, §16). Reinstatement will be considered by the board in accordance with the criteria established in §131.120 of this title (relating to Criminal Convictions), and Texas Civil Statutes, Article 6252-13c, §4(a)-4(c) (7). (4) Any registrant whose certificate of registration has been suspended or revoked under the provisions of this subsection, who has exhausted administrative appeals, may file an action in a district court of Travis County for review of the evidence presented to the board and its decision. The person must begin the judicial review by filing a petition with the court within 30 days after the board's decision is final and appealable.

RULE 131.138: This rule pertains to engineers' seals and the following amendments have been made: Paragraph (2) has been modified to read as follows: "The engineer shall only seal work done by him or under his responsible supervision, except as relates to standards in paragraph (9) of this section. Paragraph (8) was modified to read as follows: "The registrant shall affix his seal, sign his name, and place the date of execution, only on engineering documents that have been issued by the registrant as completed for an intended purpose which should be specified prominently adjacent to the seal. Documents considered as incomplete by the registrant may be released temporarily for interim review and do not need to have the registrant's seal or signature affixed, but shall be dated; bear the responsible engineer's name,

serial number, and 'P.E. designation; and be clearly labeled to indicate the documents are for interim review and not intended for construction, bidding, or permit purposes. The use of signature reproductions, such as rubber stamps, or computer generated or other facsimiles shall not be permitted in lieu of actual signatures.

Paragraph (9) was added to cover the following: "The engineer shall affix his seal or professional identification as stipulated in paragraph (8) of this section on each sheet of engineering plans, drawings, and other separate engineering documents, and on the title or contents page of engineering specifications, reports, studies, and similar engineering work products considered to be bound volumes. Registered employees of the state, its political subdivisions, or other public entities are responsible for sealing their original engineering work; however, such registered employees engaged in review and evaluation for compliance with applicable law or regulation of engineering work submitted by others, or in the preparation of general planning documents, a proposal for decision in a contested case or any similar position statement resulting from a compliance review, need not seal the review reports, planning documents, proposals for decision, or position statement. Not included in the sealing requirements of this paragraph are standards and general guideline specifications which should be labeled as such by and bear the identity of the publishing entity, except that when an engineer elects to use such standards and incorporate them into his work he must seal each of those which he uses, or seal an integral design/title/contents sheet which authorizes and directs the inclusion of each enumerated standard, and become responsible for their use in the end product.

RULE 131.155: This rule is entitled Professional Practice and Reputation. Subsection (d) therein pertains to restrictions against competitive bidding. The Board has adopted modified language in paragraph (1) as a result of 1989 legislation which amended the Professional Services Procurement Act to require a two-step negotiated architectural or engineering contract. Paragraph (1) now reads as follows: "For purposes of this section, the board considers competitive bidding to perform engineering services to include the submission of any monetary cost information in the initial step of selecting qualified engineers. Cost information or other information from which cost can be derived must not be submitted until the second step of negotiating a contract at a fair and reasonable cost.

RULE 131.166: This rule pertains to multiple offices maintained by registrants wherein paragraph (2) covers situations where a branch office may not have a full-time engineer. Such a branch may not do engineering work for the public unless under subparagraph (A) a responsible engineer of the company meets the requirements of Rule 131.162; and under (B), unless "the responsible engineer personally affixes his signature, Texas Professional Engineer's seal, and date to all reports, plans and specifications, or other engineering documents issued by the office, or as otherwise required by §131.138 of this title (relating to Engineer's Seals).

TESTING LAB ACTIVITIES

Questions originally posed to the Board in 1977 by the Texas Council of Engineering Laboratories (TCEL), relative to lab activities being in conformance with the Engineering Practice Act, were answered and have again been updated at TCEL request. Space does not permit repeating the questions and complete answers, but the essence of the Board's positions are herewith summarized.

When testing and inspection services are required to monitor materials used in construction, the testing, inspecting and reporting of interpretations and evaluation of data and engineering recommendations are to be done or supervised, sealed and signed by a P.E. Authorities are Sec. 15(b) of the Act, and Rule 131.138(8). The Professional Services Procurement Act and Rule 131.155(d) restrict competitive bidding for such engineering services by public entities. The Board would have authority to investigate infractions based on probable cause and take disciplinary action if a registrant violated the cited restrictions. State and federal laws and the Board rule do not apply to the private sector of business. Although not recently, several registrants have been disciplined for bidding activity.

PRIVATE UTILITIES BALK AT BOARD'S INTERPRETATIONS

In the last Newsletter, under the heading "Utilities' Exemption Believed to be Misconstrued, a ten-point interpretation of Section 20(h) of the Act was reported, having been disseminated to over 3,000 applicable entities throughout the state. Reaction has been mixed, but in some quarters opposition

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has been quite verbal through written retorts and testimony at public committee meetings. The center of controversy is interpretation number six which states that "all public rights of way and other easements on private property are the property of others. The gist of the opposition is that the legislature in 1965 intended to give industries total exemption from the engineering Act in matters involving their own facilities, even when situated on legal easements. The Board contends that a more literal intent is supported by engineers and their legal counsel at the time of introducing the legislation whereby industries were not to have a blanket exemption from the Act as evidenced by the careful and comprehensive wording of Sections 20(g), (h), and (1) of the Act. Legal briefs from opponents are under advisement by the Board's legal counsel.

**COMPUTER SNAFOOS
THE 1989 ROSTER**

The January 1, 1989, Roster of Engineers was published with the aid of computerized registration records. Three blocks of about 40 names each were inadvertently omitted and went undetected until concerned (omitted) registrants notified the Board. The missing names should have appeared alphabetically between the following pairs of names:

- Hausken, Thomas Ray
- Hawks, Victor Roland, Sr.
- Haynie, Timothy Ewing
- Healey, Anthony John;
- Kelly, Robert M. Jr.
- Kenchington, Henry Sidney.

Anyone having questions about any registrant within these groups should call the Board office.

WHERE ARE YOU?

Everyone has to be somewhere! While you may know where you are and how you can be reached, the Board frequently has difficulty locating you to let you know your license is about to expire. When you next renew your license, PLEASE provide your business telephone number in the appropriate space. After that, if you should change your residence and the next renewal notice is returned to the Board as undeliverable, we'll have a better chance of locating you through your business number.

DISCIPLINARY ACTIONS

The Board took the following disciplinary actions since the last Newsletter: It revoked the registration of Joseph W. Gillespie, P.E. for his felony conviction and incarceration for tampering with a government document. It issued Earl F. McKinney, P.E. a three-year probated suspension of his license after a formal hearing on several charges dealing primarily with the questionable use and control of his seal. It issued Horacio Castillo, P.E. a one-year probated suspension for sealing documents on an expired license, beyond his expertise, and which aided the unlicensed practice of others. It suspended the license of Merlin G. Martin, P.E. for one year, with 9 months probated, for seal infractions and providing false information to two state agencies. It issued six-month probated suspensions to Garland C. Pool, Jr., P.E. and Jesse P. Rodriguez, P.E. for various seal infractions. It issued a formal reprimand to Edward H. Fox, P.E. for practicing and seal-

ing seven documents on an expired license; and issued two formal reprimands to Curtis Emerson Neal, Jr. P.E. for failure to contact a design engineer and for providing a misleading letter to a city official.

NEW BOARD APPOINTMENTS

James K. 'Jim' Wilhelm, P.E., of Houston, has been appointed to the Board to replace Mr. W. Clay Roming, P.E. whose term expired last September. Mr. Wilhelm is a graduate of the University of Texas at Austin, and is currently the president of the consulting firm of Lockwood, Andrews and Newnam, Inc.

Dr. Earnest F. Gloyna, P.E. was appointed to the Board as the replacement for Robert Navarro, P.E. whose term expired. Dr. Gloyna received his BSCE degree from Texas Technological College, his MSCE degree from the University of Texas at Austin, and his Doctorate of Engineering degree from Johns Hopkins University. He is the former Dean of Engineering at the University of Texas, and is currently Professor of Civil Engineering & Bettie Margaret Smith Chair in Environmental Health Engineering.

James G. Abbee of Bedford, Texas has been appointed as a public member of the Board to replace Charles Finnell whose term expired. Mr. Abbee is a retired Air Force Colonel with 30 years of service, and is currently a consultant in marketing and public relations. He is also serving as a Senior Staff Member, Defense Secretary's Commission on Base Realignment & Closure. He holds a BA degree from the University of Oklahoma, and an MS degree in Communications from The American University.

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