



KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY OF THE KANSAS ASSOCIATION OF COUNTIES
TO THE SENATE FEDERAL & STATE AFFAIRS COMMITTEE
ON SB 54

JANUARY 31, 2013

Mr. Chairman and Members of the Committee:

Senate Bill 54 appears to be a comprehensive revision of the statutes for all five technical professions: engineers, architects, landscape architects, land surveyors and geologists. We appreciate that the Board of Technical Professions has spent considerable time reviewing and updating the laws; however, we were informed of this legislation within the last two weeks and we have found two issues that are a major concern to local government.

Professional Surveying

Our first issue is the new definition of "professional surveying," formerly called "land surveying." The definition of professional surveying is broadened to encompass mapping and general surveying where licensing has never been required or needed. Specifically on Page 13, starting at line 30, items (A), (B), & (H) are new tasks not currently in the definition of surveying. Our concern about this new definition arises from an Attorney General Opinion (AGO 93-57), which opined that listing an activity and defining it as land surveying places that activity within the exclusive purview of a land surveyor; meaning, no one other than a licensed individual can perform the task.

We understand from conversations with the proponents that the additional items listed for land surveying were part of a national model. However, Kansas counties cannot accept these activities as falling within the sole purview of a licensed surveyor; otherwise, Kansas counties will need to hire additional professional employees to perform routine county work. These tasks are currently performed by many different occupations such as mappers, appraisers, aerial photography companies and other county offices that do not now require a license.

Representatives of the Board of Technical Professions and KAC have met to discuss this particular item, and we have reached an agreement to amend the exemption given in SB 54 to clarify the practice of surveying at the county level. The agreed wording for Section 25, new (e) is as follows:

(e) Mapping by governmental agencies when such activity does not involve the locating, relocating, or physical establishment of land boundaries and related monuments or the preparation of original or field retracement of existing descriptions of real property.

If this language is added to SB 54, our concern over this section is appeased.

Ethical Marketing of Professional Services

Our second item of concern is the new definition of “ethical marketing of professional services,” which is defined on Page 8, line 36. There is one other reference to this new definition, which is found on Page 18, line 28, where the Board of Technical Professions is given authority to adopt rules and regulations on ethical marketing.

As you will note from reading the definition, “ethical marketing” is new language to Kansas statute. This new statute makes it unethical for licensees to provide their fee at the time of offering a proposal to government. It requires government units to make the decision on contracting professional services based on qualifications without reference to a price. After the government unit has decided the chosen contractor, the government can then negotiate the price.

We often refer to this procedure as Qualification Based Selection or QBS. The federal and state government use QBS on most projects to select design professionals, and that process may work well for them, as they have professionals on staff that know what professional services should cost. Local governments find this method more problematic as some counties do not have the expertise to know what professional services should cost. Without knowledge of what professional services should cost, the local governments are at a distinct disadvantage in the negotiating process. Having several proposals – that include pricing – is really the best method for a county to determine what proposal is best for the county.

By way of an example, consider the Board of County Commissioners that is building a new jail. Under this bill, the BOCC will first hire an architectural firm to design the jail, without any discussion on price. There is no range of fees from which the BOCC can determine what a reasonable fee is for designing a jail. Wouldn't the taxpayers expect the county to compare qualifications AND prices? Isn't that what a private person does when having work done on a person's home – obtain several bids that include pricing? The new ethical marketing requirement in SB 54 prohibits government from knowing the price up front and from making wise choices on how to spend taxpayer monies.

We also ask, if this proposal is about ensuring ethical behavior, why is it designed just for government contracts? Shouldn't we be proposing similar language for private contracts if it is unethical conduct?

Current Kansas law requires the counties to bid all construction projects in excess of \$25,000. We do not understand the purpose of one statute that requires bids but another statute that then doesn't allow for pricing to be part of the bid.

We would request that the two sections relating to "ethical marketing" be eliminated from the bill.

Conclusion

With the two amendments – the land surveying exemption and the eliminating of "ethical marketing" – as described in our testimony, we can support SB 54.

Melissa Wangemann
General Counsel/Director of Legislative Services

1 corporation, limited liability company, limited liability partnership,
2 corporate partnership or other legal entity created by law.

3 (g) "Common technical services" means those services which may be
4 offered or performed by any licensee, are performed within the licensee's
5 defined scope of practice and are further described as follows:

6 (1) Representation of clients in connection with contracts entered into
7 between clients and others;

8 (2) coordination of elements of technical submissions prepared by the
9 licensee's consultants;

10 (3) administration of contracts for construction;

11 (4) observation of construction for general conformance with
12 requirements of approved construction documents or technical
13 submissions prepared by a licensee;

14 (5) performing acts of consultation and technical investigation;

15 (6) providing expert technical testimony or testimony evaluation;

16 (7) performing technical evaluations and research;

17 (8) teaching in a college or university offering an accredited
18 technical professional curriculum recognized by the board; and

19 (9) providing responsible supervision of these services, insofar as
20 such services involve safeguarding the health, safety, property and welfare
21 of the public.

22 (h) "Construction administration" means the provision of technical
23 professional services during construction by licensees, or persons under
24 the licensee's responsible supervision, which act to confirm substantial
25 compliance with the requirements and provisions of applicable technical
26 documents prepared by the licensee or under the licensee's responsible
27 supervision. Such technical professional services include, but are not
28 limited to: Assisting with bidding or negotiation processes; reviewing and
29 acting upon shop drawings and other submittals; providing clarification
30 or interpretation of the licensee's technical documents; evaluating general
31 progress of construction; observing or evaluating completed construction;
32 and assisting the client in matters related to the licensee's technical
33 professional expertise. Construction administration services do not
34 include management of, or responsibility for, the contractor's construction
35 activities, means or methods.

36 ~~(i) "Ethical marketing of professional services" means the solicitation~~
37 ~~or offer by a licensee, either as an individual or on behalf of a business~~
38 ~~entity or by a business entity, to provide professional services for a~~
39 ~~potential governmental client, based on the licensee's professional~~
40 ~~qualifications, technical ability, specialized training and ability to provide~~
41 ~~the services in a timely manner, with the fee for such services entering into~~
42 ~~the discussions only after such governmental client has identified the~~
43 ~~licensee who is most qualified to provide the services required. For the~~

delete

1 ~~purpose of this subsection, if an individual who is not a licensee is acting~~
 2 ~~on behalf of a business entity, the business entity shall be responsible for~~
 3 ~~the actions of the non licensee.~~

} delete

4 (j) "Government client" means any state, county or municipal
 5 governmental entity including, but not limited to, any department, agency,
 6 authority, planning district, board, commission, office or institution
 7 thereof, and any school district, college, university and any individual
 8 acting under authority to represent any such governmental entity.

9 (k) "Landscape architect" means a person who is qualified to engage
 10 in the practice of landscape architecture and who is licensed by the board
 11 to practice landscape architecture as provided in K.S.A. 74-7001 et seq.,
 12 and amendments thereto.

13 (l) (1) "Landscape architecture" or "practice of landscape
 14 architecture" means performing professional landscape architectural
 15 services including the following: Common technical services, as defined in
 16 subsection (g); consultation, planning, designing or responsible
 17 supervision in connection with the development of land areas for
 18 preservation and enhancement; the development of sustainable designs
 19 and technology; preparation, review and analysis of master plans for land
 20 use and development; production of overall site development and land
 21 enhancement plans, grading and drainage plans, irrigation plans,
 22 planting plans and construction details; specifications, cost analysis and
 23 reports for land development; and the designing of land forms and non-
 24 habitable structures for aesthetic and functional purposes, such as pools,
 25 walls and structures for outdoor living spaces, for public and private use.
 26 The practice of landscape architecture also encompasses the
 27 determination of proper land use as it pertains to: Natural features;
 28 ground cover, use, nomenclature and arrangement of plant material
 29 adapted to soils and climate; naturalistic and aesthetic values; settings
 30 and approaches to structures and other improvements; soil conservation;
 31 erosion control; and the development of outdoor space in accordance with
 32 ideals of human use and enjoyment.

33 (2) The term "landscape architecture" or "practice of landscape
 34 architecture" shall not include those services specifically identified in the
 35 definition of "architecture," "professional engineering," "professional
 36 geology" and "professional surveying" except for those services which are
 37 included in the term "common technical services," as defined in
 38 subsection (g).

39 (e) (m) "License" means a license to practice the technical professions
 40 granted under K.S.A. 74-7001 et seq., and amendments thereto.

41 (d) ~~"Architect" means a person whose practice consists of:~~

42 (1) ~~Rendering services or performing creative work which requires~~
 43 ~~architectural education, training and experience, including services and~~

1 licensed under ~~this act~~ *K.S.A. 74-7001 et seq., and amendments thereto*, or
 2 issued a certificate of authorization under K.S.A. 74-7036, and
 3 amendments thereto, shall be maintained by the executive director. The
 4 roster shall also specify the branch of the technical professions in which
 5 each such person is licensed or authorized to practice. Copies of the roster
 6 ~~may be placed, at the discretion of the board, on file with the secretary of~~
 7 ~~state and with the clerk of each county in this state and shall be furnished~~
 8 ~~to such other persons as determined by the board. Copies shall be~~
 9 ~~furnished to members of the public upon request. The board may charge~~
 10 ~~and collect a fee for copies furnished to members of the public in an~~
 11 ~~amount to be fixed by the board and approved by the director of accounts~~
 12 ~~and reports under K.S.A. 45-219, and amendments thereto, in order to~~
 13 ~~recover the actual costs incurred. All fees collected under this section shall~~
 14 ~~be remitted to the state treasurer in accordance with the provisions of~~
 15 ~~K.S.A. 75-4215, and amendments thereto. Upon receipt of each such~~
 16 ~~remittance, the state treasurer shall deposit the entire amount in the state~~
 17 ~~treasury to the credit of the technical professions fee fund *shall be*~~
 18 ~~*provided in accordance with the Kansas open records act, K.S.A. 45-215*~~
 19 ~~*et seq., and amendments thereto.*~~

20 Sec. 11. K.S.A. 2012 Supp. 74-7013 is hereby amended to read as
 21 follows: 74-7013. (a) The board may adopt all rules and regulations,
 22 including rules of professional conduct, which are necessary for
 23 performance of its powers, duties and functions in the administration of
 24 the provisions of K.S.A. 74-7001 et seq., and amendments thereto.

25 (b) The board, through rules and regulations, may require continuing
 26 education as a condition for license renewal or reinstatement and may
 27 exempt persons from such continuing education requirements.

28 ~~(c) The board may adopt rules and regulations concerning the ethical~~ } delete
 29 ~~marketing of professional services by licensees.~~

30 (d) ~~The board may adopt rules and regulations concerning cancelled,~~
 31 ~~inactive and emeritus licensure status.~~

32 (e) ~~The board shall adopt rules and regulations prescribing minimum~~
 33 ~~standards for boundary surveys, mortgage title inspection, American land~~
 34 ~~title association surveys and such other surveys as necessary to control the~~
 35 ~~quality of surveying in the state of Kansas.~~

36 Sec. 12. K.S.A. 74-7016 is hereby amended to read as follows: 74-
 37 7016. (a) The board shall keep a record of its proceedings, and a register of
 38 all applications for license, which register shall show:

- 39 (1) The name and residence of each applicant;
- 40 (2) the date of the application;
- 41 (3) the place of business of such applicant;
- 42 (4) the applicant's educational and other qualifications;
- 43 (5) whether or not an examination was required;

1 of landscape architecture shall not be construed to prevent or to affect:

2 (a) The right of any individual to engage in the occupation of growing
3 and marketing nursery stock or, to use the title nurseryman, landscape
4 nurseryman or gardener, or to prohibit any individual to plan or plant such
5 individual's own property.

6 (b) The right of nurserymen to engage in preparing and executing
7 planting plans.

8 (c) The practice of site development planning, in accordance with the
9 practice of architecture, or the practice of engineering.

10 Sec. 24. K.S.A. 74-7033 is hereby amended to read as follows: 74-
11 7033. The provisions of ~~this act~~ *K.S.A. 74-7001 et seq., and amendments*
12 *thereto*, requiring licensure or the issuance of a certificate of authorization
13 under K.S.A. 74-7036, and amendments thereto, to engage in the practice
14 of engineering shall not be construed to prevent or to affect:

15 (a) Except as provided by subsection (b), the design or erection of
16 any structure or work by a person who owns the structure or work, upon
17 such person's own premises for such person's own use if the structure or
18 work is not to be used for human habitation, is not to serve as a place of
19 employment, and is not to be open to the public for any purpose
20 whatsoever.

21 (b) Persons designing or erecting or preparing plans, drawings or
22 specifications for ~~one or two family dwellings~~ *buildings housing no more*
23 *than two dwelling units in one contiguous structure* or for agricultural
24 buildings, as defined by ~~K.S.A. 74-7031 and amendments thereto~~.

25 (c) Persons engaged in planning, drafting and designing of products
26 manufactured for resale to the public.

27 (d) The performance of services by a licensed landscape architect in
28 connection with landscape and site planning for the sites, approaches or
29 environment for buildings, structures or facilities.

30 **Sec. 25.** K.S.A. 2012 Supp. 74-7034 is hereby amended to read as
31 follows: 74-7034. The provisions of K.S.A. 74-7001 et seq., and
32 amendments thereto, requiring licensure or the issuance of a certificate of
33 authorization under K.S.A. 74-7036, and amendments thereto, to engage in
34 the practice of ~~land~~ surveying shall not be construed to prevent or to affect:

35 (a) ~~The~~ *Those surveying activities, which include* locating or laying
36 out of alignments, positions or elevations where such work is part of the
37 construction of engineering or architectural works, *when such activities*
38 *are for purposes other than the conveyance of an interest in real property.*

39 (b) The practice of ~~land~~ surveying by an individual of such
40 individual's own real property or that of such individual's employer for
41 purposes other than the conveyance of an interest in such real property.

42 (c) The surveying on farms for agricultural purposes other than the
43 conveyance of an interest in such farm property.

1 (d) The performance of services by a licensed landscape architect or
 2 by a business entity issued a certificate of authorization to provide services
 3 in landscape architecture under K.S.A. 74-7036, and amendments thereto,
 4 in connection with landscape and site planning for the sites, approaches or
 5 environment for buildings, structures or facilities.

6 New Sec. 26. The provisions of K.S.A. 74-7001 et seq., and
 7 amendments thereto, requiring licensure or the issuance of a certificate of
 8 authorization under K.S.A. 74-7036, and amendments thereto, to engage in
 9 the practice of geology shall not be construed to prevent or to affect:

new (e)

10 (a) The practice of geology by any person before July 1, 2000.

11 (b) The practice of geology which is exclusively in the exploration
 12 for and development of energy resources and economic minerals, and
 13 which does not affect the health, safety, property and welfare of the public,
 14 as determined by the board.

15 (c) The acquisition of engineering data, geologic data for engineering
 16 purposes and the utilization of such data by licensed professional
 17 engineers.

18 (d) The performance of work customarily performed by graduate
 19 physical or natural scientists.

20 (e) The teaching of geology in a college or university offering an
 21 approved geology curriculum.

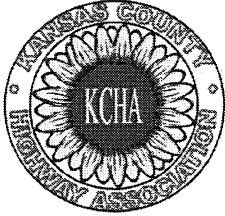
22 Sec. 27. K.S.A. 74-7035 is hereby amended to read as follows: 74-
 23 7035. The provisions of ~~this act~~ K.S.A. 74-7001 et seq., and amendments
 24 thereto, shall not apply to:

25 (a) The work of an employee, *consultant* or a subordinate of a person
 26 holding a license under ~~this act~~ K.S.A. 74-7001 et seq., and amendments
 27 thereto, if such work does not include final designs or decisions,
 28 responsible charge of design or supervision and is done under the direct
 29 responsibility and supervision of a person practicing lawfully a technical
 30 profession;

31 ~~(b) the practice of persons who are not residents of and have not~~
 32 ~~established a place of business in this state, who are acting as consulting~~
 33 ~~associates of persons licensed under the provisions of this act and who are~~
 34 ~~legally qualified for such professional service in such persons' own state or~~
 35 ~~country;~~

36 (e) the practice work of any person who is exclusively and regularly
 37 employed by ~~one a single employer only, the, provided, such~~ employer is
 38 not being an engineering, architectural or land, surveying, *landscape*
 39 *architectural or geology* firm, and ~~the employer is not being~~ primarily
 40 engaged in the business of conveying an interest in real property, ~~in~~ and
 41 also provided, such work is performed under an employer-employee
 42 relationship, ~~in~~ and making surveys of land and determinations of physical
 43 property rights is performed solely in connection ~~only~~ with the affairs of

(e) Mapping by governmental agencies when such activity does not involve the locating, relocating, or physical establishment of land boundaries and related monuments or the preparation of original or field retracement of existing descriptions of real property.



Kansas County Highway Association

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TESTIMONY

Concerning Senate Bill 54

Presented by Darryl C. Lutz, P.E., Butler County Engineer & Legislative Committee Chairman of the Kansas County Highway Association

January 31, 2013

Mr. Chairman and Members of the Senate Federal and State Affairs Committee:

I am Darryl Lutz, Butler County Director of Public Works/County Engineer and Legislative Committee Chairman of the Kansas County Highway Association (KCHA). I appreciate the opportunity today to present remarks on behalf of the KCHA. The KCHA is an affiliate association of the Kansas Association of Counties and has membership from County Public Works and Highway Departments from over 100 Kansas Counties. The KCHA is opposed to the proposed legislation in its current form based upon 2 major policy changes proposed in the Bill. With the appropriate amendments, however, the Kansas County Highway Association would support SB 54.

I along with representatives of the Kansas Association of Counties have had joint communications with representatives of the Kansas State Board of Technical Professions regarding SB 54 as introduced. Agreement has been reached on compromise language to deal with the expansion of the list of tasks that would fall solely under the purview of a licensed "Professional Surveyor" that did not previously exist. The second policy proposal regarding a County's (Government Client's) ability to obtain fee proposals from more than one (1) professional firm, however, is significant enough that it is improbable that consensus could be developed for compromise language given the relatively short time that our Association has been given notice of the proposed legislation.

Professional Surveying

SB 54 includes an expanded list of tasks that would fall exclusively under the purview of a licensed surveyor. Some of these tasks are performed by mappers, drafting technicians and other non-licensed County staff that relate to simply illustrating data or for determining information that is not intended to be used for the establishment of legal boundaries or the conveyance of property or easements. Specifically, the list has added items A, B & H in Section 5, (s) (1) found on pages 13 and 14 that would impact most Counties. These are items regularly performed by County departments that typically are not staffed with a licensed professional surveyor. The proposed amendment offered in testimony from the Kansas Association of Counties and developed with assistance from the Board of Technical Professions to exempt items performed

by counties that do not involve establishing a legal boundary or a conveyance document would be acceptable to the KCHA.

Ethical Marketing of Professional Service

SB 54 includes new language that proposes a specific requirement upon technical professionals in the fields of engineering, architecture, geology, surveying and landscape architecture and upon the firms they represent that would prohibit them from proposing a fee for professional services to "government clients" without having been first selected through a qualifications based process and only after they entered into exclusive negotiations for providing the requested service. It is recognized that some government clients choose to use this method of engaging for professional services commonly known as Qualifications Based Selection (QBS). The prohibition to comparing fees for professional services inhibits a government agency from being able to determine for itself and to assure their constituents that they are being good stewards of taxpayer money. Furthermore, the proposed statute revisions puts this prohibition in place for services offered to government clients only, but, not for services offered to private industry. Many County entities are not staffed appropriately to be able to follow the full QBS process and to know whether a fee being proposed is fair or reasonable. Some Counties use qualifications of the firm as part of the basis of selection, but, may still rely upon consideration of fee proposals as part of the process to determine and to sufficiently represent to the taxpayer that the County is prudently spending its limited resources. It is counter intuitive that the terminology "ethical marketing" would be proposed in law that limits a "government client" from price comparing for service. It would seem that in the taxpayer's eye that sole provider negotiations may for many Counties that might not otherwise be able to sufficiently demonstrate the fairness of a fee would create an appearance of unethical conduct. Additionally, such a provision placed in law would impair a County's authority to self-determine the most appropriate means to procure covered professional services in a manner that it deems most appropriate for a particular size or type of project. The only acceptable proposal for the Kansas County Highway Association is to recommend removing all references to "ethical marketing" and the granting of regulatory authority to the Board of Technical Professions that could limit County's from being able to evaluate comparison of fees as a basis of consideration for procuring technical services.

In closing, the KCHA would support SB 54 with the proposed amendment to add language to exempt Counties from some of the exclusive functions listed under the Professional Surveyor section of this bill and with the proposed amendment to remove any language from the bill that would prohibit a professional firm from providing a fee as a basis of consideration by a County (government client) for procurement of covered professional services.

I respectfully submit these comments and will gladly stand for questions.

Darryl C. Lutz, P.E., Butler County Director of Public Works/County Engineer
Legislative Committee Chair, KCHA

