

DCA04-DEC-069 by Bob Boyer, Palm Beach County.

Question:

Does failure of Rule 9B-72.110(3) and 9B-72.110(4) to include “performing a validation” mean architect and engineer may have a financial interest when performing a validation, which is prohibited for evaluations?

Background:

Section 553.842(9), F.S., provides: “The Commission may adopt rules to approve the following types of entities that produce information on which product approvals are based. All of the following entities, **including engineers and architects**, must comply with a nationally recognized standard demonstrating independence or no conflict of interest.

- (a) Evaluation entities that meet the criteria for approval adopted by the Commission by rule. ... Architects and engineers licensed in this state are also approved to conduct product evaluations as provided in subsection (6).
- (b) Testing laboratories...
- (c) Quality assurance agencies...
- (d) Certification agencies...
- (e) Validation entities that comply with accreditation standards established by the commission by rule.

Rule 9B-72.110, F.A.C., requires: “A certification of independence shall be provided by a Florida registered architect or professional engineer as applicable...”

Rule 9B-72.110(4), F.A.C., requires: “The Florida registered architect or professional engineer performing an evaluation does not have nor will acquire, a financial interest in any other entity involved in the approval process of the product.”

Analysis:

The law requires engineers and architects to comply with nationally recognized standard demonstrating independence or no conflict of interest.

The rule requires engineers performing evaluations to be independent of any other entity involved in the approval process. Entities involved in the approval process identified in law and rule are:

Manufacturer and their representative, if one is used to submit the application for approval

Evaluation entity, evaluating engineer or engineering firm, test laboratory or certification agency (possibly multiples depending on application)

Quality Assurance entity(ies)

Validation entity

Recommendation:

No. An engineer conducting an evaluation cannot have financial interest in a validation entity or validating engineer. Therefore, a validating engineer cannot have financial interest in an engineer conducting the evaluation. While the rule is not specific that an

engineer conducting the application validation for the Commission cannot have financial interest in the manufacturer of a product, the law is clear the engineer must comply with national standards of independence or no conflict of interest in the approval of the product.

2nd Question:

Question:

When a local building official validates an evaluation for a local product approval request, as required in Rule 9B-72.045, is he doing an administrative review or technical review?

Background:

Section 553.842(6), F.S., requires: Local approval of seven product categories covered by Rule 9B-72, F.A.C. by “submittal and validation” of either a certification listing of an approved certification agency, a test report of an approved testing laboratory or an evaluation report of an approved evaluation entity or Florida licensed engineer or architect. (See section 553.842(6), F.S., for specifics)

Section 553.842(8), F.S., requires: “...The Commission shall adopt by rule criteria constituting complete validation by the local official, including, but not limited to, criteria governing verification of a quality assurance program. ...”

Section 9B-72.045 Validation of Evaluation for Local Approval requires the building official to validate the reports or listings recognized as means of demonstrating compliance with the Code by following steps (1) and (2).

Section 9B-72.045(1) requires: “Verification that the testing, evaluation and quality assurance requirements established by Rule 9B-72.040, F.A.C., are met and that all documentation required by Rule 9B-72.040, F.A.D., is in order.”

Section 9B-72.045(2) requires: “Validation of the method of compliance using the validation checklist in subsection 9B-72.130(5).”

Section 553.842(3), F.S., requires: “Products..., that have standardized testing or comparative or rational analysis methods established by the code, and that are certified by an approved product evaluation entity, testing laboratory, or certification agency as complying with the standards specified by the code shall be approved for **local** or statewide use by one of the methods established in subsection (6) **without further evaluation**.

Chapter 471, F.S., delegates the Florida Board of Professional Engineers authority to establish regulations regarding the practice of engineering. The board’s Rule 61G15-26.001(1), F.A.C., requires: “As required by s. 471.003(2)(b)2., F.S., employees of governmental entities must act under the responsible charge professional engineers ... whenever they are performing engineering as that term is defined in s.471.005(7), F.S.

..... This rule shall prohibit non-professional employees governed by this rule from overriding, or approving, accepting or rejecting, or modifying engineering document prepared by professional engineers unless such actions are concurred in by a professional engineer in responsible charge for such employee and such professional engineer takes full responsibility for such a decision.”

Analysis:

Building officials cannot conduct validation of engineering reports in a manner that requires engineering as defined by s.471.005(7), F.S., unless the validation is conducted under the supervision of a professional engineer who takes responsibility for the validation.

Section 553.842(3), F.S., requires approval of products evaluated by a standard method and certified to comply with the Code by an approved evaluation entity, certification agency or testing laboratory **without further evaluation**. Rule 9B-72.045(1), F.A.C. requires the building official to verify that the testing, evaluation and quality assurance requirements of rule 9B-71.040, F.A.C., are met and all documentation is in order.

Recommendation:

For products covered by rule 9B-72 and for which the Florida Building Code establishes performance criteria and standard evaluation test of rational or comparative analysis, building officials should verify that all documentation and submittals required by rule 9B-71.040, F.A.C., have been submitted and are complete **including statements of compliance** with the respective standards of the Code.

For products covered by rule 9B-72 and for which the Florida Building Code does not establish a standard method of evaluation, building officials may require verification reviews, which constitutes engineering technical review, of documentation for all products evaluated by Florida licensed engineers and architects and when such review is conducted in accordance with Rule 61G15-26.001(1), F.A.C.

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Verification that testing, evaluation and quality assurance requirements are met will require review of reports to determine the information required by Rule 9B-72.040(5), F.A.C., is included. Such verification is administrative in nature and does not require supervision by a professional engineer. Verification of listings by approved certification agencies is administrative in nature.

Question:

Can rational or comparative analysis be allowed to change the performance level of a product and conditions or limitations of use for a window with state approval?

Background:

Section 553.842(3), F.S., requires: “Products . . . , that have standardized testing or comparative or rational analysis methods established by the code, and that are certified by an approved product evaluation entity, testing laboratory, or certification agency as complying with the standards specified by the code shall be approved for local or statewide use by one of the methods established in subsection (6) without further evaluation.

Section 553.842(4), F.S., requires: “By October 1, 2003, products or methods or systems of construction requiring approval under s. 553.77 must be approved by one of the methods established in subsection (5) or subsection (6) before their use in construction in this state. . . . statewide approval shall preclude local jurisdictions from requiring further testing, evaluation, or submission of other evidence as a condition of using the product so long as the product is being used consistent with the conditions of its approval.”

Rule 9B-72.050(2), F.A.C., requires: “Acceptance of a product, material or system of construction is specific to a project and requires approval by a local jurisdiction pursuant to Rule 9B-72.050, F.A.C., or statewide approval by the Commission pursuant to Rule 9B-72.090, F.A.C., and verification that the product is being used consistent with the approved evaluation and limitations of use established by the approved evaluation as required by the design specifications.

Analysis:

Building officials are only precluded from requiring further evaluation when a product is being used consistent with the conditions of state approval and is evaluated to a standard method adopted by the Code and its compliance is certified by an approved evaluation entity, testing laboratory or certification agency (s. 553.842(3)) However, the law does not preclude building officials from allowing further evaluation to demonstrate a product’s compliance with Code requirements for a specific to a project. Florida law and rule do require demonstration of compliance for covered products using the appropriate method identified by Code and s. 553.842, F.S., and Rule 9B-72.040, F.A.C.

Recommendation:

The consensus recommendations which were integrated into law determined flexibility of the system to allow for products to be used in specific projects outside of the limitations and conditions established by local and state approval of documentation demonstrating compliance is essential to the construction process. Building officials should be able to allow use of products covered by Rule 9B-72 outside the conditions and limitations established by state approval by requiring demonstration the product will comply with requirements of the Code specific to a project by requiring demonstration of compliance by the appropriate method recognized by s. 553.842(6), F.S., and Rule 9B-72.040, F.A.C.