

June 9, 2006

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Re: MAPPS, et al. v. United State of America
Civil Action No.: 1:06 CV 378


Dear Lauren:

As we discussed in our telephone conversation of earlier today, I am forwarding you the Amended Complaint in the above captioned matter. The only amendments to the initial Complaint reflected in this document is the addition of two plaintiffs; the Council on Federal Procurement of Architectural and Engineering Services ("COFPAES") and the American Society of Civil Engineers ("ASCE").

I am serving this document by both electronic mail and United States mail. In the future, I hope that we can agree to service by electronic means, if that meets with the Department of Justice's approval and if you find it a more convenient method of serving documents. I look forward to discussing this matter with you in more detail

Please let me know if I may provide you with any additional information. Thank you for your attention and assistance in this matter.

Sincerely,


Alexander M. Bullock

Enclosure

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

MANAGEMENT ASSOCIATION FOR)
PRIVATE PHOTOGRAMMETRIC)
SURVEYORS)
1760 Reston Parkway, Suite 515)
Reston, VA 20190,)
)
COUNCIL ON FEDERAL PROCUREMENT)
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1760 Reston Parkway, Suite 515)
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NATIONAL SOCIETY OF PROFESSIONAL)
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1420 King Street)
Alexandria, VA 22314-2794)
)
AMERICAN SOCIETY OF CIVIL ENGINEERS)
1801 Alexander Bell Drive)
Reston, VA 20191-4400)
)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA)
)
Defendant.)

Civil No.: 1:06 CV 378

**AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF OR MANDAMUS**

Plaintiffs, the Management Association For Private Photogrammetric Surveyors (“MAPPS”), the Council on Federal Procurement of Architectural and Engineering Services (“COFPAES”), the National Society of Professional Engineers (“NSPE”), and the American Society of Civil Engineers (“ASCE”) allege as follows:

1. Plaintiffs seek a declaratory judgment under 28 U.S.C. § 2201, *et seq.*, that the federal regulation found at 48 C.F.R. Part 36.601-4, conflicts with 40 U.S.C. 1101, *et seq.*, known as the Brooks Architect-Engineers Act, (“Brooks Act”).

2. Accordingly, Plaintiffs seek injunctive relief under 5 U.S.C. § 701-706, and/or a writ of mandamus under 28 U.S.C. § 1361, directing defendants to revise 48 C.F.R. 36.601-4(a)(4) within the meaning of the Brooks Act, as directed by Congress on numerous occasions.

THE PARTIES

3. MAPPS is an association organized under the laws of the Commonwealth of Virginia, with its offices located in Reston, Virginia. MAPPS is the only national association of firms in the field of surveying, spatial data and geographic information systems. MAPPS’ members are engaged in surveying, photogrammetry, satellite and airborne remote sensing, aerial photography, hydrography, aerial and satellite image processing, Global Positioning System (“GPS”) and Geographical Information Systems (“GIS”) data collection and conversion services.

4. The Council on Federal Procurement of Architectural and Engineering Services (“COFPAES”) is an association organized and existing under the laws of the Commonwealth of Virginia, with its offices located in Reston, Virginia. The members of COFPAES are the major organizations representing design professionals throughout the United States. COFPAES provides the design community with a common voice focusing upon federal procurement law and regulations.

5. NSPE is an association organized and existing under the laws of the Commonwealth of Virginia, with its offices located in Alexandria, Virginia. NSPE is the recognized voice of and advocate for licensed professional engineers. The purpose of NSPE is to strengthen the engineering profession by promoting engineering licensure and ethics, enhancing

the engineer image, advocating and protecting professional engineers' legal rights at the national and state levels, publishing news of the profession, and providing continuing education opportunities.

6. ASCE is an association organized under the laws of the state of New York, with its headquarters offices located in Reston, Virginia. Founded in 1852, ASCE is the country's oldest national civil engineering organization. It represents more than 139,000 members of the civil engineering profession who serve in private practice, government, industry, and academia. ASCE is a 501(c) (3) not-for-profit educational, scientific, literary and charitable society dedicated to the advancement of the science and profession of engineering to enhance the welfare of humanity.

7. The members of these four organizations respond on a routine basis to requests for mapping and surveying services by federal agencies; therefore, their members have a stake in the proper interpretation of Congressional intent and the proper application of statutes and regulations by federal agencies.

8. Defendant is the United States of America, acting by and through the Federal Acquisition Regulation Council ("FAR Council"). Under the provisions of 41 U.S.C. § 421, the FAR Council consists of the Secretary of the United States Department of Defense, currently held by the Hon. Donald H. Rumsfeld; the Administrator of the National Aeronautics and Space Administration, currently held by the Hon. Michael Griffin; the Administrator of the United States General Services Administration, currently held by David L. Bibb (acting); and the Administrator of Federal Procurement Policy (vacant). Together, these agencies, acting as through the FAR Council, declined to revise 48 C.F.R. Part 36, et seq. on April 12, 2005. The FAR Council's decision is discussed in Federal Acquisition Regulation; Application of Brooks

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. 1331, 1361, 1651, 2201; 5 U.S.C. 701-706, and 40 U.S.C. 1101, et seq. Venue in this court is proper under 28 U.S.C. 1391(e)(3), which provides that a civil action in which an agency of the United States is the defendant may be brought in any judicial district in which the plaintiff resides, if no real property is involved in the action. Plaintiffs' principal places of business are in the Eastern District of Virginia and there is no claim involving real property at issue in this matter.

BACKGROUND

10. In 1972, Congress enacted the Brooks Act, which codified the United States' traditional and longstanding practice for selecting contractors to provide architectural and engineering services. The statute, currently codified at 40 U.S.C. § 1101¹, et seq., states in pertinent part:

The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.

11. In 1988, Congress amended 40 U.S.C. § 1102 to include the phrase "surveying and mapping" in the definition of "architectural or engineering services."

(2) Architectural and engineering services. – The term 'architectural and engineering services' means –

(A) professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph;

(B) professional services of an architectural or engineering nature

¹ The Brooks Act was originally codified at 40 U.S.C. 541, et seq.

performed by contract, that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C) other professional services of an architectural or engineering nature or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

12. In response to the 1988 amendments of 40 U.S.C. § 1102(2)(C), the FAR Council amended the sections of the FAR addressing the Brooks Act, 56 Fed. Reg. 29124, (June 25, 1991); however, the language that it inserted failed to match either the express language of the statute or the intent of Congress. The rule, found at 48 CFR 36.601-4(a)(4) (1991) stated:

Contracting officers should consider the following services to be "architect-engineer services" subject to the procedures of this subpart:

Professional surveying and mapping services of an architectural or engineering nature.

Surveying is considered to be an architectural and engineering service and shall be procured pursuant to 36.601 from registered surveyors or architects or engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an A&E service and must be procured using the process in FAR 36.601. However, mapping services, such as those procured by the Defense Mapping Agency, that are not connected to traditionally understood or accepted A&E activities, are not incidental to such A&E activities or have not themselves traditionally been considered A&E services, shall be procured pursuant to provisions of FAR part 13, 14 and 15.

(56 Fed. Reg. At 29128-29). By including the last sentence in this regulation, the FAR Council created an exception for certain "mapping services procedures" that is not authorized by statute.

13. After the FAR Council promulgated this regulation, including the unauthorized language that was not authorized by the statute, Congress took a number of steps to reiterate that

Brooks Act procedures should be applied to all contracting for mapping services.

14. In the “Small Business Administration Reauthorization and Amendments Act of 1990”, the Congress directed that: “modification to Part 36 of the Federal Acquisition Regulation (48 C.F.R. Part 36) shall specify that the definition of architectural and engineering services **includes surveying and mapping services** to which the selection procedures of Subpart 36.6 of the Federal Acquisition Regulation apply.” See, Public Law 101-574, § 403, 104 Stat. 2814, 2832 (1990) (*Emphasis added*). (Ex. 2)

15. In the Small Business Credit and Business Opportunity Enhancement Act of 1992, Congress directed that: “Solicitations for the award of contracts for architectural and engineering services (**including surveying and mapping**) issued by a Military Department or a Defense agency shall comply with the requirements of subsections (a) and (b) of section 2855 of title 10, United States Code” (*Emphasis added*). See, 15 U.S.C. § 644, Note Pub. L. 102-366, § 202, 106 Stat. 986, 994 (1992). (Ex. 3)

16. In two reports contained in the Omnibus Consolidated Appropriations Act of 1997, Congress addressed again this issue. In House Report 104-617, Congress stated “that any proposals to increase private contracting [**for mapping, charting and geodetic activities**] should be done in compliance the **normal qualifications based selection process** found in 40 U.S.C. 541 and 10 U.S.C. 2855 (*Emphasis added*). See H. R. Rep. No. 104-617, at 48 (1996). (Ex. 4) In Conference Report, H. Rept. 104-863, Congress stated: “The Conferees concur ...[DMA’s] private contracting be conducted in compliance with the **normal qualifications based selection process** found in 40 U.S.C. 541 and 10 U.S.C. 2855” (*Emphasis added*). See H. R. Rep. No. 104-863, 881 (1996). (Ex. 5)

17. Finally, in the 1999 Defense Appropriations Act, Congress stated:

SEC. 8101. None of the funds in this Act may be used by the National Imagery and Mapping Agency² for mapping, charting, and geodesy activities unless contracts for such services are awarded in accordance with the qualifications based selection process in 40 U.S.C. 541 et seq. and 10 U.S.C. 2855: Provided, That such agency may continue to fund existing contracts for such services for not more than 180 days from the date of enactment of this Act: Provided further, That an exception shall be provided for such services that are critical to national security after a written notification has been submitted by the Deputy Secretary of Defense to the Committees on Appropriations of the House of Representatives and the Senate.

Pub. Law 105-262, § 8101, 112 Stat. 2279, 2320 (1998). (Ex. 6)

The House and Senate Conferees on this legislation were even more specific in providing Congressional direction to the FAR Council by stating pointedly:

The conferees included a general provision (Section 8101) to provide permanent clarification of the application of the 'Brooks Act' qualifications based selection (QBS) process to surveying, mapping, charting and geodesy contracts of the National Imagery and Mapping Agency (NIMA). The conferees expect the officials responsible for the Federal Acquisition Regulations (FAR) to strike and revise the last sentence of section 36.604(a)(4) of the FAR (48 CFR 36.604(a)(4)) to define 'Surveying and mapping in such a manner as to include contracts and subcontracts for services for Federal agencies for collecting, storing, retrieving, or disseminating graphical or digital data depicting natural or man made physical features, phenomena and boundaries of the earth and any information related thereto, including but not limited to surveys, maps, charts, remote sensing data and images and aerial photographic services'.

House Report 105-746 (*Emphasis added*). See, H. R. Rep. No. 105-746, at 165 (1998). (Ex. 7)

Despite the specific language of Section 8101 and the even more explicit expectation set forth in the Conference Report, the FAR Council has refused to reconcile the language of its regulation with the directions issued by Congress.

18. In a Federal Register Notice dated March 23, 2004, the FAR Council, sought comments regarding:

² The National Imagery and Mapping Agency is the successor to the Defense Mapping Agency.

whether guidance in the Federal Acquisition Regulations addressing the application of the Brooks Act to mapping services should be amended. The current version of the FAR requires application of the Brooks Act's qualifications "based selection process to certain types of mapping services while precluding application in other instances.

Federal Acquisition Regulation; Application of the Brooks Act for Mapping Services, 69 Fed. Reg. 13499 (Mar. 23, 2004). (Ex. 8)

19. In an April 19, 2005, Federal Register notice, the FAR Council determined that, despite the language of the statute and the multiple declarations of Congressional intent, "based on interpretation of the Brooks Act and decisions of the Comptroller General, reaffirmed by NCEES and NCARB guidance, that the best solution is to retain FAR Part 36 without revision." Vol. 70, No. 74, p. 20333. Accordingly, FAR Part 36 remains inconsistent with the clear intent of Congress, as set forth in 40 U.S.C. § 1102(2)(C) and the legislative history of the Brooks Act.

20. Since the April 19, 2005 notice, Plaintiffs have been engaged in discussions and negotiations with FAR Council in a good faith attempt to have FAR Part 36 brought into compliance with the provisions of the Brooks Act. Despite repeated representations that it was reviewing Plaintiffs' request, it was not until February 15, 2006, that the FAR Council informed Plaintiffs that it had reviewed the issue and refused to amend FAR Part 36 in any manner.

COUNT I

(Request For Declaratory Judgment And Mandatory Injunction)

21. Plaintiffs repeat, reallege, and incorporate the allegations contained in Paragraphs 1 through 20 as if fully set forth herein.

22. There is an actual controversy between Plaintiffs, on behalf of their members, and the Defendants for the Defendants' failure to revise 48 C.F.R. 36.601-4(a)(4) to comply with the language of the Brooks Act and with express Congressional directives.

23. Plaintiffs are entitled to a declaratory judgment that 48 CFR 36.601-4(a)(4), as it relates to the application of the Brooks Act to “mapping services” is invalid, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law. Pursuant to the provisions of 28 U.S.C. 1361 and 28 U.S.C. § 1651, Plaintiffs are also entitled to a mandatory injunction compelling the FAR Council to promulgate regulations in accordance with the intent of Congress as set forth in the 1999 Conference Report.

COUNT II

(Request For Mandatory Injunction Under 5 U.S.C. § 706(1)).

24. Plaintiffs repeat, reallege, and incorporate the allegations contained in Paragraphs 1 through 23 as if fully set forth herein.

25. As a result of the FAR Council’s unlawful and unreasonably delayed actions, Plaintiffs are entitled to a mandatory injunction compelling the FAR Council to issue regulations that are consistent with the provisions of 40 U.S.C. § 1102, as explained in the Conference Report found in House Report 105-746.

COUNT III

Request That The FAR Council’s Decision Not To Amend Be Set Aside Under 5 U.S.C. § 706(2)(A) Because It Is Arbitrary, Capricious, An Abuse Of Discretion, And Not In Accordance With Law.

26. Plaintiffs repeat, reallege, and incorporate the allegations contained in Paragraphs 1 through 25 as if fully set forth herein.

27. By failing to issue regulations that are consistent with the provisions of 40 U.S.C. § 1102, (namely that portion of 48 CFR Part 36 that relates to the application of the Brooks Act to “mapping services”) as explained in the Conference Report found in House Report 105-746, the FAR Council, and its constituent agencies have acted in a manner that is arbitrary, capricious,

an abuse of discretion, and is not in accordance with law. Accordingly, this action should be set aside by this Court, pursuant to the provisions of 5 U.S.C. § 706(2)(A).

COUNT IV

Request that the FAR Council's Decision Not to Amend 48 C.F.R. 36.601-4 Be Set Aside Under 5 U.S.C. § 706(2)(C) Because It Is In Excess of Statutory Jurisdiction Authority, Limitations Or Short of Statutory Right.

28. Plaintiffs repeat, reallege, and incorporate the allegations contained in Paragraphs 1 through 27 as if fully set forth herein.


29. By failing to issue regulations that are consistent with the provisions of 40 U.S.C. § 1102, (namely that portion of 48 CFR Part 36 that relates to the application of the Brooks Act to "mapping services") as explained in the Conference Report found in House Report 105-746, the FAR Council, and its constituent agencies have acted in a manner that exceeds their respective statutory jurisdiction, authority, limitation, or statutory right. Accordingly, this action should be set aside by this Court, pursuant to the provisions of 5 U.S.C. § 706(2)(C).

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment:

1. Declaring that 48 C.F.R. Part 36 is arbitrary, capricious, an abuse of discretion, not in accordance with law, and therefore, invalid;
2. Setting aside the FAR Council's decision not to amend 48 C.F.R. Part 36, as reported in the Federal Register notice of April 19, 2005.
3. Enjoining the United States From Contracting For Surveying Or Mapping Services By Procedures Other Than The Qualifications-Based Selection Process Set Forth in the Brooks Act at 40 U.S.C. § 1101, et seq. and 10 U.S.C. § 2855; and directing the FAR Council to revise 48 C.F.R. Part 36 in conformance with the dictates of House Report 105-746.
4. Granting an award of reasonable attorneys fees, costs, and disbursements, and for

such other relief as the Court may deem just and proper.

Respectfully submitted.



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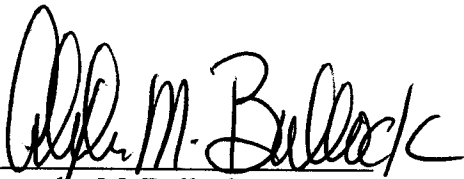
June 9, 2006

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2006, I severed the foregoing Amended Complaint upon the following counsel by electronic transmission and United States mail:

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