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## Reflections on “The Lawsuit” Was it a Procurement Issue or a Licensing Issue?

**F**irst, let me make it clear that I am not an attorney, nor do I portray one on TV. The reflections stated herein are solely mine, and have no legal weight whatsoever. They are based on my experiences, having been brought into the discussion of this matter on a number of occasions, and having had the opportunity to consult with others who have been similarly involved.

My reason for writing this article is to alert those in the surveying profession to what has taken place, and what the resulting consequences may be. I hope that the readers of *The American Surveyor* will patiently read through the following details of the lawsuit, and the responses to it, in order to a better grasp their potential impact.

The reason surveyors need to be knowledgeable about this case is that it will be the basis for many arguments that will occur, not only in the context of the lawsuit itself, but also as licensing laws continue to be reviewed throughout the various states with regard to new technologies, and their use.

### The Lawsuit

In April 2006, the Mapping Association for Private Photogrammetric Surveyors (MAPPS) filed suit in the United States District Court for the Eastern District of Virginia, Alexandria Division against the United States of America, acting by and through the Federal Acquisition Regulation Council (FAR Council). Later, the complaint was amended to include among the plaintiffs several other

organizations, namely, 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).

The basic premise of the lawsuit is that the FAR Council has failed to adhere to 40 U. S. C. 1101, *et seq.* (commonly referred to as the “Brooks Act”) in its administration of 48 C. F. R. Part 36.601-4 (the Federal Acquisition Regulation). The plaintiffs (MAPPS, et al) asked for a judgment “directing the defendants to revise 48 C.F.R. 36-601-4(a)4 within the meaning of the

In the Memorandum Opinion issued by the presiding judge, there was no resolution to the plaintiffs’ underlying request. The reason stated is that the plaintiffs “lack the requisite standing to maintain this action.” The judge’s statement says, in part, “the proffered affidavits do not demonstrate a cognizable injury resulting from the FAR Council’s refusal to revise the disputed regulation ... moreover, the affidavit does not demonstrate a plausible threat of discipline should a surveyor bid on non-QBS solicitations, or indeed any such threat at all. To the contrary, the record reflects that the alleged prohibition on competitive bidding is unenforced.”

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Brooks Act, as directed by Congress on numerous occasions.” Representatives of the plaintiffs note that the lawsuit was intended to require that professional mapping services procured by the Federal government, whether provided by licensed individuals or not, must be procured via Qualifications Based Selection (QBS) processes. Among the supporting documents for the complaint were affidavits from surveyors who claimed to have elected not to bid on federal projects due to laws in their respective states prohibiting surveyors from bidding.

It appears to me that the basic complaint of the plaintiffs may have been clouded by the introduction, as supporting evidence, of the affidavits from surveyors claiming harm. It is these affidavits that the judge refers to when opining that the plaintiffs were not able to prove they had standing to file the complaint. Therefore, the issue of which mapping services should be procured via QBS was not directly addressed. The judge did, however, give some clues to how he might have ruled on the definition of the term

“surveying and mapping” within the FAR guidelines.

A reference in the *Statutory and Regulatory History* section of the judge’s Memorandum Opinion to the plaintiffs’ claim regarding the wording in the current FAR definition of surveying and mapping services notes the following, “the legislative history of the bill stated that Congress intended for the FAR Council to ‘strike and revise’ the final sentence of 48 C.F.R. § 36.601-4(a)4 and replace it with language requiring a much broader definition of ‘surveying and mapping’ that must be procured via QBS.” He went on to say, “Specifically, the conferees directed the FAR Council to define ‘surveying and mapping’ in the disputed regulatory provision to mean 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

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and aerial photographic services....

Notwithstanding this legislative history, the FAR Council did not change the rule in this manner.”

The abovementioned final sentence of 48 C.F.R. § 36.601-4(a)4 currently states, “However, mapping services 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.” Parts 13, 14, and 15 of the FAR rule use price, along with qualifications or other technical evaluations, for procurement of services.

In the same *Statutory and Regulatory History* section of the opinion, the judge also says, “It is worth noting that the

record unambiguously reflects that the provision of ‘mapping’ services in the modern marketplace includes a much broader scope of work than the traditional mapping work of land surveyors.”

### **Reaction to the Lawsuit**

It is the latter statement that seems to be at the core of the position taken in opposition to the lawsuit by a group of associations that identify themselves as representing the GIS and computerized mapping industry. In January 2007, this group, led by the American Association of Geographers (AAG), filed an *amicus curiae* brief with the court in opposition to the plaintiffs’ motion for summary judgment.

The brief states in part, “a victory for the plaintiffs would not only insulate all federal mapping contracts from price competition, but also *exclude* everyone else – that is, anyone and everyone other than licensed engineers and surveyors – from even being eligible to receive a federal mapping contract, even where engineers and surveyors lack the training and subject matter expertise needed to perform the contract. This

result would follow from the requirement of the Brooks Act to award contracts for ‘architectural or engineering’ services only to ‘firms’ licensed to practice architecture and engineering. In short, a victory for the plaintiffs would ensure the surveyors a monopoly over *all* federal mapping contracts, to the detriment of the *amici* associations, their members, and the GIS and computerized mapping industry as a whole.”

So, it seems that the purpose of the lawsuit is being interpreted differently by the plaintiffs and their detractors. The plaintiffs contend that they are simply trying to have the FAR be required to comply with the intent of Congress by including among the definition of services to be procured using QBS those mapping services of a professional nature requiring specialized training and subject matter

expertise. The detractors apparently believe that the lawsuit is intended to insure that only those who are professionally licensed by the respective states as engineers or surveyors have a monopoly over all federal mapping contracts.

Soon after the filing of the *amicus curiae* brief, articles began to appear in national association publications laying out the arguments against the lawsuit. Panels were assembled to allow those on both sides of the issue to make their points. I was involved in several of these panels. One point I tried to make is that not all mapping meets the threshold of requiring that it be provided by someone holding a license, but that much of this type of mapping does require special expertise, thus making it important that the qualifications of the firm providing that service are the primary factor in selection of a provider with whom to negotiate price. Even the representatives from MAPPS in these panel discussions pointed out that many MAPPS members are not licensed surveying or engineering firms, thus it would not be in the best interest of that organization to pursue a judgment that would eliminate some of its members from competing for federal mapping contracts.

It is interesting to observe that those who oppose the lawsuit say that “a victory for the plaintiffs would not only insulate all federal mapping contracts from price competition, but also *exclude* everyone else – that is, anyone and everyone other than licensed engineers and surveyors – from even being eligible to receive a federal mapping contract, even where engineers and surveyors lack the training and subject matter expertise needed to perform the contract.” There seems to be a bit of a contradiction in this statement. On the one hand it implies that price competition for mapping services is desired, and on the other hand it implies that qualifications should be a key component for selecting a provider of services. The Brooks Act does both of these things by selecting a firm with which to negotiate price based on the fact that its qualifications are best suited to perform a particular project.

### **What Does the Brooks Act Actually Say?**

Item 3 in Section 1101. Definitions, states: The term “architectural and engineering services means”:

(A) professional services of an architectural or engineering nature, as defined by State law, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as 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) such 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.

How one interprets the language stated above is what has created the controversy.

For those who are accustomed to reading language in legislation, the fact that subparagraph (C) uses the phrase “may logically or justifiably perform” implies that the work being described may be performed by, but is not exclusively restricted to, licensed architects, engineers, and surveyor/mappers. In fact, firms that are not managed by, nor employ, licensed professionals have been awarded government contracts (including mapping contracts) that are procured using the qualifications based selection process prescribed by the Brooks Act.

### **What Does it All Mean?**

As we have seen through the past few years, licensing laws (in particular those associated with surveying) have begun to be revised to insure that the professional services they are intended to oversee are included within the jurisdiction of the respective licensing boards, regardless of the methods and technologies used to accomplish them. In most, if not all, instances where this has been attempted, there has been opposition from the same general group of individuals and organizations that have challenged the “MAPPs lawsuit”. I am not stating an opinion about whether or not the

opposition has been warranted. Whether that is true is determined by the specific circumstances in each case, and whether the actual intent of the proposed legislative and/or regulatory actions is clear. Most of us can relate to this from our exposure to the debates regarding the wording of the NCEES Model Law. A lot of hard work went into attempting to be clear about to which activities the Model Law would apply, and still the debate continues.

It is said by some that surveyors believe any mapping, for any purpose whatsoever, should only be performed by a licensed Professional Surveyor. Others say that those in the “geospatial community” (as if surveying isn’t part of this overall community) contend that surveying and surveyors are now irrelevant because of technological advancements. I am not necessarily surprised that these statements are made, but I don’t believe anyone who objectively looks at the issue would make either statement.

I cannot say whether the opposition to the lawsuit was intended to speak against procurement of services using Qualifications Based Selection processes, or if it was intended to incite the GIS and computer mapping industry to become more active in the political arena. At least some of the material that was published stated that the lawsuit provided an opportunity to establish an “us vs. them” scenario from which a political action initiative among the constituent groups that submitted the *amicus curiae* brief spawned.

Such an initiative would undoubtedly be focused on any attempt to clarify the limits of licensure as they relate to the expertise and training required to provide any number of services. Paramount among the considerations of this issue will be the potential harm to the health, safety, and welfare of the public, which is the underlying tenet of licensing.

It may be some time yet before it can be determined whether the result of services provided in the geospatial environment have the potential for such harm. In fact, it may take a case in which harm is caused on a large scale before the matter can be rationally discussed.

For now, though, the diametrically opposite positions taken on the purpose of “the lawsuit” points out that not enough communication has occurred among the parties to provide an understanding of why any of them act and/or react with such vitriol. 