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Washington Oregon Alaska Idaho

NEW STRUCTURAL ENGINEERING REGISTRATION REQUIREMENTS IN WASHINGTON STATE

In May 2007, RCW 18.43.040 was amended by the Washington legislature to require that an engineer be specially registered to provide structural engineering services for "significant structures." A significant structure includes:

- (1) Hazardous facilities containing explosives that would endanger the public if released;
- (2) Essential facilities such as hospitals, fire and police stations, structures holding water or fire suppression materials, emergency vehicle shelters and garages, standby power generating equipment, government communications centers, aviation control towers, and buildings having critical national defense functions;
- (3) Structures exceeding 100 feet in height;
- (4) Buildings of five stories or more;
- (5) Bridges with spans of more than 200 feet;
- (6) Piers with a surface area of more than 10,000 square feet; and
- (7) Buildings where more than 300 people congregate in one area.

The registration requirement takes effect July 1, 2008. The Board of Registration for Professional Engineers and Surveyors can waive the registration requirement for any individual until December 31, 2010 if (a) on January 1, 2007, the engineer was registered as a P.E. and (b) the engineer can demonstrate to the Board's satisfaction by January 1, 2009, that he or she has sufficient experience in structural engineering of significant structures to warrant an exemption.

Rules on Gifts and Gratuities for Public Works Contracts

Because many design professionals are engaged to work on government projects or on projects involving federal funds, it is important to keep in mind that there are several federal and state laws, as well as professional guidelines relating to the making of gifts to public clients.

RCW 18.43.105(1) allows the Board of Registration for Professional Engineers and Land Surveyors to take action against any engineer for "offering to pay, paying or accepting, either directly or indirectly, **any substantial gift**, bribe, or other consideration to influence the award of public work." The regulations found at WAC 196-27A-030 explicitly define the following acts as misconduct in the practice of engineering and/or land surveying:

- Soliciting or accepting gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with clients or employers in connection with work for which the registrant is responsible.

In addition, there are several federal and state criminal laws that make it illegal to give gratuities to public officials. 5 U.S.C. § 7353 lays out laws relating to gifts to federal employees. 18 U.S.C. § 201 makes bribery of any public official a crime. 18 U.S.C. § 666 makes it a crime to commit bribery on any project receiving federal funds. RCW 9A.68.010 makes bribery of a state official a crime.

The Code of Ethics for Engineers, published by the National Society of Professional Engineers, contains similar guidelines relating to gifts or gratuities. Section II.5.b of the Code prohibits the offering or so-

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Contractual Indemnification—Are there limits?

When we review design professional contracts, one of the major provisions of concern is the indemnity clause. These contract clauses are usually the most difficult aspect of a proposed agreement for design professionals to understand.

The Washington anti-indemnity statute provides some protection from over-reaching indemnity obligations. Indemnity obligations from claims arising out of injury to persons or from damage to property should be limited to the negligence of the design professional. However, the risk of these kinds of claims forms only a small part of the risks faced by design professionals. By far the most common indemnity risks are for **economic losses** that all too frequently arise in the construction process. **Economic loss** claims against design professionals can arise when there are cost overruns on a project and the Owner, when faced with claims for extra compensation from contractors, seeks contribution from the design team members. **Economic loss** claims can also arise when an Owner is faced with repairs of construction defects and the Owner seeks contribution for these cost exposures from the designers.

Owners frequently ask design firms to indemnify them from “all claims relating to the work performed under this agreement.” This is the broadest form of contractual indemnity possible and includes indemnity for **economic losses**. It does not require that the design professional be at fault or even that the design professional cause the loss!

Is an indemnity obligation for economic loss that does not require “fault” or “causation” an enforceable duty?

We do not have a definitive case in Washington on this issue in Washington. Older Supreme Court cases seemed to require an

overt act or omission on the part of the party from whom indemnity was sought or the indemnification obligation would not arise. Mere presence on the job site, “inculpably performing its obligations, standing alone,” would not constitute a cause of loss and thus not trigger the duty to indemnify.

More recent cases seem to suggest that if the parties contract for broad form indemnity in the **economic loss** context, the courts will enforce the clause. In *MacLean Townhomes v. America 1st Roofing, 153 Wn. App. 828 (2006)*, a condominium defect case, the Court held that a broad form indemnity clause for **economic loss** is not prohibited by law.

What should a design firm do when faced with a demand to agree to a broad form indemnity clause for economic loss claims?

Be sure you understand what you are being asked to agree to. Personnel with contracting responsibility should be trained to spot these clauses.

This broad form contractual indemnity risk for **economic losses** is not insurable under professional liability policies. Most insurance carriers and brokers will review these contract terms and provide a letter that the proposed indemnity risk is certainly not insurable.

Professional trade associations should be alerted when these clauses are being sponsored by various owners’ groups. Policy level discussions with state and local governmental contracting agencies and with Owners’ trade organizations may be in order.

When all else fails, it may be necessary and appropriate to just say “NO.”

GIFTS AND GRATUITIES (cont’d)

liciting **any contribution** to influence the award of a public works contract, or **which may be construed by the public as having the effect or intent of influencing the awarding of a contract**.

How many times have you offered to pay for a public client’s lunch or for that cup of coffee while you were discussing an existing or upcoming project? Are these permissible gifts or illegal gratuities or bribes?

Here are some basic guidelines to gifts and gratuities, gleaned from the rulings of the National Society of Professional Engineers Board of Ethical Review:

1. Never give cash to a government employee.
2. Avoid even the appearance of a conflict of interest. When attending a professional seminar, avoid sharing accommodations or split-

ting travel costs with friends when those friends work for a government agency that is in a position to award professional assignments.

3. When hosting a hospitality suite at a conference, refrain from promoting your services or those of your firm to public employees who drop by.
4. Sponsoring a buffet lunch or cocktail reception in conjunction with a continuing education seminar or a professional convention is considered permissible.
5. But avoid “talking shop” to a public employee at social or professional gatherings where you or your firm are sponsoring the event.

If you have further questions, we invite you to read our White Paper, “Criminal Enforcement and Regulatory Compliance for Design Professionals: Understanding and Managing the Risks” (2006), available at www.skellengerbender.com.

UPCOMING EVENTS

14th Annual Washington Construction Law Seminar, September 20-21, 2007, featuring attorneys David K. Eckberg and Kara R. Masters, who will speak on “Environmental Considerations.”

Register at
www.theseinargroup.net

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