

Idaho Board of Licensure of Professional Engineers And Professional Land Surveyors

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NEWS BULLETIN

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INTRODUCTION

This NEWS BULLETIN is distributed a minimum of twice per year by the Idaho State Board of Licensure of Professional Engineers and Professional Land Surveyors to inform the public and the State's Professional Engineers and Professional Land Surveyors of those events which significantly affect the professions.

LEGISLATURE PASSES BILLS TO AMEND LICENSING LAW AND PLATTING LAW

The 2012 session of the Idaho Legislature has passed, and Governor C.L. "Butch" Otter has signed House Bill No. 374 (<http://www.legislature.idaho.gov/legislation/2012/H0374.htm>) which includes several changes to Idaho Code Title 54, Chapter 12, the Engineers and Surveyors Licensing Law. The changes will accomplish a number of objectives:

- Require that only Idaho residents be assigned to examinations for initial licensure or certification. Exceptions would include military personnel stationed in Idaho, students at Idaho colleges and universities, and persons employed full-time in Idaho;
- Allow the Board to postpone action on an application from an applicant against whom disciplinary charges are unresolved in another jurisdiction;
- Allow the Board to postpone release of scores to candidates on an examination if there is any unresolved examination irregularity involving the applicant;
- Modify the application process to allow digital applications in the future.

The Legislature also passed, and Governor C.L. "Butch" Otter has signed House Bill No. 375 (<http://www.legislature.idaho.gov/legislation/2012/H0375.htm>) which allows a substitute professional land surveyor to take over responsible charge of the delayed placement of interior lot monuments in a subdivision if the original professional land surveyor is, for any reason, not able to do so, provided the substitute surveyor is employed by the same business entity.

Both bills were supported by the Idaho Society of Professional Engineers, the Idaho Society of Professional Land Surveyors and the American Council of Engineering Companies – Idaho.

ADMINISTRATIVE RULE CHANGES GO INTO EFFECT

Upon adjournment of the 2012 Session of the Idaho Legislature a number of changes to the Board Administrative Rules went into effect. The amendments received the support of the Idaho Society of Professional Engineers, the Idaho Society of Professional Land Surveyors and the American Council of Engineering Companies – Idaho. They are summarized below:

The Rules of Procedure, IDAPA 10, Title 1, Chapter 1(<http://adminrules.idaho.gov/rules/current/10/0101.pdf>) were amended to

- Allow individuals to select retired status at any time upon request;
- Amend the application submittal deadlines to accommodate converting some examinations to computer-based format;
- Eliminate the need for engineer intern and land surveyor intern applicants to provide references on their examination application;
- Adopt national standards for the evaluation of non-accredited engineering programs.

The Rules of Professional Responsibility, IDAPA 10, Title 1, Chapter 2 (<http://adminrules.idaho.gov/rules/current/10/0102.pdf>) were amended to

- Provide for an exception to the rule requiring license holders to notify other license holders of the discovery of material discrepancy if the licensee is working in the employ of an attorney as an expert witness;
- Provide for a two-staged process of notification of discovery of material discrepancy, first informally, then in writing, and make notification to the Board optional rather than mandatory if the discoverer does not receive a response that answers the concerns of the discoverer;
- Reduce from sixty (60) to twenty (20) the number of days which a license holder has to respond to notification of discovery of a material discrepancy by another license holder;
- Establish a limitation on the amount of time that can pass following discovery of an event for the Board to accept an affidavit of complaint.

The Rules of Continuing Professional Development, IDAPA 10, Title 1, Chapter 4 (<http://adminrules.idaho.gov/rules/current/10/0104.pdf>) were amended to

- Clarify that routine job assignments are not considered qualified activities for continuing professional development purposes;
- Allow newly licensed persons to carry forward professional development hours earned during the biennium prior to the first renewal following the issuance of the license;
- Allow continuing professional development credit for authoring each chapter of a book;
- Allow professional development hours for peer review of published technical or professional paper, articles or book chapters;
- Extend the same exemption from compliance to civilians deployed with the military as is extended to the military;
- Allow license holders who are residing outside the United States to earn the required professional development hours upon return to the United States.

GUEST ARTICLE

The following guest article is reprinted from the February 2012 Association of Idaho Cities Newsletter and is presented here for information purposes only. It should not be interpreted as the opinion of the Board of Licensure of Professional Engineers and Professional Land Surveyors.

Procurement of Professional Engineering and Land Surveying Services

by

Tim Haener, P.E.

ACEC Idaho - Government Affairs Chairman
QBS Facilitators Council - Member

The following Q&A covers some common issues related to the procurement of professional engineers (PE) and professional land surveyors (PLS) for public works projects. Many thanks go to Dave Curtis, Executive Director of the Idaho Board of Professional Engineers and Land Surveyors, and Teri Ottens, Director of the QBS Facilitators Council for their review and input.

Please consult your City Attorney for any specific questions or other related information.

Question:

Is hiring a PE required for the design and construction of a City's public works project?

Answer:

Yes, per Idaho Code, it is a requirement to have a PE prepare the plans, specifications, and estimates, and to review the construction process.

54-1218. Public work. It shall be unlawful for this state, or for any county, city, school district, irrigation district, drainage district, highway district, or other subdivision of the state, having power to levy taxes or assessments against property situated therein, to engage in the construction of any public work when the public health or safety is involved unless the plans and specifications and estimates have been prepared by, and the construction reviewed by a professional engineer.

Question:

Is hiring a PLS required for City land surveying work?

Answer:

Yes, Idaho Code requires all land surveys for political subdivisions (Cities) to be performed by a professional land surveyor.

54-1229. Legal Survey of Land. No survey of land, or plat or subdivision shall be legal unless made by or under the responsible charge of a professional land surveyor. All land surveys made under the authority of the state, or of any political subdivision of the state, must be performed by a professional land surveyor.

54-1202(9). Professional Land Surveying...mean(s) responsible charge of surveying of land to determine the correct boundary description, to convey, to establish, or reestablish land boundaries, or to plat lands and subdivisions thereof...

Question:

How does a City procure the services of a professional engineer or professional land surveyor?

Answer:

A City must follow a Qualifications Based Selection (QBS) process that is delineated in Idaho Code 67-2320. The preamble of that section reads as follows:

67-2320. PROFESSIONAL SERVICE CONTRACTS WITH DESIGN PROFESSIONALS, CONSTRUCTION MANAGERS AND PROFESSIONAL LAND SURVEYORS. (1) Notwithstanding any other provision of law to the contrary, it shall be the policy of this state that all public agencies and political subdivisions of the state of Idaho and their agents shall make selections for professional engineering, architectural, landscape architecture, construction management and professional land surveying services, including services by persons licensed pursuant to chapters 3, 12, 30 and 45, title 54, Idaho Code, on the basis of qualifications and demonstrated competence and shall

negotiate contracts or agreements for such services on the basis of demonstrated competence and qualifications for the type of services required at fair and reasonable prices.

The code referenced above provides further details about the QBS process. In summary, for contracts in which the fee is anticipated to be greater than \$25,000, the procedure requires the City to establish selection criteria (not based on price) and solicit statements of qualifications from interested PE/PLS's through a published notice. The City then reviews the proposals and ranks them in order of qualifications. The City and the highest-ranked firm then finalize the scope of services and negotiate a suitable fee. If they cannot agree, the City can then terminate negotiations and undertake discussions with the next highest ranked firm. For contracts with an anticipated fee less than \$25,000, the City does not have to advertise the solicitation but must still select the PE/PLS based on demonstrated competence and qualifications.

Question:

Can a City ask for billing rates or overhead multipliers in the QBS process?

Answer:

Yes, but they cannot be used in ranking the PE/PLS firms. Note that the City also cannot ask for information that could be used to formulate a "bid" for services, such as "billing rates" plus "estimated hours".

Question:

Why can't a City select a PE/PLS based strictly on price?

Answer:

For professional services where the life, health and safety of the public are paramount, it is in the best interest of the public to select based on qualifications. A common analogy is that you "wouldn't hire your legal advisor based on lowest price". Lowest price is usually contrary to experience and qualifications.

Secondly, often a City knows it needs to undertake a project, but does not know all the steps that might be involved in order to successfully accomplish that project. Selecting the most qualified firm and then negotiating a detailed scope of services gives both sides an opportunity to understand in detail what will be expected of the PE and of the City.

Lastly, the qualifications of the PE can greatly impact the overall project price. The design fee for a project is typically only five to 15 percent of the construction budget, and much less than that based on the project's life cycle cost (including operation and maintenance, etc.). The big dollars for the City are in construction and operation. A design performed by the most-qualified PE firm (using their experience and innovation) has a high probability of lowering construction bid prices versus the low price engineering alternative. Moreover, the experience of the PE as it relates to the construction process is also very valuable in mitigating claims, change orders, and delays. Finally, the more qualified PE will find ways to make the project more effective to operate and maintain – lowering the overall life-cycle cost. These probable savings through the use of QBS will far outweigh the relative minor savings in engineering fees if selection were based on lowest price.

A recent study proved that QBS selection of PE is more cost and time-effective than a "low bid" approach. Commissioned by the American Public Works Association (APWA) and the American Council of Engineering Companies (ACEC) and performed by independent researchers from Georgia Tech and the University of Colorado, the 2009 study concluded the following:

- The average amount of change orders versus construction costs was three percent for QBS projects versus ten percent for cost-based selections.
- The average construction schedule growth was 8.7 percent on QBS projects versus ten percent for non-QBS projects.
- Owners rated their satisfaction of projects that had QBS selection at 93 percent "high" or "very high".
- QBS projects addressed the concerns of more stakeholders in the process than cost-based procurements.

More information on this study can be found at:

<http://www.acec.org/advocacy/committees/qbs.cfm>

QBS is so vital to the protection of the public life, safety, and welfare that it is mandated for all federally funded projects through the Brooks Act of 1972 (Public Law 92-152). APWA likewise encourage the use of QBS for selection of design professionals.

Question:

Can a City hire a previously-selected PE/PLS for a subsequent project related to the original project?

Answer:

Yes, the City may choose to hire the same PE/PLS for an “associated or phased project” without going through a new QBS selection process. If the City wishes to hire a different engineer or land surveyor (after the first project or if the current contract is terminated with their existing PE/PLS) they must conduct another QBS selection process.

Question:

How does a City select for on-call, “City Engineer” and/or “City Surveyor” services that aren’t related to a single project and don’t involve a specific scope of services?

Answer:

The City would go through the QBS process and rank firms based on qualifications. The City would then negotiate rates that are acceptable. If negotiations fail, then the next highest ranked firm would commence negotiations and so on. A firm selected as City Engineer and/or City Surveyor may do any assignments for the City for which they are qualified. If the City wishes to hire another firm for a specific project, they must go through a separate QBS process.

Question:

Can a City create a pre-approved “roster” of engineers and/or land surveyors that they can choose from for future projects that are not yet known?

Answer:

Yes, the City would solicit statements of qualifications through the QBS process. The solicitation may include several categories of services with rating criteria for each. The City would then review the proposals and rank the responding firms. Once the firms are ranked, an “approved list” of firms would be created for each category (usually no more than five firms per category).

When a project comes up in a category, the City would assign that project to the firm on the approved list that they think can best execute the project. Then they would negotiate a scope of work and fee. If negotiations fail, the City can then choose another firm from the approved list to negotiate with. Another option would be to negotiate the first project with the highest ranked firm on the approved list and the second project with the second firm, and so on.

Often on larger projects, the City may request a “mini proposal” from several of the firms on the preapproved list to garner additional QBS information related to that project – and then award that project based on the results of the mini proposal.

Question:

Are PE/PLS’s required to follow the QBS process? What happens if they submit a price with their statement of qualifications or otherwise give a price for services during a solicitation?

Answer:

The QBS statute regulates Cities and not professional engineers or professional land surveyors. However, PE/PLS Rules of Professional Responsibility require license holders to not subvert the process or be complacent in a violation of State Law. In addition, specific Rules of Professional Responsibility require that a PE/PLS “not submit information that constitutes a bid for services requested” under a selection process required by 67-2320. If they do, please contact the Board of Professional Engineers and Professional Land Surveyors at (208) 373-7210.

Question:

How can I get more help or information on the QBS process?

Answer:

Discuss with your City Attorney.

Also, the QBS Facilitators Council is available to assist you in the QBS process and answer questions that you may have.

- Phone: 208-321-1736
- Email: tottens@amsidaho.com
- The QBS-Idaho website has a lot of useful information and can be found at the following location: www.idahoqbs.com

Question:

Can I hire the same engineer for construction phase engineering services (observation, administration, testing) that performed the design?

Answer:

Yes. There are distinct advantages in having the design PE involved in the construction process since they are familiar with the design background, intent, and specific project conditions. In fact, most standard engineering and construction contracts (including the Engineers Joint Contract Documents Committee (EJCDC) forms contemplate the fact that the design PE is best suited to fulfill the construction phase services role during the construction process. It is not a conflict of interest for the PE to fulfill both the designer role and construction observation / administration role on a project.

Question:

What if a PE/PLS tries to solicit work from my City for which another PE/PLS is currently under contract?

Answer:

That is a violation of the PE/PLS Rules of Professional Responsibility unless the soliciting PE/PLS has notified the incumbent PE/PLS of their intent in writing and prior to the solicitation. So, if a PE/PLS solicits work for which another PE/PLS is under contract, you might want to ask the soliciting PE/PLS if they “pre-notified” the incumbent engineer or land surveyor. If not, please contact the Board of Professional Engineers and Professional Land Surveyors at (208) 373-7210.

Question:

What if a PE tries to solicit work from my City on a contingent fee basis? For example, they say “We will do a grant application” or “We have connections to get an earmark” for a project in exchange for some assurance that they will be selected to do the subsequent engineering work?

Answer:

Contingency basis work is a violation of the PE Rules of Professional Responsibility. A PE is allowed to do grant applications or investigate funding sources without cost to the City, however, there can be no written or implied “quid pro quo” for giving the subsequent work to the PE. In fact, it should be make clear to the PE that their *pro bono* work comes at their own risk and a QBS process will be used to select the PE for the project.

Summary:

Procuring the services of a professional engineer and professional land surveyor is required under Idaho Code for public works projects and land surveying, respectively. The Idaho QBS law provides procedures for securing these services from the most qualified firm – which is in the best interest of the public. Professional engineers and land surveyors must comply with their Rules of Professional Responsibility regarding how they respond to a QBS solicitation and how they behave as professionals in a very competitive environment.

BOARD TO PROMULGATE RULES

The Board will be promulgating Administrative Rules to define “resident” as used in the amendments to Idaho Code Section 54-1212 contained in House Bill No. 374. They will be promulgating Administrative Rules to remove the National Council of Examiners for Engineering and Surveying as the source of the Registered Continuing Education Provider program as they have discontinued their partnership with the American Council of Engineering Companies in that program. They will be promulgating Administrative Rules to clarify that non-United States residents must comply with the Rules of Continuing Professional Development. The Board will be undergoing negotiated rulemaking on all these rules and notices will be published in the Department of Administration Administrative Bulletin.

BOARD TO DEVELOP AMENDMENT TO LICENSING LAW

Idaho Code Section 54-1221 allows the Board to “. . . reissue or reinstate a license or certificate or certificate of authorization, provided three (3) or more members of the board vote in favor of such reissuance or reinstatement.” This portion of the law was originally enacted in 1939, long before the development of the Administrative Procedures Act through the provisions of which licenses or certificates or certificates of authorization might be revoked or suspended. The Board is concerned that reissuance or reinstatement of practice privileges by simple vote of the board would be in violation of the Administrative Procedures Act. The Board will be suggesting changes to this section of Idaho Code to remove their ability to reissue or reinstate practice privileges but still allow the replacement of wall certificates which attest to practice privileges if such wall certificate is lost, destroyed or mutilated.

DISCIPLINARY ACTIONS

The following final formal actions have been taken by the Board since publication of NEWS BULLETIN No. 48 in November of 2011.

Docket No. FY 10.22 - IN THE MATTER OF JOHN MICHAEL STEARNS, P.L.S. Mr. Stearns signed a Stipulation and Consent Order in which he admitted to failing to maintain records of Continuing Professional Development in violation of IDAPA 10.01.04.008.03 and to failing to make a complete, objective and truthful statement in accordance with IDAPA 10.01.02.007.01 in that he signed a renewal form to the Board stating that he had complied with the rules, including the Rules for Continuing Professional Development, but had not for the audit period July 1, 2006 through June 30, 2008. Mr. Stearns was admonished by the Board, ordered to pay a \$500 fine to the State of Idaho, General Fund, and agreed to complete thirty (30) Professional Development Hours not later than October 31, 2010. Mr. Stearns failed to comply with the terms of the Stipulation and Consent Order and his license to practice in Idaho as a professional land surveyor was suspended effective November 2, 2010. Mr. Stearns subsequently completed the terms of the Stipulation and Consent Order and at the March 2012 Board meeting his license was reinstated.

Docket No. FY 12.01 – In the Matter of Thomas Burton, P.E./L.S. This matter involved the retirement of Mr. Burton’s Washington Professional Land Surveyor’s license as a result of a negotiated settlement/agreement following a previous revocation of his license there. Mr. Burton voluntarily surrendered his license to practice as a professional land surveyor in the state of Idaho. He agreed not to renew or seek reinstatement of his license to practice as a professional land surveyor in Idaho; however if his Washington license is reinstated he may reapply for his Idaho license subject to the Board’s approval, and the Board approval is not guaranteed.

Docket No. FY 12.06 – In the Matter of Charles A. Gay, P.E. This matter involved work performed by Mr. Gay for his client, the Bonner County Planning Department. Mr. Gay submitted a letter to the Bonner County Planning Department reporting about work performed by other licensed professional engineers. In the letter Mr. Gay stated there was impending catastrophic slope failure, and that was beyond his expertise. The statements were known to be, or should have been known to be false. Mr. Gay signed a Stipulation and Consent Order in which he agreed that there was sufficient evidence to support a finding that he failed to perform in accordance with the standard of care for the profession in violation of IDAPA Rules 10.01.02.004.04; 005.02; 006.01 and 007.04. Mr. Gay was admonished and he agreed to complete a course in engineering ethics.

Docket No. FY 12.07 – In the Matter of David Kirkham, E.I. Mr. Kirkham sent two letters to his client, a mechanical contractor, which accused another engineer of shortcomings, alleged failures in the engineering process, and recommended that the engineer and commissioning authority be dismissed or replaced. The letters were not first sent to the engineer, the subject of the criticism, previous to being sent to the client as required by IDAPA Rules 10.01.02.005.04 and 007.04. Mr. Kirkham was admonished and he agreed to complete a course in engineering ethics. In addition, he agreed to issue a formal retraction of his letters and an apology to the engineer for failing to comply with the Rules of Professional Responsibility with a copy to the Board office.

Docket No. FY 12.11 – In the Matter of David J. Weiler, P.E. This matter involved Mr. Weiler’s failure to obtain Continuing Professional Development in the form of Professional Development Hours (PDHs) to satisfy the Administrative Rules adopted by the Board within the audit period. He subsequently completed a sufficient number of PDHs. He signed a Stipulation and Consent Order in which he was admonished.

IN MEMORY OF THOSE RECENTLY DECEASED

Harold J. Cox, CE/SE 1347, Boise, Idaho
Marvin George Merkel, EE 4453, Boise, Idaho
Ramesh Vera, EE 13187, San Ramon, California