ACEC
AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Massachusetts

Abbie R. Goodman
Executive Director
agoodman@engineers.org
617/305-4112

American Council of Engineering Companies of Massachusetts

The Engineering Center
One Walnut Street
Boston, MA 02108-3616

Phone
617/227-5551

Fax
617/227-6783

Email
acecma@engineers.org

Web
www.acecma.org

Twitter
@ACECMA

Comments of the American Council of Engineering Companies of Massachusetts

Presented by
Abbie Goodman, ACEC/MA Executive Director
Nick Ferzacca, PE, LEED, Co-Chair, ACEC/MA Building Engineering Committee

In addition to testifying at the Board of Registration of Architects on September 2, 2015, we are submitting this written testimony on behalf of the American Council of Engineering Companies of Massachusetts, a business association of more than 110 Member Engineering, Architecture/Engineering, Land Surveying and related professional service firms in Massachusetts. Our Member Firms employ approximately 7,000 people in Massachusetts, including Professional Engineers, Architects, Professional Land Surveyors, Licensed Site Professionals, Planners, Geologists and other professionals working on projects in the natural and built environment. ACEC/Massachusetts is affiliated with the American Council of Engineering Companies in Washington, DC. Council members – numbering more than 5,000 firms representing more than 500,000 employees throughout the country – are engaged in a wide range of engineering works that propel the nation's economy, and enhance and safeguard America's quality of life. These works allow Americans to drink clean water, enjoy a healthy life, take advantage of new technologies, and travel safely and efficiently.

ACEC member firms employ hundreds of thousands of engineers, architects, land surveyors, scientists, and other specialists, responsible for more than $200 billion of private and public works annually. About one third of the members are small businesses with ten or fewer employees. Our member firms range in size from single employee entrepreneurs to the corporate headquarters of large national or international firms, and are involved in a wide range of public and private engineering works that contribute to the economic viability and quality of life in the region and beyond.

Like many associations, we have committees of members to focus on particular issues. In Massachusetts, our Building Engineering Committee includes representatives of member firms that have professionals practicing architecture, structural, mechanical, electrical and plumbing engineering, as well as civil engineering site work. As our Building Engineering Committee first became involved in reviewing the proposed changes to 231 CMR, it became clear over time that the most misunderstood requirements related to the existing regulations, not the proposed changes. An informal survey of firms we've contacted showed that over 50% of the A/E firms do not have the corporate structure to comply with 231 CMR 4.04 (2)'s contract signing provisions.

We understand 4.04 (2) has been in place due to language in current state law under MGL Ch. 112, § 60L(8). We want to emphasize that Chapter 112 was passed into law more than 50 years ago, well before combined architecture/engineering firms became common in the industry. Chapter 112 §60L fails to recognize the diversity of the current design market place and its needs for more flexibility in managing multi-disciplined national design businesses, while protecting the health, welfare and safety of the public. We think that this section of law places an undue burden on business in the Commonwealth and should be repealed.

Regarding current regulations:

231 CMR 4.04 (2) requires that large firms, who have sufficient licensed professionals and resources to practice architecture in Massachusetts create corporate structures simply to practice in Massachusetts. This imposes significant administrative commitment and continued upkeep, as well as significant legal costs. According to legal counsel for a large, multinational A/E firm, Massachusetts is one of only 5 states with a law and commensurate regulation which create burdensome corporate structure requirements and contract signing provisions.

This requirement prohibits engineering firms from signing multi-discipline contracts, such as for large infrastructure contracts, or institutional house doctor contracts that may include architecture.

Through our discussions with member A/E firms and with some Architecture firms, we discussed some situations where an engineering firm signs such a contract and then subcontracts with an architectural firm. Members of this Board of Registration of Architects have told us that in these cases 4.04 (2) can be met. However, this situation is not supported by the language in the regulations.

In short, we believe the real protection to the public is through the enforcement of licensed professionals exercising responsible control over the project, not in who signs the contract. We do not believe there is a clearly identified need for the contract signing provisions of 4.04 (2) and that the cost for this provision does not provide any benefit. In fact, the burdensome provision only serves to ensnare A/E firms in a regulatory and disciplinary logjam that will discourage A/E firms from doing business in Massachusetts. The proposed draft regulations we have reviewed, particularly section 4.04, do not solve the problem and would actually impose more requirements for firms to keep detailed logs in case of audit or investigation by this Board under the section called Business Enterprise Additional Recordkeeping, i.e. Proposed Regulation Section 4.04(1)(c). This again places an unfair and unnecessary burden on business in Massachusetts.

We should also note that there is precedent for these regulations to be viewed as a restraint of trade as noted in the recent US Supreme Court opinion, *North Carolina State Board of Dental Examiners v Federal Trade Commission,* 135 S. Ct. 1101 (2015). In that case the Supreme Court affirmed an FTC decision that a North Carolina Board of Dental Examiners, which six of its eight members must license dentists engaged in the active practice of dentistry, unlawfully restrained non-dentists from the market for teeth whitening services, an act by the Board which "constituted an anticompetitive and unfair method of competition." There the Board was composed of members who had every incentive to limit teeth whitening to dentists. Moreover, teeth whitening was not

subject to state regulation because the practice of teeth whitening was not around when the state statutes creating the Board of Dentistry was enacted.

Requirements such as 4.04 (1) (a) (4) could open this Board of Registration to anti-trust action by the Federal Trade Commission for unreasonably restraining trade. The current and proposed regulations equally restrain trade. Here, the Board is composed of architects whose interest is naturally to promote the interests of Massachusetts architects. The regulations have the effect of inhibiting the practice of architecture in the state of Massachusetts by A/E firms. Like teeth whitening in North Carolina, national A/E firms were non-existent when the statutes related to the practice of architecture and the establishment of the Board of Architecture were enacted. As such, there is no state authorization permitting Board regulations that would restrain the practice of architecture by A/E firms.

We would also like to provide some comments on the July 2015 draft of the proposed changes to 231 CMR, Section 4.00:

I. Section 4.04(1)(a)(4):

With respect to the most recent proposed revisions to 231 CMR that we have seen, we should also point out Section 4.04 (1) (a) (3) "*Once an agreement to perform architectural services has been executed by an Architect Officer, a Business Enterprise may not change the Architect Officer who is in responsible control of those services unless that change is first approved by the Board.*" Approval by the board of registration at this level seems to be an inappropriate use of state resources and creates an added burden for business. We believe the case can be made that such a requirement could be viewed as a restraint of trade.

II. Section 4.04(1)(c):

We still believe there are less restrictive alternatives that do not impose the Additional Recordkeeping requirements of 4.04 (1) (c), which are onerous and costly for firms. These go well beyond any other required by any other state.

III. Section 4.04(1) (a) 3.

We understand the most recent changes of 4.04 (1) (a) 3. attempts to provide flexibility to allow an Architect Officer to delegate stamping to another registered architect, but you have indicated that this officer must still maintain "professional and supervisory control." This new language essentially reverts back to the current language and so the following comments relate to both the proposed and current regulations.

- This language implies that some of the requirements of 404 (1) (c) 1. and 2. (responsible control) are still imposed on the architect officer but it is unclear. Shouldn't the board be satisfied that the public good has been ensured once a Massachusetts registered architect has prepared and stamped the drawings regardless of whether that task has been delegated to him and under the professional and supervisory control of an Architect Officer? After all, by issuing a license to that licensed architect Massachusetts has deemed that that architect has

the requisite skill to provide professional architecture services, can exercise responsible control over the architectural design, and can sign and seal architectural design documents.?

- Implying the architect officer has some responsible control requirements, opens this officer to an evaluation of capacity to exercise responsible control that may not be reasonable and which may preclude the corporation's management intent. In other words, a corporation should be free to structure its firm with an officer that may be managing many high level architects or principals, but there is a fear by many of our members that with 4.04 (1) (a) (3) this same officer could never meet the board's judgement of his/her ability to exercise responsible control over all projects prepared and stamped by those architects under him or her.

- The board is creating a new level of responsibilities – that of "professional control" over those that exercise responsible control – but there are no details on what these responsibilities are and therefore no guidance on how to follow them.

- We understand the requirements of 4.04 (1) (a), (b), (c) and (d) are meant to protect the public by imposing requirements on an officer that may avoid a situation whereby a nonprofessional officer could compel a professional to stamp non-compliant work. We just do not see evidence that this is a systemic problem and a problem that is not rectified already in the disclosure requirements of 4.01 (3). After all, it is the stamping professional's obligation and responsibility under its license to evaluate whether the work is compliant and not to stamp work that is not. Again, we believe the real protection to the public is through the enforcement of licensed professionals exercising responsible control over the project, not in who signs the contract.

- Moreover, this added oversight adds a whole new review authority by the Board that could be quite onerous. Not only, will the board have professional oversight of the practice of architecture by licensed architects, it will be taking on the business oversight of architect officers.

Finally, for a smaller engineering firm currently providing engineering services for building projects, the current law and the current and proposed regulations present another unfair scenario that stifles growth. If one of our member engineering firms, Architectural Engineers, Inc., a twenty-person MEP engineering firm, decided to hire an architect to provide architectural services, the firm would have to make that architect an officer of the firm, when he or she has not earned that place in the senior leadership of the firm. This again is a barrier to business.

Thank you for giving us the opportunity to testify before you today. ACEC and the design professional community plan to stay engaged in the regulatory review process and continue to discuss our concerns about the current and proposed changes to 231 CMR with this Board and with the Administration.

For more information, contact: Abbie Goodman, Executive Director, American Council of Engineering Companies of Massachusetts (ACEC/MA), The Engineering Center Education Trust (TECET), One Walnut St, Boston, MA 02108-3616, T: 617-305-4112; agoodman@engineers.org, www.acecma.org