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**BEFORE THE WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS**

**IN RE: DAVID BERRY
 APEC ENGINEERING, INC.**

C2016-11

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers by Edward L. Robinson, P.E., its President, (hereinafter “the Board”) for the purpose of agreeing to resolve a Complaint seeking disciplinary action against David Berry (hereinafter “Respondent Berry”) and APEC Engineering, Inc. (hereinafter “Respondent Firm”) (together, “Respondents”). As reflected in this document, the parties have reached an agreement concerning the proper disposition of this matter, and the Board, upon approval of such agreement, does hereby **FIND** the following:

1. The matters set forth herein are within the jurisdiction of the Board, which is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia.
2. Respondent Berry is a licensed professional engineer in his home state of Ohio and in New York, but has never been licensed to offer engineering services or practice engineering in West Virginia.
3. Respondent Berry is the President of Respondent Firm, which is organized under the laws of the State of Ohio.
4. Respondent Firm has never had the Certification of Authorization (COA) required to offer engineering services or practice engineering in West Virginia.

5. This Complaint relates to a quotation for custom-engineered industrial equipment sold by Respondent firm which included an option for engineering services for installation of the equipment.
6. The quotation was submitted by Respondents to a third-party engineering firm on January 23, 2015, and shortly thereafter provided to the potential client, a power plant in West Virginia.
7. The Board initiated complaint number C2016-11 at its regular meeting on September 15, 2015, which was filed and served on September 23, 2015.
8. Respondents admitted the allegations and initiated settlement negotiations in lieu of filing a response to the Complaint.
9. In prior communications with the Board, Respondents indicated that:
 - a. In this instance, Respondents were the electrical component of a quotation process conducted through a third-party engineering firm in Utah;
 - b. Respondents' quotation process often takes years, and, although Respondents were aware at the time the quotation was submitted that the project was in West Virginia, they are not always advised of the location of the project for which a quotation is requested;
 - c. Respondents' communications with the potential customer stated their intention to acquire West Virginia credentials if awarded the project; and
 - d. As this was the first project quoted in West Virginia, this six-year-old firm was unaware that West Virginia engineering law's definition of the practice of engineering includes the offer to practice engineering.
10. Respondent Berry applied for comity licensure and was issued PE License #21557 on September 29, 2015.
11. Respondent Firm intends to apply for its COA after Respondent Firm has a qualified engineer to serve as its engineer in responsible charge.

12. Respondent Berry admits that he offered engineering in West Virginia without a professional engineering license, in violation of West Virginia engineering law.
13. Respondent Firm admits that it offered engineering in West Virginia without a COA, and further admits it did not qualify for a COA because it had no engineer with an active license in West Virginia who could act as Respondent Firm's engineer in responsible charge.
14. The Board has taken into account the following factors in reaching this settlement:
Respondents' cooperation in communicating with this Board after bringing this matter to the Board's attention with the comity application; Respondents' cooperation in the resolution of this Complaint; and the nature of the violation, which did not pose harm to the public since no engineering services have been performed by Respondents in West Virginia.
15. The Board, in its discretion, will not assess administrative costs although it is within its power to assess such costs and administrative costs that were incurred in the investigation, initiation and resolution of this complaint.

CONCLUSIONS OF LAW

16. The Board is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia, and matters related to such practice are within the jurisdiction of the Board. W. Va. Code § 30-13-1 et seq.
17. David Berry, as the President of Respondent Firm, has the power and authority to make admissions and otherwise act on behalf of Respondent Firm.
18. It is unlawful for any person to practice or offer to practice engineering, as defined by West Virginia Code § 30-13-3(e), in the State of West Virginia unless that person is duly

registered under the provisions of West Virginia engineering law. W. Va. Code § 30-13-2.

19. West Virginia engineering law allows a firm to practice or offer to practice engineering only upon the issuance of a certificate of authorization by the Board. W. Va. Code § 30-13-17.
20. The Board may suspend or revoke or refuse to issue, restore or renew a certificate of registration of, or place on probation, impose a civil penalty or reprimand any professional engineer who has failed to comply with any of the provisions of this article or any of the rules promulgated under it. W. Va. Code § 30-13-21(a)(4).
21. The provisions of W. Va. Code § 30-13-21(a) are applicable as appropriate to unlicensed persons and firms. W. Va. Code §§ 30-13-21(b) and (d).
22. The Board is authorized to “assess civil penalties against any person who violates any provision of this article or any rule promulgated by the board for each offense in an amount determined by the board.” W. Va. Code § 30-13-21(b); see also W. Va. Code § 30-13-21(d)(4).
23. Practicing or offering to practice engineering, as defined by W. Va. § 30-13-3(e), without a license is an action that may subject a person to discipline by the Board, including a civil penalty up to Five Thousand Dollars (\$5,000.00). W. Va. Code R. § 7-1-15.1.
24. Practicing or offering to practice engineering, as defined by W. Va. § 30-13-3(e), without a valid Certificate of Authorization is an action that may subject a firm to discipline by the Board, including a civil penalty up to Five Thousand Dollars (\$5,000.00). W. Va. Code R. § 7-1-15.1.
25. In determining the amount of a civil penalty to be assessed, the Board may consider such factors as the circumstances leading to the violation; the nature and severity of the

violation and the risk of harm to the public; the extent to which the cited person or firm has cooperated with the Board and the Board's investigation; and other matters as may be appropriate. W. Va. Code R. § 7-1-15.4.

26. The assessment of administrative costs is within the Board's sole discretion. W. Va. Code § 30-13-21(d)(4) and W. Va. Code R § 7-1-14.4.

CONSENT OF RESPONDENTS

Respondent David Berry, individually and as the President of APEC Engineering, Inc., by affixing his signature hereon, agrees to the following:

27. Respondents are aware of their right to be represented by counsel and to pursue this matter through appropriate administrative and/or court procedures, including their right to a formal hearing before the Board, and Respondents intelligently and voluntarily waive these rights provided the Board accepts the terms and conditions set forth in this Consent Order.
28. Respondent Berry admits that he did not have a license to offer or practice engineering in the State of West Virginia at the time of offering engineering services in West Virginia, in violation of West Virginia engineering law.
29. Respondent Firm admits that it did not have a Certificate of Authorization at the time it offered engineering services in West Virginia, in violation of West Virginia engineering law.
30. Respondents accept the findings set forth above and consent to the entry of this Consent Order freely and voluntarily and not under duress, restraint or compulsion.
31. Respondents acknowledge that this Consent Order is being executed for the purpose of avoiding further administrative action with respect to the above-styled matter. In this

regard, Respondents authorize the Board to review and examine all investigative file materials concerning Respondents' activities in West Virginia in consideration of this Consent Order.

32. Should the Board not approve this Consent Order, Respondents waive any objections to the Board or any of its members participating in the adjudication of this matter. This paragraph is binding on the Respondents even if the Board does not approve this Consent Order.
33. Respondents acknowledge that the Board may reject this proposal, notice and hold a hearing, and, upon adjudication, impose such sanctions of a disciplinary nature as it deems appropriate.
34. Respondents understand that this Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to the same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order, but that nothing in this Consent Order prohibits the Board from considering this disciplinary action or the circumstances giving rise to same with regard to any future disciplinary matter involving Respondents which may be before this Board.
35. Respondents understand that the complaint and this Consent Order are public records which, together with other public documents in the file, must be made available upon legal request in accordance with the State's Freedom of Information Act.
36. Respondents agree that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board's website, as well as other appropriate placements, including the non-public enforcement exchange

database administered by the National Council of Examiners for Engineering and Surveying (NCEES).

37. Respondents acknowledge that non-compliance with this Consent Order may result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation of any license or certification issued to Respondents by the Board, and the addition of any other charges which may arise or ensue from Respondents' non-compliance with this Consent Order.
38. Respondents acknowledge that proof of any material misstatement or misrepresentation made in connection with this matter will result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation of any license or certification issued to Respondents by the Board, and the addition of any other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

ORDER

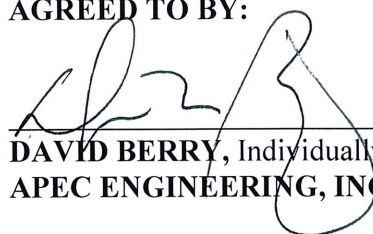
1. On the basis of the foregoing, and upon entry of this Consent Order, the Board hereby **ORDERS** that this Consent Order shall serve as settlement of Complaint number C2016-11 pursuant to West Virginia Code § 30-13-22(b).
2. The Board **ORDERS** Respondent Berry to pay a civil penalty in the amount of Two Hundred and Fifty Dollars (\$250.00) for offering to practice engineering in West Virginia without a license.
3. The Board **ORDERS** Respondent Firm to pay a civil penalty in the amount of Two Hundred Fifty Dollars (\$250.00) for offering to practice engineering in West Virginia without a certificate of authorization.

4. The civil penalties imposed herein totaling Five Hundred Dollars (\$500.00) must be paid within thirty (30) days of the date of entry set forth below, such amount to be made payable to the W. Va. P.E. Board for transfer to the general fund of the State of West Virginia upon receipt.
5. The sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board's website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).
6. Any violation of the terms of this Consent Order shall be immediate cause for further disciplinary action by the Board.
7. If the civil penalties imposed herein are not timely paid, this Consent Order may be summarily enforced in the Circuit Court of Kanawha County without further notice to Respondents upon application by the Board for the entry of a Judgment Order for the total amount of payment agreed to herein (\$500.00), together with pre-judgment interest from the date of the President's signature hereon, post-judgment interest from the date of entry of the Judgment Order and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.
8. This matter shall be closed upon execution of this Consent Order by both parties and the full payment of the civil penalties agreed to herein.
9. This Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to same may be the subject of any appeal or other civil or administrative actions except an action by the Board to enforce the terms of this Consent Order. This shall not prohibit the Board from considering this

disciplinary action or the circumstances giving rise to the same with regard to any future disciplinary matter involving Respondents which may come before this Board.

10. This Consent Order relates solely to matters set forth in West Virginia engineering law and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

AGREED TO BY:




DAVID BERRY, Individually and as President of
APEC ENGINEERING, INC.

10/8/15
DATE

ENTERED into the records of the West Virginia State Board of Registration for Professional Engineers this 8 day of October, 2015.

**WEST VIRGINIA STATE BOARD OF REGISTRATION
FOR PROFESSIONAL ENGINEERS**

By:



EDWARD L. ROBINSON, P.E.
BOARD PRESIDENT