



TEXAS COUNCIL OF ENGINEERING COMPANIES

WHAT TEXAS CEC DOES FOR YOU

TEXAS CEC is involved in a variety of activities and programs, including business and leadership training and promotion of the industry. But our central focus is political, legislative and administrative advocacy on behalf of the industry.

The State Legislative Committee (SLC) is the group within CEC that guides all of the organization's legislative and public affairs strategy. Over the years, the SLC has been involved in a number of legislative accomplishments including:

- **Tort Reform and Liability Protection:**

- ***Deceptive Trade Practices Act revisions:*** During the liability crisis of the early 1990's, the primary threat to engineering firms was the use of the state's consumer protection statute in unintended ways. The DTPA was enacted in the 1970's to assist unsophisticated consumers in small, retail-type transactions; consequently, it provided remedies heavily weighted in favor of consumers. By 1990, however, sophisticated owners such as the City of Houston were claiming consumer status under the DTPA in order to use that law and its remedies in routine construction contract litigation. Legislation pushed by CEC and passed in 1995 revised the DTPA to eliminate its use in that sort of litigation.
- ***Certificate of Merit:*** In 2003, CEC was successful in including in the omnibus tort reform package passed that session a provision requiring a certificate of merit in lawsuits against design professionals. This provision was subsequently strengthened in 2005 and again in 2009. It provides that in any action against an engineering firm, a plaintiff must provide an affidavit from another engineer knowledgeable in the same area of practice, attesting to (for each theory of recovery) the negligence, if any, or other action, error, or omission of the engineer in providing the professional service. This provision has helped firms get out of the sort of cases in which all parties involved in a project get sued, regardless of negligence.

To back up this provision, CEC was successful in 2003 in amending the Texas Engineering Practice Act to make clear that the filing of a certificate of merit is the practice of engineering and that the Texas Board of Professional Engineers can discipline a licensee for negligence in a filing. This creates a very real disincentive against fraudulent filings.

- ***Indemnification Limits:*** CEC has fought several legislative battles over indemnification limits, and other battles are looming on the horizon. Initially, language was inserted into the state Appropriations Act dealing with the then-TNRCC's indemnification policy on hazardous waste cleanups. Later legislation amended the Civil Practices and Remedies Code to provide that an owner may not require an engineer to indemnify the owner against the owner's negligence. The law applies to both public and private contracts and provides that such a provision is void and unenforceable.

In 2007, CEC was successful in amending a provision in the Local Government Code to prohibit political subdivisions from receiving indemnity and/or a duty to defend for anything other than negligence, intentional torts, intellectual property infringement, or failure to pay a subcontractor or supplier.

- ***Errors and Omissions Recovery:*** In 2007, CEC was successful in establishing guidelines for policies by state agencies related to recovering the costs of design consultant errors and omissions including: notification to the consultant at the time the error is discovered, opportunity for the consultant to be involved in the resolution of the problem, guidelines for distinguishing an error from other reasons for a change order, a process for determining the cost, an evaluation of the totality of the consultant's services, an internal appeal without requiring prepayment of the claim, a process for tracking the errors and omissions of in-house employees, and a recognition that some errors are likely to occur in any project. This was in response to one state agency's efforts to put in place a policy that required an engineering firm to pay a claim before the claim could be appealed.
 - ***Good Samaritan Statute:*** CEC, in 2007, joined with others to push for the passage of a "Good Samaritan" statute that provides liability protection for PE's who provide voluntary services during disasters.
 - ***Statute of Repose:*** In 2009, CEC pushed for and won passage of a statute that clarified that the statute of repose is 10 years for all claims against engineers. This was in response to an appeals court opinion that weakened the statute of repose. The bill was ultimately vetoed, but the opinion was overturned by the Texas Supreme Court. CEC helped with the legal expenses of the appeal.
- ***Qualifications-Based Selection/Procurement:***
- In 2001, the SLC was successful in expanding the Professional Services Procurement Act to include local government corporations and other entities created by and acting on behalf of cities, in order to close off the opportunity for end-runs around the PSPA.
 - Also, in 2001, CEC was successful in amending the TNRCC/TCEQ Sunset bill to require the use of the PSPA in the selection of non-engineering scientific and technical services.
 - In 2005 CEC coordinated a major effort to defeat the efforts of the Transportation Commission to eliminate qualifications-based selection for all public entities. This effort included public relations, grassroots activity, and a major lobby effort. A bill was ultimately filed in the House but never got out of committee.

- In 2007 CEC supported an amendment to the QBS law to allow for enforcement through declaratory and injunctive relief, prohibited purchasing cooperatives and buy boards from procuring and offering engineering services, required local government corporations to comply with procurement laws for entities that set them up, and clarified that a design professional has to be selected by and contracted to the owner for projects using the job order contracting method of contracting.
- In 2009 CEC, along with other groups, was twice successful in defeating amendments providing for priced-based selection for engineering and architectural services. Through the SLC's efforts, the amendments were resoundingly defeated by a hundred vote margin in the House.
- TEXAS CEC staff plays an active role on an ongoing basis in the enforcement of the PSPA, contacting owners on behalf of members to revise a procurement that does not comply.

▪ **Government Competition:**

- TxDOT outsourcing has been a major focus of the industry's efforts in this area going back to 1991. In the 1991 session, CEC was successful in inserting a statutory mandate that TxDOT seek a "balance" between the use of inside and contracted services. (During this period, TxDOT's payout to the private sector engineering industry was approximately \$10 million per year.) In 1997, after TxDOT had failed to honor the requirement for a balance, CEC convinced the Legislature to add a minimum floor for outsourced engineering-related services tied to a given budget strategy. Since then, as the construction program grew, TxDOT attempted to increase its FTE limits in order to absorb the increasing workload in-house, but CEC opposed that. Spending on outsourced engineering-related services grew to over \$500 million per year, although it has declined over the last couple of years due to reduced construction funding. Several times during the past decade the SLC has initiated and guided special studies (costing well over \$100,000) in response to studies initiated by TxDOT on the cost of in-house vs. outsourced services. In 2009, CEC participated in a study by the Comptroller on TxDOT's costs. This study concluded that TxDOT's accounting system is not capable of generating an apples-to-apples comparison and that, in particular, the method of allocating overhead is totally different, validating a long-term criticism of TEXAS CEC.

CEC has also worked to protect this market in other ways. For example, the authorization for TxDOT to use comprehensive development agreements provides that money spent on engineering in CDAs does not count toward the minimum spending requirements.

CEC has made a very high priority of incorporating greater business planning, accountability and transparency into the DOT contracting and planning process. Many provisions related to these issues were included in HB 330 (the DOT Sunset bill) during the 2009 session. Although that bill did not pass, TxDOT is moving administratively to adopt as many of the provisions as the agency has authority to adopt. The result will be a significantly greater ability for the industry to anticipate agency contracting opportunities.

- **Project Delivery:**

- Project delivery has been a major focus of SLC discussions in recent years. Beginning in 1997, CEC, working with other industry groups representing architects and contractors, has been instrumental in shaping project delivery legislation in Texas. Initially, the consensus within the SLC was to keep alternate project delivery confined to the vertical construction market. In 2005 and 2007, that changed somewhat and we were successful in passing legislation that would have consolidated various construction procurement statutes into a single procurement statute for construction services, although both bills were subsequently vetoed for unrelated reasons. Also in 2007, CEC was successful in expanding construction management at risk and competitive sealed proposals for construction services into the infrastructure market as well as writing a new process for and expanding design-build into the infrastructure market with certain protections for engineering firms.

- **Miscellaneous:**

- ***TBPE Sunset and Professional Practice Issues:*** During the 2003 session, the SLC was heavily involved in the Sunset review of the Board of Professional Engineers. The highest-profile issue was a fight between the professional engineering community and high-tech and industrial associations over engineering licensure and use of the term “engineer.” CEC was instrumental in achieving a compromise that prevented carve-outs from licensure and protects the use of the title in competitive situations or public representations.

During the Sunset session, CEC also worked to give the Board the authority to issue advisory opinions interpreting the Act as it applies to specific or hypothetical situations. These questions often arise in the context of procurement situations in which a public entity is attempting to bid engineering services by calling them “planning.” CEC has subsequently pushed for a number of advisory opinions on water quality planning, transportation planning, roofing repair and replacement, and other areas intended to protect the boundaries of the engineering practice.

On a related subject, in 2001 CEC promoted and achieved language in the TEPA that required continuing education for P.E.s but did so in a very flexible manner that recognizes in-house training and self-study. In the absence of this effort, it is likely that a more restrictive approach would have been implemented during the 2003 Sunset bill.

In 2009, CEC was successful in amending the Engineering Practice Act to provide that a P.E. may not be required to have any additional certification other than a P.E. license to seal an engineering plan, specification, plat, or report.

- ***Related Professional/Industry Issues:*** There have been a number of bills in recent years involving associated service providers attempting to achieve or revise licensure requirements in a way that affects engineering practices. For example, CEC opposed

(and killed) a bill for geologist licensure for several sessions until a compromise was agreed to that establishes as a matter of law the boundaries between the two professions and protects the rights of geotechnical engineers to practice freely in this area. Similarly, landscape architects sought licensing revisions in 2003 that would have greatly expanded the role of landscape architects in drainage and projects that border on civil works; this bill was substantially revised and limited prior to passage.

- ***Conflict of Interest Disclosure:*** In 2007, the SLC worked with others to revise the conflict of interest disclosure notice (making it less onerous and clarifying the intent) that is required to be provided by firms working or seeking to do work with local governmental entities.

In any legislative session the SLC monitors and attempts to kill or influence dozens of pieces of legislation. A few examples of bills that we opposed in recent sessions that did not pass include such items as

- Licensing of construction/program managers
- Requirements for mandatory errors and omissions insurance
- Requirement for annual CPA audit for businesses that contract with the state for more than \$25,000
- Provisions exempting telephone companies from being required by cities to obtain engineering plans for street cut repairs
- Prohibition of pay-when-paid provisions in engineering and design contracts
- Sales tax on services
- Creation of inspector-general positions in large state agencies