

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

MANAGEMENT ASSOCIATION FOR)
PRIVATE PHOTOGRAMMETRIC)
SURVEYORS, *et al.*)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA,)

Defendant.)

Civil Action No. 1:06-cv-378 (TSE/BRP)

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT AND IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY
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The United States of America respectfully submits this memorandum in support of its cross-motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment. Because Plaintiffs still have not met their burden to establish standing and cannot prevail on the merits of their claims under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2), the Court should deny Plaintiffs' motion and grant summary judgment in favor of the United States.

INTRODUCTION

In this suit, Plaintiffs, four trade associations in the fields of photogrammetric surveying and engineering, seek to limit the pool of competition for Federal mapping contracts by requiring the Federal Government to procure mapping services only from licensed surveyors and engineers. The Federal Acquisition Regulatory Council ("FAR Council")—the multi-agency council charged with creating a uniform body of procurement regulations—has denied Plaintiffs' attempts to

achieve this result through the administrative process. Rather than ceding to Plaintiffs' demands, the FAR Council has determined that it should abide by the intent of Congress while keeping the pool of competition for mapping services as broad as statutorily permissible, particularly in the face of changing technologies that have diminished the need for licensed surveyors and engineers to perform some mapping services.

Plaintiffs have now filed suit under the APA challenging the FAR Council's determination in April 2005 not to commence rulemaking proceedings to revise 48 C.F.R. § 36.601-4(a)(4), the provision of the Federal Acquisition Regulation ("FAR") that governs the procurement of mapping services.¹ Plaintiffs argue that the FAR Council's decision violates the APA in two ways. First, they contend it perpetuates a regulation that is inconsistent with the Brooks Architect-Engineer Act ("Brooks Act"), 40 U.S.C. §§ 1101-04. *See* 5 U.S.C. § 706(2)(C). Second, they argue that the FAR Council's explanation for its decision was "arbitrary and capricious" under *Motor Vehicle Manufacturers' Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). *See* 5 U.S.C. § 706(2)(A).

Both of these claims must fail. As an initial matter, however, the Court lacks jurisdiction over Plaintiffs' claims because they do not have standing to challenge the FAR regulation at issue. The affidavits submitted by employees of two of the Management Association for Private Photogrammetric Surveyors' ("MAPPS") members alleging that the employees have been injured by the interplay between the Brooks Act and state laws do not confer jurisdiction on this Court. For the reasons explained *infra*, Plaintiffs lack associational standing to sue on behalf of these

¹ Plaintiffs have appropriately abandoned the claims in Counts 1 and 2 of their Amended Complaint that they are entitled to a writ of mandamus pursuant to 28 U.S.C. § 1361, and that the FAR Council violated 5 U.S.C. § 706(1) by unreasonably withholding or unlawfully delaying agency action.

employees, and even if they could, the employees' alleged injury is neither cognizable nor redressable.

Moreover, even if Plaintiffs had standing, Congress has never foreclosed the FAR Council's reasonable interpretation of the Brooks Act. Rather than requiring all mapping services to be procured using Brooks Act procedures, Congress left it to the FAR Council, which has expertise in Federal procurement policy, to determine which types of mapping services logically or justifiably require performance by registered architects or engineers. The FAR Council's regulation, 48 C.F.R. § 36.601-4(a)(4), is entitled to *Chevron* deference. Furthermore, the FAR Council's reasoned decision in April 2005 not to institute rulemaking proceedings to revise the FAR should be upheld under the extraordinarily deferential standard of review afforded to such decisions.

LEGISLATIVE AND REGULATORY BACKGROUND

I. Overview of the Brooks Act

Enacted in 1972, the Brooks Act governs the Government's method of selecting contractors to provide architectural and engineering ("A-E") services. *See* 40 U.S.C. §§ 1101-04 (former 40 U.S.C. § 541 *et seq.*). Under the Act, federal agencies must "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." 40 U.S.C. § 1101. This method of selection, commonly referred to as qualification-based selection ("QBS"), mandates that agencies solicit statements of qualifications from licensed providers of A-E services, select the most qualified contractor, and then attempt to negotiate a fair and reasonable price with

the contractor.² 40 U.S.C. §§ 1103, 1104.

When procuring services using Brooks Act procedures, the Federal Government may only contract with firms that are “permitted by law to practice the professions of architecture or engineering.” 48 C.F.R. § 36.601-4(b); *see* 40 U.S.C. § 1103 (requiring procurement from qualified “firms”); *id.* § 1102(3) (defining “firm” as “an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering”). This means that competition for Brooks Act procurements is limited to firms whose employees include architects, engineers, or surveyors who are licensed to practice these professions under state law. *See* 48 C.F.R. § 36.601-4(a)(4) (explaining that “surveying is considered to be an architectural and engineering service and shall be procured . . . from registered surveyors or architects and engineers”).

II. Role of the FAR Council

The FAR Council has promulgated regulations interpreting and implementing the Brooks Act in FAR Subpart 36.6. *See* 48 C.F.R. pt. 36.6. The FAR is “a single, simplified, uniform Federal procurement regulation,” 41 U.S.C. § 405a, which is jointly issued by the Department of Defense (“DOD”), the National Aeronautics and Space Administration (“NASA”), and the General Services Administration (“GSA”), with oversight by the Administrator of the Office of Federal Procurement Policy (“OFPP”), *see id.* §§ 405, 421. Together, the heads of these agencies

² The term QBS, while a useful shorthand, is misleading to the extent it implies that Brooks Act procedures are unique in requiring the Federal Government to consider qualifications. To the contrary, other procurement methods such as FAR Part 15 (Contracting by Negotiation) mandate that “the quality of the product or services” must be addressed in source selection through factors such as “past performance, . . . personnel qualifications, and prior experience.” 48 C.F.R. § 15.304(c)(2). In order to avoid confusion on this score, the United States will use the term “Brooks Act procedures” instead of QBS.

make up the FAR Council, which Congress has charged with assisting in the direction and coordination of government-wide procurement policy.³ *See id.* §§ 421(a), (b).

STATEMENT OF MATERIAL UNDISPUTED FACTS

I. Facts Related to Standing

A. MAPPS

According to its website, MAPPS is “An Association of Photogrammetry, Mapping and Geospatial Firms.” *See* Defendant’s Exhibit (“DEX”) 1. A new member of MAPPS may either be categorized as a “Member Firm” or an “Associate Firm.” *Id.* In addition to Aerial Data Service, Inc. (ADS) and Aero-Metric, Inc., MAPPS’ members also include: Aerial Services, Inc.; Horizons, Inc.; LandAir Mapping, Inc.; Photo Science, Inc.; Sanborn; and Surdex Corporation. *See* DEX 2.

B. Solicitation USDA-NAIP-3-04

On March 31, 2004, the United States Department of Agriculture (“USDA”) issued solicitation USDA-NAIP-3-04, which sought contractors to provide aerial photograph and digital imagery services across forty-eight states, in support of the National Agriculture Imagery Program (“NAIP”).⁴ *See* DEX 3, ¶¶ 3-4 (Declaration of W. Geoffrey Gabbott and attached exhibits (“Ex.”) A and B). The USDA used FAR Part 15, 48 C.F.R. pt. 15, negotiated acquisition procedures to procure services for the NAIP project, with technical excellence being more significant in the evaluation process than price. *See id.*, ¶ 3 & Ex. A, p. 78.

³ DOD, NASA, and GSA conduct their FAR-related work through sub-councils known as the Defense Acquisition Regulations Council (“DARC”) and the Civilian Agency Acquisition Council (“CAAC”). *See* 48 C.F.R. § 1.201-1. In order to avoid undue complication, in this memorandum, the United States will collectively refer to the joint actions of DOD, GSA, NASA, and OFPP as “FAR Council” actions.

⁴ The specific purposes of this project are described in the attached declaration of W. Geoffrey Gabbott, the contracting officer for the solicitation. *See id.* ¶ 4.

Seventeen companies responded to USDA's solicitation. *Id.* ¶ 6. Each company specified the states for which it wished to be considered for a contract. *Id.* Three MAPPS members, *see* DEX 2, specified that they wished to be considered for Mississippi, North Carolina, Oklahoma, and/or South Carolina, DEX 3 ¶ 6. In addition, two firms identified Aerial Data Services, Inc. ("ADS") as a subcontractor that would assist them if they were awarded a contract for the NAIP project. *See id.*, ¶ 7. These firms submitted Letters of Commitment written by ADS executives, which pledged ADS's aerial photography and digital imagery services for the NAIP project. *See id.* & Ex. B. One of these letters specified that ADS would provide equipment and manpower in Oklahoma. *See* Ex. B, p. 1.

USDA awarded contracts to ten companies, at least seven of which are MAPPS members. *Id.* ¶ 8; *see* DEX 2. One MAPPS member, Photo Science, Inc., was awarded a contract that included providing services in Mississippi and South Carolina. DEX 3 ¶ 9. A second MAPPS member, Sanborn, was awarded a contract that included providing services in North Carolina. *Id.* A third MAPPS member, Surdex Corporation—one of the companies that had identified ADS as a subcontractor—was awarded a contract that included providing services in Oklahoma. *Id.*

C. Solicitation PR-NC-04-10550

On March 25, 2005, the United States Environmental Protection Agency ("EPA") issued Solicitation PR-NC-04-10550, which sought contractor support for a large-scale remote sensing program of the National Exposure Research Laboratory's Environmental Sciences Division ("ESD"). *See* DEX 4, ¶ 3 (Declaration of McDonald Morrison, and attachments). ESD, which is based in Las Vegas, Nevada, supports all EPA Regional and Program Offices and Laboratories. *Id.* ¶ 4. The contract required providing remote sensing services wherever they were needed across the United States and internationally. *Id.* ¶ 4 & p. 6 (stating that aerial imagery services could be

needed “anywhere in the United States or its Trust Territories”). With the exception of a few contractor personnel with Secret or Top Secret (SCI) security clearances who might be expected to work in classified facilities in Washington, DC or other areas as needed, contractor personnel were to work at their own contractor facilities, not at government facilities. *Id.* ¶ 5.

The EPA used FAR Part 15 negotiated acquisition procedures to procure this massive contract. *Id.* ¶ 3. As explained in solicitation PR-NC-04-10550, all evaluation factors other than cost or price, when combined, were significantly more important than cost or price. *Id.* ¶ 3 & p. 15. The EPA anticipated awarding the contract to a company with a wide range of capabilities that could provide a multi-disciplinary staff skilled in the application of remote sensing technology to natural and cultural resources identification and mapping, as well as personnel with technical capabilities in image analysis, image processing, Geographic Information Systems (GIS), photogrammetry, Global Positioning Systems (GPS) and cartography. *Id.* ¶ 7; *see also id.*, pp. 3-4.

There were three respondents to the solicitation: Lockheed Martin, General Dynamics, and Computer Services Corporation. *See id.* ¶ 8. Lockheed Martin was awarded the contract. *Id.*

II. Facts Related to the Merits

A. Enactment and Amendment of the Brooks Act (1972-1988)

In 1972, Congress enacted the Brooks Act to ensure that the Government would select “the best qualified design professional” at a fair and reasonable price. *See S. Rep. 92-1219 (1972), as reprinted in 1972 U.S.C.C.A.N. 4767, 4768.* As explained in the Senate Report accompanying the legislation, its purpose was to “amend the Federal Property and Administrative Services Act of 1949 to establish a Federal policy for the selection of qualified architects and engineers to design and provide consultant services in carrying out *Federal construction and related programs.*” *Id.* at 4767 (emphasis added). Underscoring the Brooks Act’s traditional real property focus, the Senate

Report went on to explain that “[t]he costs for architectural and engineering services in the construction of a structure or a facility generally represent a very small part of the total cost of construction, and yet those services are basic and essential to the quality of the construction of the building or facility.” *Id.* at 4772.

As originally enacted, the Brooks Act defined “architectural and engineering services” as “those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logically or justifiably perform.” 40 U.S.C. § 541(3) (1972). In 1977, the Comptroller General interpreted this definition to mean that “incidental services” should be procured using Brooks Act procedures only when they were performed in connection with a project for professional services of an A-E nature.⁵ *Ninneman Engineering—Reconsideration*, B-184770, 77-1 CPD 171, 1977 WL 13209 (1977). Applying this test in *Ninneman*, the Comptroller General ruled that since the cadastral (public land) surveying services being procured were not related to a project involving professional A-E services, such surveying services should not be procured using Brooks Act procedures. *See id.*

In 1988, Congress responded to *Ninneman* and other Comptroller General decisions that followed it by attempting to clarify the definition of A-E services. *See Business Opportunity Development Act of 1988*, Pub. L. 100-656, § 742, 102 Stat. 3897 (Nov. 15, 1988); *Office of Federal Procurement Policy Act Amendments of 1988*, Pub. L. 100-679, § 8, 102 Stat. 4068 (Nov. 17, 1988).⁶ Explaining that “changing technology and applications, as well as several decisions of

⁵ The Comptroller General of the General Accountability Office (GAO) has influenced the interpretation of the Brooks Act as a result of that office’s role in adjudicating bid protests. *See* 31 U.S.C. §§ 3551-56; 48 C.F.R. subpt. 31.1.

⁶ In a span of two days, Congress enacted two public laws that contained identical provisions amending the Brooks Act. The committee reports accompanying both laws state that their purpose was to “clarif[y]”—not expand—the application of Brooks Act procedures. *See* H.R.

the Comptroller General which might have been interpreted as narrowing the applicability of this law, have made clear the need to clarify for Federal agencies the range of services that are subject to the 1972 Act's procedures," H.R. Rep. 100-911, at 24 (1988), Congress set forth the following amended definition of A-E services:

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 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.⁷

Rep. 100-911, at 24 (1988); H.R. Rep. 100-1070, at 89 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 5401, 5523.

⁷ The list of services in 40 U.S.C. § 1102(2)(C) was adapted from a provision of the Federal Procurement Regulations (FPR) that was promulgated soon in 1973, after the enactment of the Brooks Act. The original regulation defining A-E services stated:

(c) "Architect-engineer services" are those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform: Including studies, investigations, surveys, evaluations, consultations, planning, programming, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

41 C.F.R. § 1-4.1002(c) (1974); 38 Fed. Reg. 33594, 33595 (Dec. 6, 1973). This list was dropped

40 U.S.C. § 1102(2). By identifying three distinct meanings of A-E services, the revised definition made clear that the *Ninneman* interpretation of A-E services was no longer viable. “Incidental services” were to be procured using Brooks Act procedures as long as such services could be considered incidental to professional A-E services; it did not matter whether they were also incidental to a particular A-E project. *See In re Forest Service, Department of Agriculture—Request for Advance Decision*, 68 Comp. Gen. 555, 558 (1989) (reviewing the legislative history of the Brooks Act and concluding that “the revised definition now makes it clear that ‘incidental services’ means types of services which are incidental to (part of) A-E services, and not, as we previously have held, incidental to an A-E project.”), (AR 193-196).

Even as § 1102(2)(C) solved one interpretative puzzle, however, its reference to “surveying and mapping” created another. Representative Mavroules captured the new puzzle—whether all mapping services fell within § 1102(2)(C)—in a colloquy with Representative Brooks during floor debate on the 1988 legislation. Rep. Mavroules asked:

With respect to the phrase “surveying and mapping” [in § 1102(2)(C)], I would like to propound a question. If, as it does regularly, the Defense Mapping Agency contracts with outside firms for certain production support services which are limited to the tasks of compilation, terrain analysis, color separation and digital collection and processing, and if these contracted services result solely in the production of maps and mapping products for the Department of Defense and military service use, and finally if these services are totally unrelated to the physical construction, or activities in anticipation of or incident to physical construction, then is it the understanding of the gentleman that such contracts are not intended to be included within the phrase “surveying and mapping” as it is contained in new section 901(3)(c) of the Federal Property and Administrative Services Act of 1949 contained in S. 2215?

134 Cong. Rec. H10606-03 (daily ed. Oct. 20, 1988). Rep. Brooks—the principal House sponsor

from the definition of A-E services by 1986, when the FAR Council added a revised definition of A-E services to the FAR, which had replaced the FPR. *See* 48 C.F.R. § 36.102 (1987); 51 Fed. Reg. 36970, 36972 (Oct. 16, 1986). Congress revived the list in modified form in 1988.

of the Brooks Act and the 1988 amendments—responded:

Mr. Speaker, the gentleman is correct, to the extent that the maps and mapping products to be produced as a result of the Defense Mapping Agency contracts *are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services.* The language contained in S. 2215 would not apply to procurements in those instances and they would not be required to be conducted under this provision. The purpose of this provision is to assure that professional services of an architectural and engineering nature and incidental services thereto, including mapping and surveying *in those instances*, are procured on the basis of quality. The definition of architectural and engineering services contained in S. 2215 is not an expansion of previous law, but a clarification of the definition of the term "architectural and engineering services" as it was incorporated into law by Public Law 92-582 in 1972.

Id. (emphasis added).⁸ Rep. Brooks thus assured Rep. Mavroules that § 1102(2)(C) did not refer to *all* mapping services, but only those that “are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services.” *Id.*

Congress has not amended the definition of A-E services since 1988.

B. Promulgation of 48 C.F.R. § 36.601-4(a)(4) (1988-1991)

After the 1988 amendment, the FAR Council set out to revise FAR Part 36 to reflect the amended definition of A-E services. It initially drafted an interim rule and issued a Federal Register notice inviting public comment. *See* 54 Fed. Reg. 13332, 13336-37 (Mar. 31, 1989). In

⁸ Before the colloquy, Rep. Brooks cautioned that “during the Senate floor debate on this legislation, there were numerous statement[s] made by several Senators regarding the purpose and intent of several provisions in the bill,” but that because “[m]ost of these statements have not been made available to the House . . . , we cannot speak to their completeness or accuracy.” 134 Cong. Rec. H10606-03 (daily ed. Oct. 20, 1988). He warned that “[a]ny statements that were made on the Senate floor that are inconsistent with the bill should be considered extraneous and not reflective of the intent of the Congress or the bill.” *Id.*

1990, Congress itself weighed in on how the FAR should be revised when it stated:

Pursuant to section 742 of Public Law 100-656, modifications 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.*

Small Business Administration Reauthorization and Amendments Act of 1990, Pub. L. 101-574, § 403, 104 Stat. 2814, 2832-33 (1990) (emphasis added).⁹ The legislative history of Section 403 suggests that it was intended to avert two problems. First, there was a concern that “the interim rule revising Subpart 36.6 (Architect-Engineer Services) of the [FAR] attempted to empower contracting officers with discretion, not granted by statute, to determine the types of services included within the new definition and the types of procurement procedures to be used.”¹⁰ S. Rep. 102-35, at 83 (1990). Second, “proposed changes to FAR Subpart 36.6 suggested deleting references to mapping services.”¹¹ *Id.* Section 403 was thus enacted “to ensure that the final FAR

⁹ Plaintiffs persist in erroneously suggesting that the Small Business Administration Reauthorization Amendments Act of 1990 was passed “after” 48 C.F.R. § 36.601-4(a)(4) was promulgated in 1991. Plaintiffs’ Memorandum in Support of their Motion for Summary Judgment (“Pl. Mem.”) at 3-4.

¹⁰ The interim rule stated that A-E services meant, *inter alia*:

(c) Other professional services of an architectural or engineering nature (including surveying and mapping, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) *that the contracting officer determines* should logically or justifiably be performed by members of the architectural and engineering professions (and individuals in their employ).

54 Fed. Reg. 13332, 13336-37 (Mar. 31, 1989) (quoting proposed 48 C.F.R. § 36.102(c) (emphasis added)).

¹¹ It is unclear what proposed changes were being referred to here, as the interim rule explicitly referenced mapping. *See supra* n. 10.

coverage address all types of professional service specifically included by statute in 40 U.S.C. 901(3) [sic] and does not grant to the contracting officer discretion to avoid the statutorily required source selection procedures for 'architectural and engineering services.'" *Id.*

Responding to the 1988 amendment, the 1990 legislation, and a notice and comment period that generated 189 comments, the FAR Council issued a final rule in 1991. *See* 56 Fed. Reg. 29124, 29128-29 (June 25, 1991). The rule provided:

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

- (1) Professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer.
- (2) Professional services of an architectural or engineering nature associated with design or construction of real property.
- (3) Other professional services of an architectural or engineering nature or services incidental thereto (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) that logically or justifiably require performance by registered architects or engineers or their employees.
- (4) *Professional surveying and mapping services on [sic] 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 and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to 36.601. However, mapping services, such as those procured by the Defense Mapping Agency, that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14, and 15.

48 C.F.R. § 36.601-4(a) (1991). While the first three subsections roughly paralleled the 1988 amendment, subsection (4)—the provision at issue in this litigation—provided additional guidance on when “surveying and mapping” were required to be procured using Brooks Act procedures. Pursuant to § 36.601-4(a)(4), all surveying, as well as all mapping services associated with the research, planning, development, design, construction or alteration of real property, were to be procured using Brooks Act procedures. However, mapping services that—in Representative Brooks’s words—are “not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services,” were to be procured through other competitive procurement procedures.

C. 1999 Defense Appropriations Act

Since promulgating 48 C.F.R. § 36.601-4(a)(4) in 1991, the FAR Council has made only two minor revisions to it. The first was in 1998, when it substituted the “National Imagery and Mapping Agency” (“NIMA”) for the “Defense Mapping Agency” (“DMA”) to reflect a name change.¹² See 63 Fed. Reg. 58602, 58603 (Oct. 30, 1998). The second revision was in 1999, when the FAR Council removed the reference to NIMA in response to Section 8101 of the Department of Defense Appropriations Act, 1999 (“1999 Defense Appropriations Act”), which provided:

None of the funds in this Act may be used by the National Imagery and Mapping Agency 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. . . .¹³

¹² The DOD agency once known as the DMA later became known as NIMA, and is now called the National Geospatial-Intelligence Agency (NGA).

¹³ 40 U.S.C. § 541 et seq. is a reference to the Brooks Act before it moved to its present location in Title 40. 10 U.S.C. § 2855 provides that “[c]ontracts for architectural and engineering

Pub. L. 105-262, § 8101, 112 Stat. 2279, 2320 (1998). The FAR Council responded by amending the final sentence of 48 C.F.R. § 36.601-4(a)(4) to eliminate the words “such as those typically performed by the National Imagery and Mapping Agency.” See 64 Fed. Reg. 32746, 37247 (June 17, 1999), (Administrative Records, p. 21 (“AR” 21)).¹⁴ As it explained in the Federal Register, “although this is an annual appropriations requirement which affects NIMA only when using fiscal year 1999 funds, it is appropriate to remove the reference to NIMA as exemplifying the type of mapping services that must not be procured pursuant to FAR Subpart 36.6.” *Id.*

While the 1999 Defense Appropriations Act narrowly addressed NIMA’s use of 1999 funds, the House Report accompanying it contained language not reflected in the appropriations bill itself. See H.R. Rep. No. 105-746, at 165 (1998) (Conf. Rep.). The House Report called on the FAR Council to “strike and revise” the final sentence of 48 C.F.R. § 36.601-4(a)(4) and replace it with a sentence that would require a broad range of mapping services to be procured using Brooks Act procedures, regardless of whether they were connected to traditional A-E services.¹⁵

services and construction design in connection with a military construction project or a military family housing project shall be awarded in accordance with [the Brooks Act].”

¹⁴ The FAR Council did not invite public comment because the removal of an example “would not have a significant effect beyond the internal operating procedures of the agency.” 41 U.S.C. § 418b(a); 48 C.F.R. § 1.301(b); (AR 16).

¹⁵ House Report 105-746 stated:

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 36.601-4(a)(4) of the FAR (48 CFR 36.601-4(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

The FAR Council carefully considered this legislative history but, relying on well-settled canons of statutory construction, concluded that it was not controlling because there was no “authority in the statutory (as compared to the Conference Report) language for Government-wide application,” and the statutory text contained no “words of ‘futurity.’” (AR 11-12).

MAPPS and a few other entities responded by sending letters to the OFPP Administrator, asking her to exercise her powers pursuant to 41 U.S.C. §§ 405 and 421 to propose a new rule that would implement the language of the House Report. (AR 378-90). After careful review of the issue, the Administrator declined. (AR 391-398).

D. Denial of MAPPS’ Request for Rulemaking (2002-Present)

On February 21, 2002, MAPPS again requested review of 48 C.F.R. § 36.601-4(a)(4), entreating a new OFPP Administrator to issue a new proposed rule with an opportunity for public comment. (AR 402-03). In response to MAPPS’ request for rulemaking, the FAR Council issued a “Request for Comments” in the Federal Register to determine whether it should initiate new rulemaking procedures to revise the FAR. *See* 69 Fed. Reg. 13499, 13499 (Mar. 23, 2004), (AR 22-23). The notice explained that while the FAR Council did not consider the removal of the NIMA example to constitute a shift in longstanding policy, it was opening up a public comment period “on the mapping policies articulated in FAR 36.601-4(a)(4) so it, the CAAC, and the DARC may review the effectiveness of current policy in selecting quality firms to perform mapping services and consider if a FAR change should be pursued.” *Id.* (AR 22).

Fifty-two respondents submitted comments, thirty-eight of which either opposed further

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.

H.R. Rep. No. 105-746, at 165 (1998) (Conf. Rep.).

amendment to the FAR, or argued that Brooks Act procedures should apply to an even narrower range of mapping services. (AR 24-140, 150-51). Even though only four respondents provided substantive comments calling for a broadening of the Brooks Act's application to mapping services,¹⁶ in a Federal Register notice dated April 19, 2005 ("the April 2005 notice"), the FAR Council identified and carefully addressed the four principal assertions of these respondents. See 70 Fed. Reg. 20329, 20330-33 (Apr. 19, 2005), (AR 178-82). In the end, the FAR Council determined that a new rulemaking was not appropriate, concluding, "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." *Id.* at 20333. Thus, the FAR Council did not propose a new rule. Plaintiffs subsequently filed this lawsuit.

RESPONSE TO PLAINTIFFS' LISTING OF UNDISPUTED FACTS

Pursuant to Local Civil Rule 56(B), the United States responds to Plaintiffs' supplemental "Listing of Undisputed Facts" by pointing out that the "facts" listed at paragraphs 1, 5, 6, and 7 are arguments of law, not statements of fact. To the extent these four paragraphs are construed to contain statements of fact, the "facts" are immaterial. Moreover, paragraph 5 would be disputed to the extent it is not limited to solicitations for services that the laws of North Carolina, Oklahoma, and South Carolina define as being within the practice of land surveying. See N.C. Gen. Stat. § 89C-3(7); S.C. Code Ann. § 40-22-20(23); Okla Stat. tit. 59, § 475.2(7). Paragraph 7 would be disputed to the extent that the words "force and effect" are not qualified by the word "legal." Finally, in lieu of the Court relying on Plaintiffs' characterization of the April 2005 notice in paragraphs 8 through 12, the United States refers the Court to the Federal Register, which speaks for itself. 70 Fed. Reg. 20329-33 (Apr. 19, 2005) (AR 178-82).

¹⁶ Of the fourteen respondents who supported broadening 48 C.F.R. § 36.601-4(a)(4), ten submitted conclusory comments of only a few lines. (AR 39, 56, 67, 76-81, 121).

STANDARD ON SUMMARY JUDGMENT

Summary judgment should be granted where the evidence in the record “show[s] that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is “material” only if it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over an issue of material fact is “genuine” under Rule 56(c) only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* As this Court has observed, summary judgment is particularly appropriate in APA suits, where “the focal point . . . should be the administrative record already in existence, not some new record made initially in the reviewing court.” *New West Materials LLC & JWR, Inc. v. Interior Board of Land Appeals*, 398 F. Supp. 2d 438, 442 (E.D. Va. 2005) (Ellis, J.) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

ARGUMENT

I. Plaintiffs Lack Standing to Challenge 48 C.F.R. § 36.601-4(a)(4).

In a motion to dismiss filed June 20, 2006, the United States challenged the four plaintiff associations’ standing to sue, and thus, the subject matter jurisdiction of this Court. *See* U.S. Const. Art. III, § 2. The United States argued, *inter alia*, that Plaintiffs had not established that any of their members suffered an “injury in fact” based on their allegation that because (a) certain states have ethics codes that allegedly prohibit licensed surveyors from competing for contracts where Brooks Act procedures are not used, and (b) some of those same states allegedly define surveying to include a broad range of mapping services, their members who are licensed in states with both such laws cannot compete for Federal mapping contracts when Brooks Act procedures are not used.

In an Order of November 14, 2006, the Court denied the United States’ motion “at this